The Foundation
FOR NATURAL RESOURCES AND ENERGY LAW
FORMERLY ROCKY MOUNTAIN MINERAL LAW FOUNDATION

fnrel.org

MINERAL AND ENERGY LAW Newsletter

Volume 40 | No. 1 | 2023

In this issue

FEDERAL

Oil & Gas	1
Renewable Energy	1
Environmental	1
Congress/Federal Agencies	6
FERC	8

STATES

Arizona – Mining	11
Arkansas – Oil & Gas	12
California – Oil & Gas	12
Colorado – Oil & Gas	14
Louisiana – Oil & Gas	14
New Mexico – Oil & Gas	16
Pennsylvania – Mining	17
Pennsylvania – Oil & Gas	18
Texas – Oil & Gas	20
Wyoming – Oil & Gas	25

CANADA

Oil & Gas	26

FEDERAL — OIL & GAS

Kathleen C. Schroder, Reporter

Tenth Circuit Finds Component of ONRR Indian Oil Valuation Rule Arbitrary and Inconsistent with Tribal Leases

In *Merit Energy Co. v. Haaland*, Nos. 21-8047, 21-8048, 2022 WL 17844513 (10th Cir. Dec. 22, 2022), *aff'g* No. 2:20-cv-00032, 2021 WL 3135952 (D. Wyo. May 25, 2021), the U.S. Court of Appeals for the Tenth Circuit found a component of the Office of Natural Resources Revenue's (ONRR) Index-Based Major Portion (IBMP) value for Indian oil to be arbitrary and inconsistent with tribal leases.

Merit Energy Co., LLC, and Merit Energy Operations I, LLC (collectively, Merit), owned two oil and gas leases located on the Wind River Reservation in Wyoming. The leases contained a clause giving the Secretary of the Interior discretion to determine the value of oil for royalty purposes. This clause is known as a "major portion provision." The major portion provision in Merit's leases read, in relevant part:

page 2

RENEWABLE ENERGY

Mark D. Detsky & K.C. Cunilio, Reporters

U.S. Department of Commerce Makes Preliminary Determination That Four Solar Panel Manufacturing Companies Have Been Circumventing Tariffs and Dumping Solar Panels

On December 2, 2022, the U.S. Department of Commerce (DOC) issued a preliminary determination in partial favor of a foreign solar equipment trade complaint made by a small domestic solar maker that claimed that eight solar panel manufacturers were evading U.S. tariffs. *See* Press Release, DOC, "Department of Commerce Issues Preliminary Determination of Circumvention Inquiries of Solar Cells and Modules Produced in China" (Dec. 2, 2022).

The circumvention complaint was filed by Auxin Solar Inc. (Auxin) on February 8, 2022. For most of 2022, solar panel markets were riled as the DOC investigated

page 3

ENVIRONMENTAL

Randy Dann, Kate Sanford & Michael Golz, Reporters

EPA and Corps Publish Final WOTUS Rule Reflecting Pre-2015 Regulatory Policy

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published their most recent final rule defining the scope of waters protected under the Clean Water Act (CWA), known as "waters of the United States" (WOTUS Rule). *See* Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120). The new WOTUS Rule has received voluminous commentary, but, at base, it primarily codifies EPA's and the Corps' pre-2015 rules and related policies regarding agency jurisdiction under the CWA. The rule becomes effective March 20, 2023. However, the agencies may be forced to revisit the scope of the rule once the U.S. Supreme Court rules on a pending CWA case.

page 4

FEDERAL — OIL & GAS

(continued from page 1)

> "Value" may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered . . . at the time of production for the major portion of the oil of the same quality . . . produced, sold, and saved from the area where the Leased Premises are situated.

Id. at *1.

