

## Publications

### 2013 Pennsylvania Oil and Gas Law Review

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In 1878, the nation's first commercial natural gas well was drilled in Murrysville, Pennsylvania. Since then, oil and natural gas have played a vital role in Pennsylvania's economy. Despite this history of oil and natural gas production, the Commonwealth has relatively little case law and legislative regulation to guide the industry. Due to the recent surge in production of Marcellus Shale gas, Pennsylvania's production of natural gas increased by 72% from 2011 to 2012. According to a report issued by the U.S. Energy Information Administration on December 17, 2013, Pennsylvania is the fastest-growing natural gas-producing state, and preliminary data suggests that Pennsylvania may have been the second-largest producer of natural gas in 2013. Not surprisingly, the current state of oil and gas law in Pennsylvania reflects the Commonwealth's attempts to manage this rapid increase in natural gas production.

The judiciary, legislature and regulatory agencies have attempted to balance the benefits of natural gas production against the concerns of the public. However, many issues remain unresolved. To assist our clients and friends in navigating this quickly developing area of the law, we have summarized a number of the important decisions and enactments of the past year.

#### Judicial Developments

The most significant development in Pennsylvania oil and gas law in 2013 was the Pennsylvania Supreme Court's ruling in *Robinson Twp. v. Cmmw*.<sup>1</sup> in which significant portions of Act 13 of 2012 were found unconstitutional. Act 13 was signed into law in February of 2012 and included broad amendments and additions to Pennsylvania's Oil and Gas Act (Title 58). The constitutional challenges raised in *Robinson Twp.* related primarily to the portions of Act 13 which restricted the ability of municipalities to enact zoning regulations relating to oil and gas operations. The Supreme Court held that the majority of the challenged portions of Act 13 were unconstitutional as violating the Pennsylvania Constitution's Environmental Rights Amendment,<sup>2</sup> which charges the Commonwealth with conserving and maintaining natural resources for the benefit of Pennsylvania residents.

In reaching its decision, the Supreme Court stated that “[b]y any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.” The Pennsylvania Public Utility Commission and the Pennsylvania Department of Environmental Protection have filed an Application for Reconsideration of the issues in *Robinson Twp.* on January 2, 2014, but it appears likely that the Supreme Court’s ruling will stand.

The Pennsylvania Supreme Court also issued its highly anticipated opinion in *Butler v. Charles Powers Est.*<sup>3</sup> The *Butler* case called into question the long-standing Dunham Rule,<sup>4</sup> which provides that a conveyance or reservation of “minerals” without any specific mention of gas or oil gives rise to a rebuttable presumption that the parties did not intend to include natural gas or oil within the term “minerals.” At issue in *Butler* was whether Marcellus Shale gas should be encompassed within the presumption created by the Dunham Rule. After considering the case on an expedited basis, the Supreme Court found that there was no justification for overruling the Dunham Rule, holding that Marcellus Shale gas presumptively cannot be considered a “mineral” for private deed purposes.

In 2013, the Pennsylvania Superior Court issued two decisions favorable to oil and gas developers. In *Caldwell v. Kriebel Resources, Co.*,<sup>5</sup> the Superior Court of Pennsylvania held that there is no implied duty in oil and gas leases to develop multiple horizontal strata at different depths. The plaintiff-lessors sought to invalidate their oil and gas lease, claiming that the defendant-lessees had failed to develop different strata and to produce oil and natural gas “in paying quantities.” In reaching its decision, the court looked to the strict language of the lease at issue, reinforcing the generally accepted principle in Pennsylvania that a lease is in the nature of a contract and therefore contract law controls. The lease in *Caldwell* contained a disclaimer of all implied covenants, which the court found convincing. The court also refused to find an implied duty in the lease to produce “in paying quantities,” as the lease only required “production.” Accordingly, the lessors’ request to invalidate the lease was denied.

In *McCausland v. Wagner*,<sup>6</sup> the Superior Court found that forfeiture clauses in oil and gas leases do not apply to failure to pay production royalties. The plaintiff sought to invalidate his lease based on the failure of a lessee to make royalty payments for several months. Payments had been brought current at the time of the suit, but the plaintiff argued that the lease was null and void under the lease’s forfeiture clause based on the prior lapse in the payment of royalties. The court disagreed. Reasoning that “it impedes logic to ascertain that the industry would develop a lease that allows a lessor to declare a forfeiture for failure to make a royalty payment after a well has been completed and oil and gas is being produced,” the court held that forfeiture clauses in oil and gas leases are customarily applied to the failure of a lessee to develop the property and should not apply to a lapse in royalty payments.<sup>7</sup>

## Legislative Developments

### Act 13

Although significant parts of the Act 13 amendments and additions to Pennsylvania’s Oil and Gas Act were found unconstitutional in *Robinson Twp.*, other portions may still be viable. One such provision is the Impact Fee. The Impact Fee imposes an unconventional gas well fee and directs how funds collected through the fee are to be distributed to state and local governments. In its *Robinson Twp.* opinion, the

Supreme Court specifically noted that the unconventional gas well fee appears relatively independent of the unconstitutional parts of Act 13. The portions of Act 13 which were not struck down were remanded to the Commonwealth Court for further proceedings to determine if they are severable from the unconstitutional provisions, so the question of whether the Impact Fee will be enforced is yet to be determined.

