

SHALE GAS DEVELOPMENT



Shale gas development, including the Marcellus Shale, presents unparalleled energy supply and economic opportunities for the citizens and businesses of Pennsylvania, West Virginia, Ohio and New York.

The Natural Resources Development Group at Babst Calland is uniquely positioned to provide creative solutions to the most complex legal challenges facing the gas industry. Our nationally-recognized, multi-disciplinary practice group understands the legal issues facing operators who seek to develop the Marcellus Shale and other shale plays in the Appalachian Basin.

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Related Affiliations

Marcellus Shale Coalition

Pennsylvania Independent Oil and
Gas Association

Energy and Mineral Law Foundation

Rocky Mountain Mineral Law Foundation

West Virginia Oil and Natural
Gas Association

Independent Oil and Gas Association
of West Virginia

International Right-of-Way Association

Ohio Oil and Gas Association

While the Marcellus Shale is attracting new businesses, creating new jobs, generating new income sources and producing much-needed energy, its development presents wide-ranging and complicated legal issues. Horizontal drilling techniques that make development of shale gas possible have also created new legal issues not previously encountered in conventional well development. These issues include:

- Environmental concerns, such as water withdrawal, waste management, air emissions and stream and wetland disturbances
- Transportation issues, such as pipeline construction and rapid expansion of rural roadway systems
- Corporate issues, such as pooling, unitization, joint ventures and transactions
- Complex litigation, such as leasing disputes between surface owners and operators
- Land use challenges, such as zoning and ordinance challenges

Babst Calland has counseled clients in oil and gas matters for more than 20 years. Our natural resource attorneys have “hands-on” experience with the issues that matter most to producers, service providers and pipeline operators. Our attorneys not only know the issues, they also know the key industry players and governmental officials. Our natural resource attorneys are active in prominent oil and gas associations, including the Marcellus Shale Coalition, the Pennsylvania Independent Oil and Gas Association, and the Energy and Mineral Law Foundation. We frequently speak at industry-related functions and, on a regular basis, our lawyers represent clients before state and local government agencies, including the Pennsylvania Department of Environmental Protection (PADEP). In addition, through our participation on PADEP advisory committees such as the Department’s Water Resources Advisory Committee and the Solid Waste Advisory Committee, our lawyers are in a position to understand both existing laws impacting the industry, as well as emerging issues likely to impact the gas industry in the future.

We assist our clients with matters that are in the environmental, land use, employment and labor, business services and litigation practice areas as described below.

Environmental

Marcellus Shale Well Drilling Permit Requirements

Obtaining a drilling permit for a Marcellus Shale well involves providing much more than the operator’s contact information and general information regarding the well’s construction. Babst Calland uses its experience to counsel Marcellus Shale developers on the many issues associated with obtaining a well drilling permit. Marcellus Shale drilling requirements may include:

- Developing a water management plan, a preparedness, prevention and contingency (PPC) plan and an erosion and sediment control (E&SC) plan/permit
- Obtaining permits and approvals to cross streams and/or wetlands
- Permitting and constructing a storage impoundment
- Searching for endangered and/or threatened species

Using our experience and knowledge of the regulatory framework in Pennsylvania, our Natural Resources Development Group can help you navigate through these varied requirements in an efficient and cost-effective fashion.

Water Withdrawal Requirements

Water withdrawal issues associated with Marcellus Shale development have attracted much attention from PADEP and the public. Our Natural Resources Development Group counsels clients regarding the drafting and implementation of Water Management Plans.

We have a strong legal and technical understanding of the Water Management Plan requirements, including:

- Stream impact and low flow analyses
- Withdrawal impacts analyses
- Water use and source monitoring
- Act 220 water use registration and reporting

Our attorneys also advise clients regarding the water withdrawal and use monitoring requirements of the Susquehanna River Basin Commission and Delaware River Basin Commission (SRBC and DRBC, respectively).

Wastewater Management and Disposal Requirements

Developing a Marcellus Shale well generates a large volume of wastewater. The proper management and disposal of this wastewater is a continuing area of interest to government regulators and the public.