ONRR's regulations direct how the value of oil produced under leases with major portion provisions should be calculated for royalty purposes. Lessees are required to pay monthly royalties on either the higher of their gross proceeds or the IBMP value of the oil, which was calculated pursuant to a formula in ONRR's regulations. *Id.* at *2 (citing 30 C.F.R. § 1206.54(b)). That formula is:

IBMP = (NYMEX CMA) x (1 – LCTD)

Id. "NYMEX CMA" refers to the "calendar monthly average" (CMA) of the daily New York Mercantile Exchange (NYMEX) index price for sweet crude oil in Cushing, Oklahoma. "LCTD" refers to a Location and Crude Type Differential. *Id.*

The ONRR regulations provide that ONRR would calculate an "initial" LCTD that is unique to location and crude oil type using a formula in ONRR's regulations. *Id.* (citing 30 C.F.R. § 1206.54(d)). Then, ONRR would adjust the LCTD on a monthly basis after July 1, 2015, to reflect market changes. *Id.* The ONRR regulations, however, cap the monthly amount of this adjustment to 10%. *Id.* (citing 30 C.F.R. § 1206.54(d)(2)(iii)(A)–(B)).

ONRR began publishing IBMP values in 2019 and applied them to Merit retroactively. *Id.* Merit, however, did not pay royalty on the IBMP value for Wyoming asphaltic sour crude oil because the IBMP value was "dramatically higher" than actual prices. *Id.* at *3. ONRR ultimately issued an order to report and pay requiring Merit to pay past royalty using the IBMP value, which Merit administratively appealed. *Id.*

Merit also brought an "as-applied challenge" in the U.S. District Court for the District of Wyoming to the regulatory requirement that it value current and future oil and, particularly, Wyoming using the higher of gross proceeds or the IBMP value. *Id.* Merit challenged both the calculation of the IBMP value and the 10% cap on adjustments to the LCTD. *Id.* The district court held that the 10% cap on adjustments to the LCTD was arbitrary and capricious and inconsistent with Merit's leases, but upheld ONRR's calculation of the IBMP value. *Id.* Both Merit and ONRR appealed the district court's decision. *Id.*

On appeal, the Tenth Circuit rejected Merit's challenge to the calculation of the IBMP value but affirmed the district court's rejection of the 10% cap on adjustments to the LCTD. The Tenth Circuit found that the IBMP value was inconsistent with the provision of Merit's leases defining "value" based on prices "at the time of production." The court reasoned that, "by definition," the LCTD is incrementally adjusted and therefore cannot be based on prices "at the time of production." *Id.* at *9.

The Tenth Circuit also found the 10% cap to be arbitrary and capricious. The court observed that the administrative record lacked a justification for a cap of 10%, rather than another amount, and an explanation of "how a cap is consistent with the parameters of the Secretary's discretion to calculate value under the lease terms." *Id.*

The *Mineral and Energy Law Newsletter* is compiled by Professors John S. Lowe and Mark S. Squillace, and edited jointly with The Foundation for Natural Resources and Energy Law. The Foundation distributes the *Newsletter* electronically on a complimentary basis to Foundation members and on a paid circulation basis, four issues per year (print version on request); 2023 price—$120 per year.

Because Merit brought an as-applied challenge, the Tenth Circuit did not enjoin ONRR's application of its regulation at 30 C.F.R. § 1206.54(b) requiring other lessees to pay royalty on the higher of gross proceeds or the IBMP value using an LCTD adjusted with the 10% cap. *Id.*

As of the date of this report, ONRR has not published guidance regarding the impact of the *Merit* decision on calculation of the IBMP value under other Indian leases.

Court of Federal Claims Dismisses Breach of Contract Action by Solenex

In *Solenex, LLC v. United States*, 163 Fed. Cl. 128 (2022), *appeal docketed*, No. 23-1353 (Fed. Cir. Jan. 9, 2023), the U.S. Court of Federal Claims dismissed an action by Solenex, LLC (Solenex), seeking damages for breach of contract arising from the United States' decision to cancel a federal oil and gas lease in Montana.

This lease has been the subject of controversy for decades, but legal proceedings began in 2013 when Solenex sued the United States in the U.S. District Court for the District of Columbia to compel the United States to lift a suspension of the lease. *See id.* at 130. In 2016, the United States canceled Solenex's lease. Solenex responded by amending its pending complaint to challenge the cancellation. *Id.* The District of Columbia granted summary judgment in Solenex's favor in September 2022. *Id.* This *Newsletter* has detailed the history of the litigation in the District of Columbia, most recently in Vol. 39, No. 4 (2022).

