

PENNSYLVANIA OIL + GAS LITIGATION UPDATE (2021)

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I. INTRODUCTION

- A. Since our last meeting, the oil and gas industry has endured ongoing challenges engendered by the COVID pandemic; oil and gas pipeline companies have abandoned projects; the Texas ice storm caused wild price surges; companies certified their gas as responsibly sourced in response to market demands; the switch to a Biden Administration means greater focus on clean and green energy initiatives; and gas prices have increased to their highest levels in recent memory.
- B. In court news, the past year also yielded about 35 or so cases that dealt with a variety of issues affecting oil and gas companies.
- C. This outline discusses cases in Pennsylvania since September 2020 to present involving ownership and title issues; takings of subsurface estates; challenges to leasing activities under consumer protection laws; abandonment of oil and gas leases vs. lease expiration; royalties and post-production costs; notice-and-cure provisions; labor and employment issues; constitutional environmental rights in Pennsylvania; permit fights and attorneys' fees; disclosure of records of pipeline companies under the Right to Know Law; pipeline eminent domain authority under the Natural Gas Act; and climate change.

II. PENNSYLVANIA OIL + GAS LITIGATION – YEAR IN REVIEW

- A. Oil + Gas Ownership
 - 1. Rule of Capture.
 - a) The rule of capture provides that landowners and their lessees engaged in oil and gas development on the leased premises are not liable for damages for the value of drainage of oil or gas underlying adjacent unleased properties.

- b) In *Briggs v. Southwestern Energy Company*, --- A.3d ---, No. 63 MAP 2018, 2020 WL 355911 (Pa. Jan. 22, 2020), the Pennsylvania Supreme Court reaffirmed the rule of capture when hydraulic fracturing is involved, overturning a contrary opinion and order from the Pennsylvania Superior Court.
- c) The Pennsylvania Supreme Court held that the rule of capture immunizes a lessee from liability in trespass where the developer uses hydraulic fracturing on the property it owns or leases and such activities allow it to obtain oil or gas that migrates from beneath the surface of another person's land.
- d) The court remanded to the Superior Court to determine whether the plaintiffs' pleadings met standards to allege a physical trespass.
- e) After remand, the Pennsylvania Superior Court affirmed the trial court's original order granting SWN's summary judgment motion based on the rule of capture. *Briggs v. Southwestern Energy Production Co.*, --- A.3d ---, No. 1351 MDA 2017, 2020 WL 7233111 (Pa. Super. Dec. 8, 2020) (un-published; not precedential).
- f) The court concluded that the plaintiffs did not meet pleading standards to allege a trespass. In the process, the court included *dicta* and other commentary about how plaintiffs might be able to do so in the future.
- g) The Briggs filed a new action that is now pending in federal court.

2. Oil + Gas Conveyances

- a) The usual deed interpretation rules generally apply to conveyances involving subsurface estates, meaning that the intent of the parties as expressed by the words they use in the instrument control.
- b) In Pennsylvania, courts apply the "*Dunham* Rule" to determine whether parties to a transaction intended to grant or reserve oil or natural gas.
- c) The *Dunham* Rule provides that if the parties to a deed intend to convey or reserve oil or gas rights, generally they must expressly say so. There is a rebuttable presumption that the term "minerals" as used in a deed – without more – does not include oil or gas. The

word “minerals” means metallic substances. To rebut the *Dunham* presumption, one must present “clear and convincing” evidence that the parties intended to include oil or natural gas within the word “minerals.”

d) Recent *Dunham* Rule cases:

(1) In *Walters v. McIlvee*, --- A.3d ---, No. 1415 WDA 2019, 2021 WL 248540 (Pa. Super. Jan. 26, 2021), the Superior Court interpreted an agreement of sale of that contained a reservation of “minerals” as including oil and gas despite the *Dunham* Rule. The court relied on handwritten language contained in the agreement, testimony that the parties’ discussed minerals as including the oil and gas, and “reasonable, evidence-based inference” that the extensive history of oil and gas development in the region, compared to the sparse history and value of mineral extraction, made it unlikely that the parties would discuss “minerals” and not oil and gas.

(2) In *Jenkins v. P.P.&V Corp.*, --- A.3d ---, No. 692 WDA 2020, 2021 WL 2531153 (Pa. Super. June 21, 2021), the Superior Court held that a deed conveyed an undivided one-half interest in oil and gas rights despite the lack of the phrase “oil and gas” in a second conveyance. The court read two related deeds together, one of which granted a one-half interest in natural gas and the other referring back to a prior deed that did not include that phrase.