Through direct experience in counseling Marcellus Shale developers, our Natural Resources Development Group attorneys understand the legal and technical issues associated with hydraulic fracturing. We have extensive experience in navigating PADEP's regulatory requirements and guidance regarding wastewater storage, treatment, transportation and disposal. We have substantial knowledge of the Pennsylvania residual waste regulations and regularly assist clients in complying with PADEP's reporting and recordkeeping requirements, including the reporting requirements associated with PADEP's Chemical Analysis of Residual Waste Annual Report (Form 26R), which is applicable to wastewater generated during the drilling, completion and production of Marcellus Shale.

Permitting of Impoundments for Fresh Water and Flowback Storage

Managing the large quantity of water involved in Marcellus Shale development presents unique challenges to natural gas developers. Issues may include permitting and constructing necessary storage impoundments and managing the flowback water following fracturing activities. Our Natural Resources Development Group is experienced in dealing with these issues. We counsel clients in determining whether a permit under the PADEP's Dam Safety Program is necessary for such impoundments and oversee obtaining such a permit, as necessary. We also assist in ensuring such impoundments are constructed according to PADEP's Design, Construction, and Maintenance Standards for Pits and Dam Embankments Associated with Impoundments for Oil and Gas Wells, as well as with the PADEP's construction standards for impoundments. In addition, Babst Calland has extensive experience regarding the groundwater monitoring requirements for these impoundments and the application of the Pennsylvania residual waste regulations to these types of groundwater monitoring wells.

Stream Crossings and Wetland Disturbances

In Pennsylvania, it is very likely that the construction of an oil or gas facility or its associated access roads and/or pipelines, will encounter a stream or wetland. Navigating the U.S. Army Corps of Engineers (USCOE) and state permitting, construction and mitigation requirements associated with disturbing a stream or wetland can be complicated.

Babst Calland's environmental attorneys have extensive experience addressing these issues for a wide array of clients, including natural gas developers and pipeline companies. We counsel clients regarding the applicability and use of USCOE state programmatic general permits, nationwide permits and individual permits, as well as state general and individual authorizations. By drawing on our substantial experience to address specific circumstances, we are able to efficiently assess the applicable regulatory requirements and counsel our clients on how to comply with these requirements in a cost-effective and timely manner.

Erosion and Sediment Control (E&SC) Plans and Permitting

A Marcellus Shale well operator must draft and implement an erosion and sediment control (E&SC) plan prior to starting any drilling activities. In most cases, developers must also obtain an Erosion and Sediment Control General Permit (ESCGP-1) from PADEP.

Our Natural Resources Development Group assists Marcellus Shale developers with issues involved in drafting and implementing these E&SC plans and approvals, including “Expedited” and “Phased” ESCGP-1 Permits. We provide advice regarding site restoration plans and restoration activities. In addition, we represent oil and gas developers before the Environmental Hearing Board in appeals of penalty assessments and permit blocks associated with alleged E&SC violations.

Endangered and Threatened Species

Searching for and/or addressing threatened and endangered species near an oil or gas site can be a time consuming and complicated process. Babst Calland uses its decades of experience to provide practical advice to Marcellus Shale clients regarding these searches and related restrictions. Babst Calland counsels clients regarding the use and limitations of the Pennsylvania Natural Heritage Program (formerly referred to as the Pennsylvania Natural Diversity Inventory (PNDI)) and similar databases for other states. We have examined when threatened and endangered species searches are necessary in obtaining permits for well drilling, stream and wetland crossings and obstructions and other activities encountered during Marcellus Shale development. Babst Calland has counseled clients on the potential impacts and requirements associated with the possible identification of such a species in the vicinity of an oil or gas facility. We have also worked with oil and gas developers regarding threatened and endangered species search and mitigation requirements proposed by the U.S. Forest Service for oil and gas development in the Allegheny National Forest.

