

Issues Redefine Regulatory Landscape

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PITTSBURGH—The Marcellus and Utica shale plays account for some 30 percent of total U.S. natural gas output, compared with only 3 percent a decade ago. The Appalachian Basin’s rapid growth in natural gas and natural gas liquids production has occurred despite relatively low natural gas prices, driven by greater well productivity from improved drilling and completion techniques, including longer laterals and optimized well spacing.

Additionally, infrastructure build-out in the region, including the development of significant interstate pipeline projects featuring large-scale transmission of natural gas and NGLs (such as the Rover, Nexus and Mariner East 1 projects), has allowed access to Northeast population centers to increase demand for Appalachian-derived natural gas resources. Continued innovations in the industry, such as improvements to water logistics, likely will be important to reduce operational costs and further improve efficiency to maintain growth.

While the industry continues forging ahead in the Marcellus, Utica and conventional Appalachian plays, the legal landscape continues to evolve with ever-changing federal and state environmental and safety regulations, along with a variety of local government requirements across the basin. The federal and state courts, legislatures and regulatory agencies continue to address a variety of issues that affect all facets of oil and gas development in the multistate region.

These decisions and developments not only affect drilling and production, but

also the midstream and transportation infrastructure that is so critical to Appalachian producers’ ability to market their production. This article summarizes developments in the legal and regulatory landscape facing oil and gas producers and midstream operators in the Appalachian Basin.

In October 2016, the Marcellus Shale Coalition filed a petition in the Pennsylvania Commonwealth Court challenging seven new provisions in 25 Pa. Code Chapter 78a, a set of regulations applicable only to the unconventional oil and gas industry. The challenged provisions include those relating to impoundments, area of review obligations, public resource considerations in the well permit process, site restoration, spill remediation, and waste handling and reporting. The Commonwealth Court preliminarily enjoined four of seven counts on Nov. 8, 2016, a decision that the Pennsylvania Department of Environmental Protection appealed to the Pennsylvania Supreme Court on June 1, 2018.

The Supreme Court upheld the injunction as to the three most important counts to the industry—public resources, area of review obligations, and re-permitting existing centralized impoundments—and reversed it regarding two counts (registration of existing freshwater impoundments and post-construction stormwater controls). On Aug. 23, the Commonwealth Court decided Count I on the merits, invalidating provisions related to new “public resources” and new “public resource agencies,” which would have included private marinas, McDonalds, and homeowners’ associations. The remaining six counts were scheduled to be argued in the Commonwealth Court on Oct. 17.

Clean Streams Law

In a case of first impression, the Pennsylvania Supreme Court rejected the DEP’s enforcement theory that penalty liability under the Clean Streams Law continues as long as any constituents of a release remain in waters of the commonwealth, even years after the release ended. In its March 28 ruling in *EQT Production Company v. DEP*, the Supreme Court held “[t]he mere presence of a contaminant in a water of the commonwealth” does not violate the Clean Streams Law since “movement of a contaminant into water is a predicate to violations.”

In other words, a violation of these sections of the Clean Streams Law is based on the entry of pollutants into waters of the commonwealth, not the presence or movement of constituents within such waters. The Supreme Court’s opinion provides necessary clarification concerning the scope of liability for penalties under the Clean Streams Law for all persons, entities, businesses and industries that are responsible for remediation, those who would redevelop brownfield properties for reuse under Act 2, as well as any property owner with a historic contamination in groundwater that it did not cause.

The decision affirms that penalty liability is distinct from cleanup liability and recognizes that penalties are neither appropriate nor effective in altering the time that may be necessary for full remediation.

The Delaware River Basin Commission—which includes Pennsylvania, Delaware, New Jersey and New York—has published a proposed rule that would ban high-volume hydraulic fracturing in



the basin and impose new standards for exporting water from the basin for hydraulic fracturing and importing wastewater from oil and gas operations into the basin for treatment or discharge. The public comment period closed on March 30, with more than 8,600 public comments. There is no schedule for a final rule.

On July 3, a panel of the Third Circuit Court of Appeals vacated the dismissal of a complaint that challenged the jurisdiction of the DRBC to regulate oil and gas operations. The District Court had denied the request for declaratory relief, finding that the activities were subject to oversight by the DRBC. The Third Circuit remanded the matter for fact-finding to determine the intent of the drafters of the 1961 compact regarding the scope of DRBC's authority to review "projects," a term that the Third Circuit found to be ambiguous (*Wayne Land and Mineral Group LLC versus DRBC*, No. 17-1800).

Pipeline Safety Regulations

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration continues to make progress toward finalizing a rule making that could reshape the nation's federal safety standards for natural gas pipelines. In April 2016, PHMSA issued a notice of proposed rule making (NPRM) proposing extensive changes to the safety standards and reporting requirements for gas transmission and gathering lines. To address certain mandates in the 2011 reauthorization of the Pipeline Safety Act and related National Transportation Safety Board safety recommendations, PHMSA proposed new requirements, including:

- Verifying the maximum allowable operating pressure and documenting the materials in onshore steel gas transmission lines;
- Conducting integrity assessments of certain transmission lines in moderate consequence areas; and
- Corrosion control, pipeline repair and record keeping requirements, as well as changes to the integrity management requirements for gas transmission lines.