In March 2022, Solenex filed a separate action for breach of contract with the Court of Federal Claims and shortly thereafter moved to temporarily stay the proceedings pending resolution of the case in the District of Columbia. *Solenex*, 163 Fed. Cl. at 131. The United States moved to dismiss the case, arguing that the Court of Federal Claims lacked subject matter jurisdiction over Solenex's claims under 28 U.S.C. § 1500. *Solenex*, 163 Fed. Cl. at 131. The Court of Federal Claims agreed. *See id.* at 135.

The court examined its jurisdiction under § 1500, which "restricts the jurisdiction of [the Court of Federal Claims] when related actions against the United States are pending in other courts." *Id.* at 132. To determine whether this statute applies, the court must determine (1) "whether there is an earlier-filed suit or process pending in another court" and, then, (2) "whether the claims asserted in the earlier-filed case are for or in respect to the same claim(s) asserted in the later-filed Court of Federal Claims action." *Id.* (internal quotation marks omitted) (quoting *Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013)).

The court determined that both elements were met. With respect to the first element, the court cited the litigation previously filed in the District of Columbia. *Id.* With respect to the second element, the court found that the District of Columbia litigation was "for or in respect to the same claim(s)" asserted in Solenex's action before the Court of Federal Claims. *Id.* at 132–33. The court reasoned that both cases are "based on substantially the same operative facts," all of which arose from the United States' decision to cancel the lease. *Id.* at 132. Accordingly, the court dismissed the case.

Solenex has appealed the dismissal to the U.S. Court of Appeals for the Federal Circuit.

RENEWABLE ENERGY

(continued from page 1)

whether certain crystalline silicon photovoltaic cells assembled in the Southeast Asian countries of Cambodia, Malaysia, Thailand, and Vietnam actually use parts and components that originated in China. This would violate federal law blocking such imports from China. *See* Auxin Solar's Request for an Anti-Circumvention Ruling Pursuant to Section 781(b) of the Tariff Act of 1930, As Amended (Feb. 8, 2022). Auxin's anti-circumvention petition implicates the entire U.S. domestic solar industry, which relies heavily on foreign materials to bring solar technology online. Solar energy's use is growing as the United States continues to reduce its reliance on fossil fuel generation to reduce carbon emissions.

The Auxin complaint (also referred to as a petition) alleged that eight solar companies make solar cells and modules in China and then only send equipment to the four Southeast Asian countries for minimal processing before the solar equipment is exported to the United States. In light of this alleged regulatory work-around (legally referred to as the practice of "circumventing"), Auxin states that the true country of origin for these imported solar cells and modules is China, and that Chinese companies are "dumping" this equipment in the United States at an unfair price that is harmful to domestic solar manufacturers.

According to the International Trade Administration (ITA), an agency within the DOC, "[d]umping occurs when a foreign producer sells a product in the United States at a price that is below that producer's sales price in the country of origin ('home market'), or at a price that is lower than the cost of production." ITA, "An Introduction to U.S. Trade Remedies," https://enforcement.trade.gov/intro/index.html.

The impetus for the Auxin complaint dates back to 2012 when the International Trade Commission (ITC), which, unlike the ITA, is an independent and non-partisan agency, determined along with the DOC that domestic solar companies were "materially injured" as a result of China's subsidization of its solar exports. *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73,018 (Dec. 7, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Countervailing Duty Order, 77 Fed. Reg. 73,017 (Dec. 7, 2012). In order to remedy this trade issue, the agencies instructed U.S. Customs and Border Protection, the agency charged with enforcing U.S. trade laws, to enforce anti-dumping duty and countervailing duty orders and issue large tariffs on Chinese solar imports. *Id.* Auxin's petition alleges that Chinese companies are circumventing these 2012 orders by "third country export platforms." Auxin Complaint, at 1.

Petitions, like the one filed by Auxin, originate from the Tariff Act of 1930, 46 Stat. 590, and are filed with both the DOC and the ITC. Such a petition may be filed by a domestic "interested party," which can be a manufacturer such as Auxin, an industry trade association, or a union that is a competitor with the imports at issue in the petition. *See* 19 U.S.C. § 1677(9). If the DOC

EDITOR'S NOTE ON UNPUBLISHED OPINIONS: This *Newsletter* sometimes contains reports on unpublished court opinions that we think may be of interest to our readers. Readers are cautioned that many jurisdictions prohibit the citation of unpublished opinions. Readers are advised to consult the rules of all pertinent jurisdictions regarding this matter.

determines there is sufficient evidence in a petition, it can elect to conduct a circumvention inquiry. *See* 19 C.F.R. § 351.226.