Air Quality and Greenhouse Gases

Air quality issues are often among the most important environmental considerations facing the energy industry. The extraction and transportation of natural gas associated with the Marcellus Shale play will pose regulatory compliance issues for the industry regarding both hazardous and traditional criteria air pollutants as well as construction (NSR and NSPS) and operating (Title V and state-only) permitting issues.

Babst Calland’s air lawyers have been counseling companies in the energy sector on compliance with the multitude of federal and state air quality regulatory programs for more than 25 years. Our lawyers are experienced in resolving air enforcement cases and developing litigation strategies to address toxic tort cases brought by private parties.

Additionally, Babst Calland actively tracks the emerging implications of greenhouse gas regulation on the natural gas industry and has experience working with energy companies to develop strategies to address these programs.

Land Use***Land Use and Local Government Authorizations***

Legal aspects of Marcellus Shale development are complicated by the split regulatory jurisdiction between state environmental agencies and local governments, particularly in a state such as Pennsylvania, with more than 2,000 local government entities, including counties, cities, boroughs and townships. Weaving through this regulatory maze is compounded by the still uncertain dividing line between state and municipal authority, and by the fact that each of these entities may have a completely different set of regulations/ordinances regarding issues such as noise and hours of operation.

Babst Calland’s attorneys have handled the myriad of issues that arise at the local government level related to natural gas extraction, processing and transmission. With respect to zoning and other land use issues, our attorneys can:

- Identify and evaluate up-front the specific ordinance requirements and processes on a community-by-community basis
- Develop a community specific application and permitting template for use by our clients’ permitting and land personnel
- Handle special exception, conditional use and other public hearings for wells, pipelines, compressor stations and processing facilities
- Work to facilitate a voluntary amendment to local ordinances that unduly restrict natural gas activity, or where necessary, develop an appropriate legal challenge strategy and represent operators in these challenges

In addition to traditional zoning issues, Babst Calland attorneys regularly advise clients on related local government matters, including:

- The enforcement and legality of noise restrictions
- Excess maintenance (heavy hauling) agreements and associated bonding requirements on weight restricted roads
- The legality of excessive permitting fees

Employment and Labor

As the Marcellus Shale gas industry continues to expand throughout the region, many businesses find it cost-effective to engage individuals to perform services as independent contractors rather than employees. Unlike some states such as Texas, Pennsylvania does not provide statutory protection of the independent contractor relationship for gas industry workers such as landmen. Companies need to understand and carefully consider the significant legal and financial risks and potential penalties regarding the misclassification of workers as independent contractors, as these relationships are increasingly being scrutinized by government agencies and legally challenged by individuals. Our attorneys have the knowledge and experience to guide Marcellus Shale gas industry employers through the complexities of the independent contractor/employee analysis under relevant federal and state employment laws.

In addition, the gas industry in this region is growing so rapidly that employers are scrambling to find qualified employees to meet their needs. It is essential that employers protect their investment in employees just as they protect their other business assets. Our attorneys can prepare non-compete, non-solicitation, confidentiality and other types of agreements and restrictive covenants to protect your investment in employees. We can also move quickly to enforce such agreements in the event of an employee breach.

Employers new to Pennsylvania face a myriad of employment, labor and wage laws, regulations and legal interpretations unique to this jurisdiction. For example, several Pennsylvania municipalities extend protection from employment discrimination on the basis of sexual orientation and gender identity and expression. In addition, Pennsylvania has new hire reporting requirements and a wage payment and collection law that dictates when employees must be paid wages and fringe benefits (including upon termination of employment), and guarantees an employee the right to review his or her personnel file at least once each year. These are just a few of the idiosyncrasies of Pennsylvania employment, labor and wage laws as compared to other jurisdictions. We can assist you with legal compliance, and help navigate you through your most tangled labor and employment challenges. Our attorneys understand the nuances of practice before administrative agencies and courts throughout the Commonwealth to help steer your business to an optimal result.