3. Takings of Subsurface Estates

a) An oil and gas estate is a separate estate that may be owned and transferred separately from the surface. *Belden & Blake v. DCNR*, 969 A.2d 528 (Pa. 2009).

b) Owners of subsurface estates and interests sometime bring takings claims against the government or other entities clothed with condemnation powers.

(1) In *PBS Coals, Inc. v. PennDOT*, --- A.3d ---, No. 41 WAP 2019, 2021 WL 190970 (Pa. Jan. 20, 2021), the Pennsylvania Supreme Court held that PennDOT did not engage in a *de*

facto taking by cutting off all access to the surface overlying a coal estate. The court reasoned that the *de facto* takings claim hinged on whether the companies could have received a permit to mine the coal, and the evidence suggested the coal companies' ability to obtain a permit from PADEP would be too speculative to support a *de facto* taking.

- (2) In *Hughes v. UGI Storage Co.*, --- A.3d ---, No. 453 C.D. 2019, 2020 WL 6601408 (Pa. Cmwlth. Nov. 12, 2020), the Commonwealth Court held that UGI Storage Company is a public utility clothed with the power of eminent domain but cannot be subject to a *de facto* condemnation proceeding without first including the plaintiffs' properties within the area certificated by FERC for gas storage and initiating formal condemnation proceedings.

B. Oil + Gas Leases

1. Oil + Gas Leasing Activities

- a) Oil and gas leasing activities are not subject to the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL" or "Consumer Protection Law").
- b) In *Commonwealth v. Chesapeake Energy Corp.*, 247 A.3d 934 (Pa. 2021), the Attorney General invoked the Consumer Protection Law to challenge natural gas leasing activities of Chesapeake and Anadarko and to pursue antitrust claims and remedies against the company based on violations of that state statute. Commonwealth Court sided with the Attorney General, and the Pennsylvania Supreme Court accepted an appeal.
- c) In a 6-1 decision, the Pennsylvania Supreme Court held that the Attorney General cannot pursue claims against Anadarko under the Consumer Protection Law to challenge oil and gas leasing activities. The court agreed that the Consumer Protection Law is designed to protect buyers in a consumer transaction based on the legislature's narrower definition of "trade or commerce." The court concluded that Anadarko is a "buyer" in the oil and gas lease context because Anadarko as lessee acquires an estate in the oil and gas as a fee simple determinable in exchange for bonus and royalty. The court rejected a broader definition of "trade or commerce" based on

dictionary definitions and other case law as urged by the OAG and Commonwealth Court.

- d) In a dissent, Justice Dougherty would have ruled in favor of the Attorney General. Justice Dougherty acknowledged that the Consumer Protection Law only applies to trade or commerce and that an oil and gas lease transaction is one in which the lessee acquires an estate in fee simple. Nevertheless, he would hold (contrary to settled principles) that production companies are engaged in “services” for the benefit of the landowner in that setting, i.e., that the landowner essentially hires the production company to develop his or her oil and gas. On that theory, Justice Dougherty would have concluded that the Attorney General stated a valid claim under the Consumer Protection Law and would have reached the separate antitrust issue, resolving it in a manner similar to how Commonwealth Court resolved it (by holding that a violation of the statute can serve as a basis to assert antitrust liability).

2. Oil + Gas Lease: Granting Clause

- a) The granting clause in an oil and gas lease conveys the oil and gas and a number of related rights to the lessee, identifies the substances subject to the lease, identifies the acreage subject to the lease, and grants (expressly or impliedly) surface rights to the lessee.

- b) Acreage Disputes

- (1) In *Southersby Dev. Corp. v. EQT Production Company*, --- A.3d ---, No. No. 421 WDA 2020, 2020 WL 7312197 (Pa. Super. Ct. Dec. 11, 2020), a lessor claimed that a lease covered 114 despite evidence that the landowner owned only 27 acres.

- (2) The Superior Court relied on publicly available deeds and the lessor’s own concessions on the record to conclude that the landowner only owned 27 acres subject to the lease.

- c) Surface Use for Pipelines.

- (1) In *Williams Field Services Co., LLC v. Greenwood*, --- F. Supp. 3d ---, No. 3:19-CV-01545, 2021 WL 3565682 (M.D. Pa. Aug.