### ***The Oil and Gas Lease Act (“OGLA”)***

Pennsylvania also recently passed a law permitting limited forced pooling. In July of 2013, Pennsylvania Governor Tom Corbett signed Senate Bill 259, commonly referred to as the OGLA, into law. The OGLA amends various provisions of the 1979 Guaranteed Minimum Royalty Act, including requirements for additional disclosures to royalty owners in accounting statements. The OGLA also contains a new provision which allows oil and gas operators to pool contiguous leased properties as long as each lease does not contain an express prohibition against pooling. Prior to the enactment of the OGLA, in order to pool leases to form drilling units, oil and gas operators were required to obtain modifications of existing oil and gas leases from lessors unless the lease specifically permitted unitization. After the OGLA was signed into law, EQT Production Company, a Pittsburgh-based oil and gas operator, filed suit against 70 landowners seeking a declaratory judgment that EQT may jointly develop the defendants’ multiple contiguous oil and gas leases under the new provisions of the OGLA. The case is currently pending in the Allegheny County Court of Common Pleas.<sup>8</sup>

### ***Pennsylvania Senate Bill 411 (S.B. 411)***

Pennsylvania Senate Bill 411, which proposes amendments to Title 27 (Environmental Resources) of the Pennsylvania Consolidated Statutes, was introduced on February 4, 2013. Provisions of proposed S.B. 411 would limit civil liability for landowners or persons who voluntarily provide equipment, funding, materials or services for a reclamation or water pollution abatement project. Eligibility for this limit on liability is made contingent upon the approval of a detailed written plan for the proposed project by the Pennsylvania Department of Environmental Protection (the “DEP”). According to the current version of S.B. 411, the liability limits could apply to projects involving the treatment of land and water which have been adversely affected by coal mining or oil or natural gas extraction activities. The Bill was re-introduced for consideration on January 13, 2014. It is still pending final approval and has not yet been signed into law.

### **Regulatory Developments**

New Oil and Gas Surface Regulations<sup>9</sup> were proposed in August of 2013 by the Environmental Quality Board (the “EQB”), which is a 20-member independent board chaired by the Secretary of the DEP that adopts DEP regulations. The regulations were written in light of provisions of Act 13 which called for new surface regulations by the DEP. The proposed regulations<sup>10</sup> require an applicant for a well permit to notify the appropriate public resource agency if a planned well site is near certain areas such as natural national landmarks, publicly owned parks, historical or archaeological sites, or locations that may impact species of special concern. In addition, the proposed regulations include new rules regarding plugged and abandoned wells as well as provisions for protection of water resources. On December 12, 2013, the DEP announced a schedule for public hearings where members of the public may comment on the proposed

regulations. These comments will be taken into consideration by the EQB when the regulations are finalized.

The DEP also issued a White Paper on January 9, 2013 which provides methods by which “mine-influenced water” (“MIW”) may be utilized in oil and gas operations.<sup>11</sup> The White Paper explains that MIW includes water in a mine pool or a surface discharge of water caused by coal mining activities which pollutes or threatens pollution of Commonwealth waters, or surface waters that have been polluted by mine drainage. The DEP provides an outline of the requirements for proposals for use of MIW and establishes a review process for DEP evaluation of such proposals. The stated purpose of the White Paper is to “promote the voluntary use of MIW by the oil and gas industry and establish a framework in which MIW can be used for natural gas extraction.” Notably, the White Paper suggests that the DEP may agree not to hold the user of MIW for natural gas extract activities liable for long-term treatment if certain conditions are met and an appropriate Consent Order and Agreement is entered into.<sup>12</sup>

### What We Anticipate in 2014

Many issues remain unresolved in Pennsylvania oil and gas law following the late-December Act 13 decision by the Pennsylvania Supreme Court and the legislative enactments of 2013. We anticipate that 2014 will bring resolution to some of the issues which remain unsettled, including the following:

- Decision on enforceability of the remaining Act 13 provisions which were not struck down
- Finalization of surface oil and gas regulations
- Judicial interpretation of the practical effect of the new provisions of the Oil and Gas Act

Case law will also unquestionably continue to develop as lessors persist in filing lawsuits seeking to invalidate their current oil and gas leases. We likewise expect increased legislative attention to and regulation of the oil and gas industry as this Commonwealth will remain a paramount natural gas producer in 2014.

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<sup>[1]</sup> *Robinson Twp. v. Cmmw.*, 2013 Pa. LEXIS 3068 (Dec. 19, 2013).

<sup>[2]</sup> *Pa. Const. art. I, § 27.*

<sup>[3]</sup> *Butler v. Charles Powers Est.*, 65 A.3d 885 (Pa. 2013).

<sup>[4]</sup> *The Dunham Rule has been the law in Pennsylvania since the decision in Dunham v. Kirkpatrick*, 101 Pa. 36 (1882).

<sup>[5]</sup> *Caldwell v. Kriebel Resources, Co. LLC*, 72 A.3d 611 (Pa. Super. 2013), appeal denied, 2013 Pa. LEXIS 2845 (November 26, 2013).

<sup>[6]</sup> *McCausland v. Wagner*, 2013 Pa. Super. LEXIS 2675 (September 30, 2013).

[7] *Id.* at 30-31.

[8] *EQT Production Co. v. Opatkiewicz*, Allegheny County Court of Common Pleas, Civil Division, No. GD-13-13489.

[9] *Oil and Gas Surface Regulations*, Pennsylvania Department of Environmental Protection, [http://www.portal.state.pa.us/portal/server.pt/community/public\\_resources/20303/surface\\_regulations/1587188](http://www.portal.state.pa.us/portal/server.pt/community/public_resources/20303/surface_regulations/1587188)

[10] *The proposed regulations would amend 25 Pa. Code Chapter 78, Subchapter C.*

[11] *White Paper: Utilization of Mine Influenced Water of Natural Gas Extraction Activities*, Department of Environmental Protection, [http://www.portal.state.pa.us/portal/server.pt/community/abandoned\\_mine\\_reclamation/13961/MIW/1372548](http://www.portal.state.pa.us/portal/server.pt/community/abandoned_mine_reclamation/13961/MIW/1372548)

[12] *See also Pa. S.B. 411.*