In addition to the proposals for gas transmission lines, PHMSA proposed significant changes to the regulations for onshore gas gathering lines, primarily to address the growth of new pipeline infrastructure in the nation's shale plays. The proposed changes included new definitions for determining what qualifies as an onshore gas gathering line, new

safety standards for regulated onshore gas gathering lines (which would apply to certain historically exempt onshore gas gathering lines in rural locations), and new reporting requirements for all gas gathering lines, whether regulated or not.

The pipeline industry responded by expressing significant concerns with many of the proposals. For example, the American Petroleum Institute submitted an economic analysis showing that PHMSA made numerous errors in developing the preliminary regulatory impact analysis for the NPRM. API's economic analysis also showed that PHMSA overestimated the benefits of the proposed rules by \$2.9 billion-\$3.1 billion and underestimated the costs by \$32.8 billion.

The Gas Pipeline Advisory Committee, the federal advisory committee that reviews PHMSA's gas pipeline rulemaking proposals, has met on five occasions to consider the NPRM. At the most recent meeting held in March, PHMSA announced that it was dividing the NPRM into three separate proceedings for purposes of developing the final rules. Two proceedings would focus on the new requirements for gas transmission lines, and a third proceeding would be dedicated solely to gas gathering lines.

According to the DOT's latest significant rule making report, PHMSA expects to publish the first final rule for gas transmission lines in March 2019, the second final rule for gas transmission lines in June 2019, and the third final rule for gas gathering lines in December 2019.

ERA Reinterpreted

On June 20, 2017, the Pennsylvania Supreme Court reinterpreted Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment in *Pennsylvania Environmental Defense Foundation v. Commonwealth*. PEDF challenged the statutory diversion of royalties generated from leasing oil and gas under state land to the general fund.

The Supreme Court rejected the long-standing three-part balancing test developed in 1973 by the Commonwealth Court in *Payne v. Kassab*. The Supreme Court replaced the test with a standard based on the "text of Article I, section 27 and principles of Pennsylvania trust law." The Court held that the commonwealth's oil and gas rights are public natural resources under the ERA and royalties gen-

erated by the development of those resources must be held in trust to conserve and maintain public natural resources. Because the decision dealt with government-owned assets, the application of PEDF to state and local permitting and regulation of privately owned natural resources was left open to interpretation by the courts.

The Pennsylvania Environmental Hearing Board has issued a few opinions concerning the ERA in appeals of DEP permitting decisions. Analyzing the ERA in the permitting context, EHB evaluated:

- Whether DEP had considered the environmental effects of its permitting action, and whether that action is likely to cause, or in fact did cause, the unreasonable degradation or deterioration of the environment, and
- Whether DEP had properly carried out its trustee duties of prudence, loyalty and impartiality to conserve and maintain the environment by prohibiting degradation, diminution and depletion.

Significantly, HEB recently stated, "Our understanding of the trustee responsibility does not require (DEP) to deny permits to any and all activity that will negatively impact the public natural resources and/or the people who use those resources," and that "[t]o hold otherwise would essentially prevent any permitting activity since it is nigh impossible to have development without some environmental impact."

EHB has upheld various types of permits under this standard, in some cases, collapsing the analysis under the second part of the test based on the facts and record reviewed under the first part of the test.

Land Use Decisions

The parameters of local government regulation of the oil and gas industry continue to be refined and left uncertain by the ongoing judicial fallout from the Pennsylvania Supreme Court's 2013 decision in *Robinson Township v. Commonwealth*. The Robinson Township Court invalidated two sections of Pennsylvania's updated Oil and Gas Act (Act 13) that limited the authority of local governments to regulate oil and gas operations. A precursor to the Court's consideration of *PEDF v. Commonwealth*, the three-justice plurality in *Robinson Township* based its decision on a reinvigorated interpretation and application of ERA.



The Supreme Court again considered the implications of *Robinson Township* in *Gorsline v. Board of Supervisors of Fairfield Township*. The Commonwealth Court had upheld a township's conditional-use approval of an oil and gas well in a residential agriculture (RA) district pursuant to a zoning ordinance "savings" or "catch-all" provision. The Commonwealth Court found that the proposed well was similar to and compatible with other uses permitted in that district and rejected *Robinson Township*/ERA-based arguments to the contrary. Although there was no appeal by right, the Supreme Court agreed to take the case.

On June 1, the Supreme Court published its 4-3 decision. The majority reversed the Commonwealth Court's decision but it did so in a narrow holding, finding that Inflection Energy LLC did not present enough evidence establishing that its proposed unconventional natural gas well pad was "similar to" other uses allowed in the township's RA district.

The majority declined to address the constitutional question, i.e. objectors' claimed violations of substantive due process rights and the ERA based on their interpretation of *Robinson Town-*

ship. The majority opinion did, however, conclude with strong language recognizing that zoning decisions are inherently local matters, and a local municipality is empowered to "permit oil and gas development in any or all of its zoning districts."