12, 2021), a lessee assigned surface rights to a gathering company for pipeline work.

- (2) The court concluded that the gathering company had the right to lay pipeline on the property and permanently enjoined the lessors from interfering with those property rights, reasoning that interference with property rights is *per se* irreparable harm under Pennsylvania law and the lessors could not block the gathering company from proceeding with its operations.

3. Oil + Gas Lease: Habendum Clause

- a) A typical oil and gas lease sets forth (a) a primary, fixed term of years during which lessees (if they so elect) can engage in activities or operations to secure production and (b) a secondary term that lasts as long as production continues or other express limitations are satisfied.
- b) Many cases involve claims that a lease has expired either in the primary term for lack of payments or operations or during the secondary term for lack of production or other express requirements. George A. Bibikos, *Five Steps for in-House Counsel Facing Oil and Gas Lease Expiration Claims*, 29 Widener Commonwealth L. Rev. 171, 172 (2020).
- c) Abandonment vs. Lease Expiration
 - (1) An oil and gas lease governs the rights and obligations of the parties if and when a lease expires by its terms.
 - (2) In *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, --- A.3d ---, No. 6 WAP 2020, 2021 WL 1676362 (Pa. Apr. 29, 2021), the Pennsylvania Supreme Court rejected a claim that a lessee abandoned an oil and gas lease after a prolonged period of inactivity.
 - (3) The court reasoned that the oil and gas lease governs how and when the lease expires by its express terms.
 - (4) The Court stated: “Because Appellees had available to them a full and adequate remedy at law, through contract

principles generally applicable to oil and gas leases, and through the specific provisions of the subject leases, we conclude it was error to provide recourse through application of the equitable doctrine of abandonment.”

4. Royalties

a) Post-Production Costs

- (1) Royalties are a share of production, free of the costs of production. Production costs include the upstream costs to bring oil or natural gas to the surface of the earth at the wellhead.
- (2) However, royalties are subject to post-production costs – the costs of activities between the wellhead and point of sale – including gathering, dehydration, compression, etc.
- (3) In *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010), the Pennsylvania Supreme Court interpreted the Pennsylvania Minimum Royalty Act, 58 Pa.C.S. § 33.3 and held that the minimum royalty required by the statute is one-eighth of the wellhead value of oil or gas.
- (4) The court determined that the statute permits a lease to use a net-back method (sales price minus lessor’s proportionate share of post-production costs) to determine the wellhead value of the gas in order to calculate from that amount the minimum one-eighth royalty owed to a lessor.
- (5) The court noted that, in most other states, costs incurred for activities between the wellhead and the point of sale add value to the natural gas and may be shared proportionately by lessors and lessees pursuant to the lease terms.
- (6) In *Coastal Forest Res. Co. v. Chevron U.S.A., Inc.*, --- F. Supp. 3d ---, No. 2:20-CV-1119, 2021 WL 1894596 (W.D. Pa. May 11, 2021), the court concluded that the holdings in *Kilmer* apply broadly (beyond the statutory interpretation context)

to help courts interpret “at the wellhead” or similar language in leases.

- (7) The court in *Coastal* concluded that royalties payable on gross sales price received at the wellhead unambiguously authorizes the net-back method to calculate royalties such that lessees may deduct the lessor’s proportionate share of lessee’s costs of post-production activities before paying royalties. The landowners did not appeal.
- (8) Similarly, in *Dressler v. PennEnergy*, No. 2017-10357 (Butler County), *appeal pending* at 635 WDA 2021 (Pa. Super.), a court of common pleas concluded that a lease with similar language (gross proceeds sold at the well) unambiguously authorizes the net-back method to calculate royalties such that lessees may deduct the lessor’s proportionate share of lessee’s costs of post-production activities before paying royalties.
- (9) The *Dressler* case is currently on appeal to the Pennsylvania Superior Court.

b) Burden of Proof: Market Enhancement Clauses

- (1) A market enhancement clause gives lessees the ability to deduct a royalty owners’ proportionate share of post-production costs that enhance the value of gas.
- (2) In *Tennant v. Range Resources – Appalachia, LLC*, --- F. Supp. 3d ---, No. CV 18-1533, 2021 WL 4288365 (W.D. Pa. Sept. 21, 2021), the court confirmed that a lessor bears the burden of proving that the costs incurred by the lessee do not enhance the value of gas.
- (3) The Court rejected attempts by royalty owners to shift the burden to the lessee to prove that the costs enhance the value of gas, holding instead that a plaintiff in a breach of contract action regarding royalties has the burden of proof under Pennsylvania law.