Business Services

Joint Ventures, Farm-Outs and Joint Development Arrangements

With so much acreage under lease, and some leases approaching the end of their primary terms, many E&P companies and large-scale property owners look for partners to provide financing or expertise to jointly develop their Marcellus Shale properties.

This approach can be undertaken through an array of joint ventures, farm-outs and joint development arrangements to share costs, risks and benefits. Babst Calland's multi-disciplinary team of attorneys is able to assist clients in navigating the challenges of selecting partners and planning, documenting and implementing such arrangements to take maximum advantage of the strengths of the respective parties.

Transactions, Mergers and Acquisitions

We possess extensive "hands on" transaction experience for private and public entities dealing with mergers, acquisitions and divestitures, including the structuring, drafting, review and negotiation of purchase and sale agreements and all components of the deal through post-closing integration. We also cover all aspects of the title process, including title examination and title due diligence. We assist in the seller's preparation for a sale, the buyer's preparation for an acquisition, the negotiation of the purchase and sale agreement, the due diligence search, the pre-closing, the closing and the post-closing.

Title Due Diligence

Babst Calland's Natural Resources and Business Services groups have substantial experience in examination of the complex accumulation of title documents, and in the performance of the due diligence examination required to properly assess risk before closing a deal.

We know that due diligence review involves many separate tasks which must be completed in a short period of time. If the project is anything but a small project, it will require the efforts of a large number of people. The due diligence search must be carefully planned and organized in order to coordinate the efforts of many people. Our experience, knowledge and coordination can lead to a savings of time and money.

However you choose, and realizing that every project should have one person in charge, we will either coordinate or participate in all aspects of due diligence in regional and multi-state transactions at the bid preparation and contract due diligence stages.

Our due diligence experience includes working with our clients to develop a reasonable due diligence plan for the transaction at hand, gathering, reviewing and distilling information in a consistent format, and working with clients to modify the plan if new issues are uncovered. Given the typically short timeframes involved in most due diligence, we work with local landmen, environmental consultants, in-house counsel and others to identify unique local issues and to implement parts of the due diligence plan.

Our due diligence experience includes:

- title review of personal, municipal, county and state land documents and federal records
- environmental review of all energy producing properties and associated assets such as pipelines
- review of contracts for consents, preferential rights to purchase, or other terms that might have a material adverse impact on the value of the assets
- on-going litigation and permit compliance
- review the accounting to royalty and overriding royalty owners and taxing authorities to identify potential liabilities and impacts to the economic assumptions underlying a proposed transaction
- for acquisitions of companies or their assets, review of the myriad matters typically involved in evaluating operations, assets and liabilities (e.g., securities, employment matters, tax posture, intellectual property, etc.)

Pooling and Unitization Agreements

Most modern oil and gas leases permit the pooling and/or unitization of the leased tracts for purposes of applications for well permits and efficient operation of a producing reservoir. However, unlike most significant gas producing states, Pennsylvania does not have a compulsory pooling or unitization law for shallow wells, or a great deal of case law on pooling and unitization.

It is also not unusual for properties in a unit to be held by different lessees. The nuances of pooling and unitization are sometimes missed in the rush to implement pooling or unitization plans, resulting in friction with lessors and disputes among lessees in the unit. We are well positioned to assist our clients in the legal aspects of these measures in order to obtain optimal efficiency in their pooled or unitized operations.

Surface and Subsurface Ownership Rights

Frequently, the surface, mineral, and oil and gas estates of properties underlain by the Marcellus Shale are held by different parties with divergent interests. Questions frequently arise as to how and when owners and lessees of different estates (for example, coal and gas owners) have the right to develop their respective estates or to protect their interests from adverse impacts (for example, subsidence).

Depending on the subject matter, those questions are sometimes settled by reference to:

- Instruments of severance or conveyance
- Statutes (such as the Oil and Gas Act and the Coal and Gas Resource Coordination Act) and associated regulations
- Rights under common law

Babst Calland's multi-disciplinary team of attorneys has extensive experience in evaluating our clients' respective interests, assisting them in coordinating their development with other interest holders, and defending their rights to preserve their investments.