In response to the Auxin petition, hundreds of U.S. solar companies signed onto a letter sent by the Solar Energy Industries Association to Secretary of Commerce Gina Raimondo requesting that her office reject the Auxin petition for failing to meet the requirements of the federal anti-circumvention statute. *See* Letter from Solar Energy Indus. Ass'n to Secretary Raimondo (Mar. 7, 2022); *see also* 19 U.S.C. § 1677j. The industry letter also cited to the harm an anti-circumvention inquiry would impose on the U.S. solar industry, which relies heavily on solar imports from the four countries at issue in the Auxin petition as they account for the large majority (over 75%) of U.S. solar imports, due to delayed projects.

In March 2022, the DOC stated that it would conduct an investigation into the Auxin complaint. *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders, 87 Fed. Reg. 19,071 (Apr. 1, 2022).

In June 2022, while the Auxin investigation was ongoing, the Biden administration issued a presidential proclamation, entitled "Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules from Southeast Asia." *See* Pres. Proc. No. 10,414, 87 Fed. Reg. 35,067 (June 9, 2022). The Biden proclamation "declare[d] an emergency to exist with respect to the threats to the availability of sufficient electricity generation capacity to meet expected customer demand," and imposes a two-year waiver on the anti-dumping and countervailing duty tariffs on solar import tariffs from Cambodia, Malaysia, Thailand, and Vietnam. *Id.* at 35,068. As such, import duties for these four countries will not come into effect until June 2024.

The preliminary determination issued by the DOC in December 2022 found that four of the eight companies investigated were circumventing U.S. trade duties. *See* Press Release, *supra*. The DOC also noted that because some Malaysian, Thai, and Vietnamese companies failed to respond, those entities will be found to also be circumventing. *Id.* Notably, these findings do not mean that imports are banned from such counties. Rather, companies operating in Cambodia, Malaysia, Thailand, and Vietnam will have to certify that they are not circumventing U.S. anti-dumping and countervailing duty trade orders. *Id.*

Following the release of its preliminary findings, the DOC will supervise in-person audits to verify its initial findings. There is also an opportunity for parties to submit comments on the preliminary findings. By May 1, 2023, the DOC must issue a final determination on its circumvention inquiry.

ENVIRONMENTAL

(continued from page 1)

<u>Background on WOTUS and the CWA</u>

Under the CWA, EPA and the Corps (collectively, Federal Agencies) regulate activities that may result in pollution of "navigable waters," which the statute ambiguously defines as "waters of the United States" (WOTUS). 33 U.S.C. § 1362(7). The CWA prohibits the "discharge of any pollutant" into "navigable waters" unless the discharger obtains a section 402 discharge permit issued by EPA or a delegated state agency, or a section 404 permit issued by the Corps for "dredged or fill material." *Id.* §§ 1311, 1362(12). For example, if an oil and gas operator wants to fill in a marshy area to construct a gas pipeline, and the Corps deems that marshy area a WOTUS, then the operator must obtain a section 404 permit. By contrast, if the area is not a WOTUS, then the operator need not obtain such a permit, though restrictions under other statutory frameworks may apply.

Thus, the WOTUS definition is a key threshold determination that dictates when certain activities (e.g., development projects, agriculture, and mining and other extractive activities) must obtain and comply with CWA permits, which can add significant delays and expenses to a proposed project. However, the CWA does not further define the term WOTUS, so the Federal Agencies have defined it by regulation and agency guidance. *See* 33 C.F.R. § 328.3 (Corps' WOTUS definition); 40 C.F.R. § 120.2 (EPA's WOTUS definition). The Federal Agencies' regulatory interpretation of WOTUS has been a frequent target of lawsuits since the 1970s, which has resulted in a complex and ever-changing labyrinth of legal standards and jurisdictional variation.