5. Notice + Cure Provisions

- a) Many oil and gas leases provide that a lessor should give the lessee notice of an alleged breach of the lease and a period of time during which the lessee may cure the breach before the lessor may initiate a cause of action.
- b) In *Brusamonti v. XTO Energy, Inc.*, --- F. Supp. 3d ---, No. CV 20-652, 2021 WL 2209120 (W.D. Pa. June 1, 2021), the lessee had a glitch in its accounting system that inadvertently switched certain royalty owners from receiving gross royalties to net royalties. The royalty owners sued without first providing notice.
- c) The court rejected the lessee's claim that the lessor had an obligation to follow the notice-and-cure provision in the lease given that the lessee had actual knowledge of the problem before the lessor filed a lawsuit.

C. Oil + Gas Transactions

1. Operating Agreements

- a) A joint operating agreement ("JOA") is a contract between two or more working interest owners in a given area in which they agree to jointly share the costs, risks, and revenues of development and production.
- b) Basically, a JOA designates an "operator," (the other parties are "non-operators"), describes the scope of the operator's authority, provides for the allocation of costs and production among the parties to the agreement, and provides for recourse among the parties if one or more default in their obligations.
- c) Joint operating agreement disputes are rare in Pennsylvania.
- d) In *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, L.L.C.*, the court addressed a dispute between an operator and non-operator over proposals for drilling wells.
- e) As a threshold matter, the court concluded that other JOA parties electing or declining to participate in wells or units at issue in the

dispute between the operator and the non-operator are neither necessary nor indispensable parties that must be joined in the case. *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, L.L.C.*, --- F. Supp. 3d ---, No. 1:21-CV-00658, 2021 WL 1614795 (M.D. Pa. Apr. 2021).

- f) In a subsequent opinion on the merits, the court held that the non-operator failed to satisfy timing conditions in the JOA to compel its counterparty to participate in proposed wells.
- g) The court held that the JOA at issue unambiguously required the proposing party to specify a commencement date within 120 days and the counterparty did not comply. *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*, --- F. Supp. 3d ---, No. 1:21-CV-00658, 2021 WL 4306123 (M.D. Pa. Sept. 22, 2021).

D. Oil + Gas Labor and Employment

- 1. Oil and gas companies often face a number of employment claims involving workplace incidents, workers' compensation, and wage/hour disputes.
 - a) Donning and Doffing.
 - (1) In *Tyger v. Precision Drilling Corp.*, --- F.3d ---, No. 20-1070, 2020 WL 6268335 (3d Cir. Oct. 26, 2020), workers claimed the right to receive payment for the time of "donning" and "doffing" (the time spent putting on and taking off PPE at the workplace or worksite).
 - (2) The Third Circuit remanded after determining that the plaintiffs' expert opinion excluded by the district court was unnecessary to prove plaintiffs' FLSA claims.
 - b) Straight Time for Overtime.
 - (1) In *McConnell v. EN Engineering*, --- F. Supp. ---, No. 20-153 (W.D. Pa. October 8, 2020), class plaintiffs allegedly regularly worked over 40 hours in a week, and the employer paid straight-time-for overtime.

- (2) The court conditionally certified the class of plaintiffs alleging failure to pay for overtime work on pipeline projects under FLSA and the PA and KY state minimum wage laws.

E. Oil + Gas Regulatory Litigation

1. Article I, § 27 of the Pennsylvania Constitution

- a) Since the Pennsylvania Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"), several more cases have made their way to the appellate courts over the past year involving a variety of issues.

b) In General

- (1) In *PEDF v. Commonwealth*, --- A.3d ---, No. 358 M.D. 2018, 2020 WL 6193643, (Pa. Cmwlth. Oct. 22, 2020), an environmental group alleged that the Commonwealth's appropriation and use of money in the Oil and Gas Lease Fund (Lease Fund) to pay for the general government operations of the Department of Conservation and Natural Resources ("*DCNR*") or environmental initiatives unrelated to the Marcellus Shale region in northcentral Pennsylvania violated the Commonwealth's trustee obligations under Article I, sec. 27 of the Pennsylvania Constitution.
- (2) The Commonwealth Court resolved cross-motions for summary judgment by (a) upholding several statutes that did not facially violate the constitution; (b) calling the Commonwealth to task for potentially maintaining inaccurate records of the Lease Fund and failing to track monies constituting the trust principal as part of its trustee duties; (c) concluding that the Lease Fund money, including trust principal, may be expended on environmental conservation initiatives beyond the Marcellus Shale region; (d) deferring on whether the Commonwealth's use of the trust is wholly consistent with its Section 27 trustee responsibilities; and (e) deferring on whether or not the Commonwealth must have affirmative legislation to carry out its obligations under the ERA.