Pipeline Right of Way Acquisitions

The recent perfection of horizontal drilling technology has enabled the exploitation of oil and gas in the Marcellus Shale and created a sort of "Wild West Gold Rush" in Pennsylvania. Faced with the urgent need to obtain development rights ahead of their competitors, E&P companies sometimes find themselves in the situation of controlling the drilling rights with no way to get their product to the market.

Babst Calland's attorneys have years of experience in helping clients navigate the complexities of right of way acquisition in Pennsylvania, where unlike in many other states, eminent domain rights are not commonly available for gathering lines. Our clients include several midstream pipeline companies which we have assisted in acquiring rights of way by providing services such as, title review and clearance and by drafting and negotiating critical agreements such as rights of way, ratification, straw party and subordination agreements. Many of our attorneys are long-standing members of industry trade organizations, including the International Right of Way Association (IRWA), through which we have developed contacts and relationships we can call upon to help our clients get the job done.

Litigation

Marcellus Shale Leasing Disputes

Disputes over oil and gas rights are becoming increasingly frequent and contentious, particularly where the Marcellus Shale is found. Many are initiated by property owners trying to void valid leases so that they can take advantage of lucrative offers of shale gas development. Such disputes typically entail application of legal principles developed in the conventional natural gas arena, some of which have not yet caught up with technological advances in gas drilling and production. Babst Calland's experienced team of natural resource litigators understands the shifting legal landscape, and is equipped to defend these claims effectively and efficiently. Our attorneys are experienced, not only in litigating these disputes when necessary, but also in preventing disputes from ripening into litigation.

Toxic Tort and Property Contamination

Babst Calland litigators have extensive experience handling complex toxic tort and property damage cases in a variety of forums in both Pennsylvania and West Virginia. Increased Marcellus Shale drilling has already spawned cases initiated by property owners alleging contamination to property and risk to human safety caused by chemicals in frack water that allegedly infiltrate the groundwater near drilling operations. These cases may proliferate in the face of increasing recruiting efforts by aggressive plaintiff attorneys.

Challenging Municipal Ordinances

An increasing number of cities and municipalities have adopted or are considering adopting ordinances that in one form or another seek to restrict Marcellus Shale drilling activities within their jurisdiction. Babst Calland regularly monitors the development of these ordinances and advises clients concerning strategies to influence their content during the development phase and, if appropriate, challenge them through litigation.

Actions to Quiet Title and Declaratory Judgment Actions

Babst Calland natural resource litigators have defended and initiated an increasing number of quiet title actions. The extremely high value of Marcellus acreage has led landowners to scrutinize title issues and to commence litigation in an effort to void old, less favorable, leases. Likewise, the high volume of leasing activity has resulted in litigation between developers and parties seeking to establish their rights to disputed tracts.

Contractual Disputes Between Developers

The frenzied rush to get acreage under lease, followed by the pressures to meet the drilling commitments, contributes to a high level of joint ventures and other vehicles for collaboration and risk sharing for Marcellus leases. As issues arise in the performance of the obligations under these agreements, a significant body of litigation between gas companies and/or others with a working interest has ensued regarding royalty interests and development issues.

Babst Calland Overview

Babst Calland is a mid-size law firm with offices in Pittsburgh, State College, Charleston, WV and Sewell, NJ. We were founded in 1986 as predominantly an environmental law firm and currently have more than 15 lawyers exclusively practicing environmental regulatory law. Over the past 25 years, Babst Calland has complimented its nationally-recognized environmental practice by adding more than 80 attorneys with focused practice areas intended to address our clients' needs, including corporate, litigation, land use, employment and labor and construction. Since its beginning, Babst Calland has been advising natural resource and energy clients, including oil and gas producers, service providers and pipeline operators. Babst Calland is built on a commitment to provide comprehensive legal services in a timely manner at a competitive rate. We welcome the opportunity to assist your business with its challenges in developing shale gas, including the Marcellus Shale.

Please contact our offices for more information on how we can assist you with your particular needs.