In addition, the majority cautioned that its narrow holding "should not be misconstrued as an indication that oil and gas development is never permitted in RA districts, or that it is fundamentally incompatible with residential or agricultural uses." The three dissenting justices would have addressed the *Robinson Township* constitutional question and faulted the objectors for reading *Robinson Township* too broadly when they claimed that natural gas development is inherently incompatible with residential uses, and its impacts never can be mitigated through imposition of conditions.

Thus, language in both the *Gorsline* majority and dissenting opinions largely rejected the post-*Robinson Township* assertion that natural gas wells must be relegated to industrial zoning districts and are fundamentally incompatible with residential or agricultural zoning districts.

Local Ordinances Challenged

In Pennsylvania, Pennsylvania General Energy LLC and Seneca Resources Corporation challenged underground injection well bans adopted in Grant Township in Indiana County and Highland Township in Elk County, respectively.

Both municipalities worked with the Community Environmental Legal Defense Fund, an anti-industry, anti-corporation, community rights organization, to enact self-styled "Community Bill of Rights" ordinances. These ordinances specifically banned underground injection wells, and by implication, other oil and gas development, and purported to supersede any state or federal injection well permit.

PGE had applied for and obtained a PADEP permit to operate an underground injection well in Grant Township, and filed a complaint in the U.S. District Court for the Western District of Pennsylvania challenging the applicable Community Bill of Rights ordinance. The case challenged the constitutionality, validity and enforceability of these local laws.

In 2015, the court invalidated six provisions of the ordinance on state law grounds. In March 2017, the court granted PGE's motion for summary judgment on three counts of PGE's complaint on the



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remaining federal constitutional claims. PGE continued to pursue its request for damages. In a significant procedural development, PGE filed a motion for sanctions against Grant Township, CELDF and two CELDF attorneys, asserting that they abused the court system by filing frivolous, unfounded and harassing pleadings in pursuit of political objectives and other illegitimate ends.

In January 2018, the court entered a decision granting in part PGE's motion, ordering the two CELDF attorneys to pay PGE \$52,000 and directing the clerk to transmit the decision to the Pennsylvania Supreme Court Disciplinary Board with a request to determine appropriate disciplinary measures to be imposed on one of the CELDF attorneys.

After the sanctions ruling, the parties reached an agreement to resolve the remaining claims and damages issues without a trial. PGE agreed to dismiss its remaining constitutional claims and its claims for compensatory and consequential damages. Grant Township agreed to entry of nominal damages in favor of PGE regarding its constitutional claims, on which the court granted summary judgment. PGE was permitted to seek attorneys' fees and costs pursuant to 42 U.S.C. § 1988, and the parties agreed that the order imposing sanctions on the CELDF attorneys would be stayed until 30 days after the court enters final judgment on PGE's petition for attorneys' fees and costs.

In April, PGE filed a petition seeking

reimbursement of its attorneys' fees and costs. The township filed an opposition, and the matter is fully briefed and awaiting a final decision from the court.

West Virginia, Ohio Rulings

In November 2017, Mountain Valley Pipeline LLC (MVP) filed an action in the federal District Court in Charleston against the county commission of Fayette County, W.V. The lawsuit sought entry of an order declaring that the Fayette County zoning ordinance, insofar as it would apply to MVP's proposed Stallworth compressor station, is preempted by FERC's issuance to MVP of a certificate of public convenience and necessity pursuant to the federal Natural Gas Act, 15 U.S.C. 717 et seq.

Before the FERC certificate for the MVP project was issued, MVP had submitted an application for rezoning of the compressor station property to allow for industrial use and had appeared before the county commission and its planning commission on numerous occasions in support of that request. Despite those efforts, the county commission ultimately denied MVP's rezoning application on the basis of its determination that the facility would be incompatible with the county's comprehensive plan. On Aug. 29, 2018, the District Court granted summary judgment to MVP, barring the county zoning ordinance from interfering with construction of a FERC-certified compressor station. According to the court, both field and conflict preemption barred

enforcement of the ordinance.

In Ohio, the court again has found that state regulations preempt local governments from regulating oil and gas development. Following the Ohio Supreme Court's 2015 decision in *State ex rel. Morrison, et al., v. Beck Energy Corporation*, which held that Ohio Department of Natural Resources regulations preempted the city of Munroe Falls from applying certain zoning requirements to oil and gas development, the city filed a suit to define the boundaries of the holding.

In the 2016 case, the city of Munroe Falls asserted that the preemption recognized in the Morrison case did not preclude the application of traditional zoning laws to the use (i.e., while the city could not impose a separate regulatory regime for oil and gas development, it argued that it could require oil and gas development to comply with regulations that address traditional zoning concerns, such as neighborhood compatibility). In July 2016, the Summit County Court of Common Pleas issued a decision rejecting the city's position.

The court relied on *Morrison* to hold that the state's exclusive authority to enforce regulations in regard to oil and gas development prohibited the city from applying its general zoning regulations to oil and gas development. Beck Energy later dismissed its counterclaims and filed a motion for sanctions, which the court granted in the amount of \$45,000. The city has appealed that decision. □