c) Corpus of the Trust

- (1) When DCNR leases oil and gas rights, do the bonus and royalty payments both become part of the “corpus” of the trust to be used for environmental protection and conservation?
- (2) In *Pennsylvania Env'tl. Def. Found. v. Commonwealth*, --- A.3d ---, No. 228 M.D. 2012, 2019 WL 3402922 (Pa. Cmwlth., July 29, 2019), the Commonwealth Court rejected a challenge under Article I, sec. 27 to the Commonwealth’s use of bonus and royalty payments from the state’s Oil and Gas Lease Fund for non-conservation purposes, holding that (by statute) one-third of the proceeds constituting bonuses and rental payments are not part of the corpus of the trust created by Article I, sec. 27 and concluding that the challenged fiscal enactments transferring lease funds to the general fund are facially constitutional subject to an accounting.
- (3) On appeal, however, the Pennsylvania Supreme Court held that income such as bonus payments and other rental payments to the Commonwealth from its oil and gas leases with producers, in addition to royalties as determined in a previous case, also must be returned to the corpus of the trust created by the Environmental Rights Amendment in Article I, sec. 27. *Pa. Environmental Defense Fund v. Commonwealth of Pennsylvania*, --- A.3d ---, No. 64 MAP 2019, 2021 WL 3073335 (Pa. July 21, 2021).

d) DCNR Oil and Gas Leases and Forest Management Plan

- (1) DCNR issued a forest management plan that requires the agency to balance the economic benefits of oil and gas development with forest preservation.
- (2) The Pennsylvania Environmental Defense Foundation (“PEDF”) challenged DCNR’s plan, alleging that it violated Article I, sec. 27.
- (3) The Commonwealth Court dismissed the petition, rejecting PEDF’s claim that oil and gas leasing is inconsistent with

DCNR's trustee responsibilities under the constitution. *Pennsylvania Env't Def. Found. v. Commonwealth Dep't of Conservation & Nat. Res.*, --- A.3d ---, No. 609 M.D. 2019, 2021 WL 3439573 (Pa. Cmwlth. Aug. 6, 2021).

e) Using Art. I, sec. 27 Against Private Parties.

- (1) Article I, sec. 27 applies to the Commonwealth government, not private parties.
- (2) In *Marcum v. Columbia Gas Transmission*, --- F. Supp. 3d ---, No. CV 19-3873, 2021 WL 3033749 (E.D. Pa. July 19, 2021), landowners claimed that a pipeline company exercising easement rights had fiduciary and environmental-protection duties under Art. I, sec. 27.
- (3) The Court held that the provision expressly names the Commonwealth as trustee of Pennsylvania's public natural resources and imposes on it a fiduciary duty to conserve and maintain the corpus of the trust but does not impose any duty on a private company to act in the best interest of landowners with respect to their property.

f) Forced Rulemakings

- (1) Art. I, sec. 27 cannot compel agencies to promulgate rules.
- (2) In *Delaware Riverkeeper Network v. DEP*, --- A.3d ---, No. 285 M.D. 2019, 2021 WL 96887 (Pa. Cmwlth. Jan. 12, 2021), the Commonwealth Court denied in part the Delaware Riverkeeper's bid to compel DEP to respond to a petition for rulemaking to propose an MCL for PFOAs per the agency's duty under the Environmental Rights Amendment to ensure clean water.
- (3) The court held that the if the statute does not impose a mandatory duty on DEP to promulgate the rule, then neither does the environmental-rights provision.

2. Permits

a) Gas and pipeline companies faced more challenges to their permit authorizations brought by various environmental groups.

b) Venue for Federal Permit Challenges

(1) In the companion cases of *Cole v. PADEP*, --- A.3d ---, No. 1577 C.D. 2019, 2021 WL 2420667 (Pa. Cmwlth. June 15, 2021); *W. Rockhill Twp. v. PADEP*, --- A.3d ---, No. 1595 C.D. 2019, 2021 WL 2426014 (Pa. Cmwlth. June 15, 2021), opposition parties challenged a DEP approval for a pipeline compressor station issued pursuant to the federal Natural Gas Act.

(2) The court held that the challenges need not be lodged with the Third Circuit Court of Appeals but may be challenged before the EHB first because the EHB proceeding is not a “civil action” under the federal statute:

(3) The court held that the term “civil actions” in the federal statute does not include state administrative agency reviews of state permitting decisions.

c) Attorneys’ Fees in Environmental Hearing Board.

(1) When parties challenge DEP permit actions and a permittee intervenes to protect its rights, should the permittee be on the hook for fees under the Commonwealth’s Clean Streams Law when DEP and the challenging party settle the dispute?

(2) In *Clean Air Council v. PADEP*, --- A.3d ---, No. 309 C.D. 2019, 2021 WL 560349 (Pa. Cmwlth. Feb. 16, 2021); *PADEP v. Gerhart*, --- A.3d ---, No. 107 C.D. 2020, 2021 WL 563313 (Pa. Cmwlth. Feb. 16, 2021), environmental groups challenged permit actions with DEP and then settled the case.

(3) The Commonwealth Court of Pennsylvania upheld the EHB’s use of the “bad faith” test for imposing attorneys’ fees on

permittees and affirmed its decision to deny the fee petition of the environmental group that settled its appeal with DEP.

- (4) The case is currently on appeal to the Pennsylvania Supreme Court.

3. DRBC

- a) The Delaware River Basin Commission, a quasi-federal agency comprised of several states (including Pennsylvania) has jurisdiction over water withdrawals from the Delaware River. However, the DRBC has long attempted to exercise jurisdiction over natural gas wells and has banned the activity within the basin.

- b) The Wayne Land and Mineral Group has led the battle against the DCNR's attempt to exercise jurisdiction over natural gas wells within the basin, arguing that natural gas wells are not "projects" under the Interstate Compact such that the DRBC cannot exercise jurisdiction to authorize (or prohibit) natural gas wells.

- (1) In *Wayne Land and Mineral Group, LLC v. DRBC*, --- F. Supp. 3d ---, No. 3:16-CV-897, 2021 WL 54209 (M.D. Pa. Jan. 6, 2021), a federal judge denied the Delaware River Basin Commission's bid for summary judgment as to the agency's authority over certain aspects oil and gas development within the river basin.

- (2) The court concluded that fact and credibility issues precluded early disposition and stating that "[w]ith this determination, the Court does not decide that a discrete aspect of a planned natural gas development undertaking could not be considered a 'project' reviewable under § 3.8 of the Compact. The Court simply finds that such a determination is not appropriate on summary judgment."

- c) Pennsylvania lawmakers and municipalities also challenged DRBC's authority to regulate Pennsylvania activities. However, in *Senator Gene Yaw v. Delaware River Basin Commission*, --- F. Supp. 3d ---, No. 21-119, 2021 WL 2400765 (E.D. Pa. June 11, 2021), a federal court dismissed the lawsuit, holding that neither the lawmakers nor municipalities have standing to challenge DRBC's moratorium on

natural gas production but gave the local government plaintiffs a chance to re-file and explain exactly how they've been harmed.

4. Right to Know Law

a) The Pennsylvania Right to Know Law ("RTKL") provides that public records are subject to disclosure unless one of many exceptions applies. 65 P.S. § 67.708.

b) The courts have grappled with several public disclosure issues under the RTKL involving oil and gas activities.

c) Pipelines

(1) In *Pa. PUC v. Friedman* --- A.3d ---, No. 980 C.D. 2019, 2020 WL 6156677 (Pa. Cmwlth. Oct. 21, 2020), requesters asked for disclosure of documents regarding pipeline infrastructure.

(2) The Commonwealth Court concluded that the Pennsylvania Public Utility Commission, not the Office of Open Records, administers a special act prohibiting disclosure of critical pipeline infrastructure and safety information such that the Office of Open Records ("OOR") acted outside of its authority when it ordered the disclosure of that information under the state's more general RTKL.

(3) In *In re: Erica Jackson v. PADEP*, 2021 WL 194818 (Pa. Off. Open Rec. Jan. 19, 2021), the OOR denied a public-records request from a member of FracTracker Alliance, seeking records regarding pipeline company layoffs, firings, and possible investigations. The OOR held that records are part of ongoing non-criminal investigations and therefore exempt from public disclosure under the RTKL.

d) Business Meetings

(1) In *In re: Jennifer Clark v. DCED*, Docket No: AP 2020-0678, 2020 WL 6290515 (Pa. Off. Open Rec. October 23, 2020), a requester asked for documents related to communications and meetings between the Department of Community and

Economic Development and ExxonMobil companies about potential petrochemical plants or pipelines.

- (2) The OOR ordered the disclosure of all records except phone numbers, non-public email addresses, and certain pre-decisional and deliberative records.

5. Oil + Gas Miscellaneous: Discovery, Arbitration

a) Discovery

- (1) In *Cabot Oil and Gas Corporation v. Speer*, --- A.3d ---, No. 1926 MDA 2019, 2020 PA Super 258, 2020 WL 6266953 (Pa. Super. Oct. 26, 2020), the Superior Court upheld an order for the production of tax documents of lawyers and individuals accused by the company plaintiff of pursuing frivolous, vexatious litigation and wrongfully using civil proceedings, holding that the production of documents does not violate privacy rights of the lawyers and individuals particularly where the plaintiff requests punitive damages.
- (2) In *Jones v. SWEPI L.P.*, --- F. Supp. 3d ---, No. 2:19-CV-00050, 2020 WL 6322815 (W.D. Pa. Oct. 28, 2020), a federal court in Pennsylvania ordered contractors to produce multiple email threads, field service reports, and an internal memorandum in a rig-site fatality case, concluding after *in camera* review that the work-product doctrine did not prevent disclosure.

b) Arbitration

- (1) In *Intergrserv LLC v. EQT Production Co.*, --- F. Supp. 3d ---, No. CV 20-1228, 2021 WL 1816941 (W.D. Pa. May 5, 2021), a contractor brought an action against the well operator under section 1981(a) of the Civil Rights Act and for breach of contract.
- (2) The court held that that the claims are within the scope of arbitration under the parties' master service agreement.

F. Oil + Gas Pipelines

1. Public officials, environmental groups, and opponents of natural gas development waged war on pipeline infrastructure projects over the last year. Atlantic Coast, Keystone Pipeline, Constitution Pipeline, and PennEast (at least in part) have abandoned projects due to cost overruns resulting from regulatory issues and litigation.
2. Pipeline Eminent Domain Authority
 - (1) The Natural Gas Act grants interstate pipeline companies the power of eminent domain upon obtaining a certificate of public convenience from the Federal Energy Regulatory Commission.
 - (2) When a certificated pipeline company condemns property in which a state has interests, what happens?
 - (3) In *In re PennEast Pipeline Co., LLC*, --- F.3d ---, No. 19-1191, 2019 WL 4265190 (3d Cir., Sept. 10, 2019), the Third Circuit held that PennEast could not condemn land in which New Jersey claimed interests under the condemnation authority bestowed to pipeline companies in the Natural Gas Act, holding that the NGA did not abrogate the state's 11th Amendment immunity from suit in federal court and that the NGA did not delegate the federal government's exemption from sovereign immunity defenses by the states.
 - (4) However, the United States Supreme Court reversed and decided that actions brought by natural gas pipeline companies pursuant to the federal Natural Gas Act to condemn rights-of-way in which a state has an interest do not offend state sovereignty. *PennEast Pipeline Co., LLC v. New Jersey*, --- U.S. ---, No. 19-1039, 2021 WL 2653262 (U.S. June 29, 2021).

G. Climate Change Issues

1. There are a number of cases alleging that production companies and governments that support fossil-fuel development should be liable for damages caused by climate change.
2. So far, the following state or local governments have filed climate change cases against the majors: Baltimore, MD; Boulder, CO; the State of Delaware; Washington, D.C.; Honolulu, HI; the Commonwealth of

Massachusetts; the State of Minnesota; the State of New York; the State of Rhode Island; the State of Connecticut, the State of Maryland; Hoboken, NJ; and New York City.

3. The companies had little success removing these matters to federal court on the theory that climate change involves inherently federal interests as opposed to local or state interests alone, and typically remand orders don't get immediate appellate review.
4. However, the U.S. Supreme Court held that circuit courts have jurisdiction to review remand orders when a defendant invokes federal officer removal but did not address the broader question of whether climate change suits belong in state or federal court despite the fact that the Court was urged to address this issue. *Baltimore v. BP P.L.C.*, 593 U.S. __ (2021).