The U.S. Supreme Court most recently weighed in on the WOTUS definition in *Rapanos v. United States*, 547 U.S. 715 (2006). However, the Court failed to reach a majority decision, instead issuing multiple opinions that created dueling standards. Justice Scalia authored an opinion for a four-Justice plurality, which rejected the Federal Agencies' then-current position and concluded that the term WOTUS should include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739 (plurality op.) (alterations in original). Justice Scalia's plurality opinion also concluded that wetlands only fall within the scope of the CWA if they have "a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between 'waters' and wetlands . . . ." *Id.* at 742.

Justice Kennedy concurred in the judgment invalidating the Federal Agencies' position, but disagreed with the plurality's jurisdictional test. Under Justice Kennedy's preferred test, wetlands are subject to the CWA when they have a "significant nexus" to the water quality of a WOTUS, which means that the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring).

In 2008, two years after *Rapanos* was decided, the Federal Agencies issued a guidance document that summarized their position on CWA jurisdiction. *See* Joint Memorandum, EPA & Corps, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" (Dec. 2, 2008). That nonbinding guidance document and related pre-2015 rules and policies have largely governed how the Federal Agencies administered CWA permitting programs, with the exception of two short-lived rules issued in 2015 and 2020, described below. Despite the guidance, confusion and litigation over the scope of CWA jurisdiction proliferated under the dueling *Rapanos* standards.

In the aftermath of *Rapanos*, both the Obama and Trump administrations attempted to promulgate "durable" WOTUS rules. Both failed. The 2015 Obama-era "Clean Water Rule" (2015 Rule) took an expansive view of CWA jurisdiction. The rule created complex metrics for identifying certain areas as WOTUS and codified Justice Kennedy's "significant nexus" test for other areas. *See* 80 Fed. Reg. 37,054 (June 29, 2015). Multiple states successfully sued the Federal Agencies to enjoin the

2015 Rule. *See, e.g.*, *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

In contrast, the 2020 Trump-era Navigable Waters Protection Rule (2020 Rule) limited CWA jurisdiction to the "relatively permanent" waters described in Justice Scalia's *Rapanos* plurality. *See* 85 Fed. Reg. 22,250 (Apr. 21, 2020); Vol. XXXVII, No. 2 (2020) of this *Newsletter*. The 2020 Rule also faced numerous lawsuits across the country and was vacated by the U.S. District Court for the District of Arizona. *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021). The fate of these previous iterations underscores the challenge of promulgating a mutually agreeable WOTUS definition.

The "New" WOTUS Rule

The Biden administration's new WOTUS Rule reflects yet another attempt to promulgate a workable regulatory definition of WOTUS. Ultimately, however, the Rule primarily restores the long-standing definition of WOTUS contained in the Federal Agencies' pre-2015 rules and related guidance documents. Like prior rules, the new WOTUS Rule defines WOTUS to include traditional navigable waters, territorial seas, interstate waters, impoundments, or wetlands adjacent to such waters. *See* 88 Fed. Reg. at 3142 (amending 33 C.F.R. § 328.3(a)(1), (2), (4)(i)). However, unlike the Trump-era 2020 Rule, the new WOTUS Rule also defines WOTUS to include tributaries, streams, lakes, ponds, and wetlands that meet *either* the "relatively permanent" *or* "significant nexus" standard. *See id.* (amending § 328.3(a)(3)(i)–(ii), (4)(ii)–(iii), (5)). The Rule then lists several factors to be considered in determining whether the "significant nexus" test is met, including distance from a traditional navigable water and hydrologic factors like shallow subsurface flow. *See id.* (amending § 328.3(c)(6)). The new Rule also lists many long-standing exclusions, some of which are most relevant to agricultural operations. However, several exclusions are pertinent to the energy, mining, and real estate sectors, including the exclusions for waste treatment systems, 33 C.F.R. § 328.2(b)(1); certain ditches, *id.* § 328.2(b)(3); depressions incidental to construction activities, *id.* § 328.2(b)(7); and swales and erosional features, *id.* § 328.2(b)(8).

In essence, the new WOTUS Rule codifies both standards from the *Rapanos* decision, as well as long-standing agency policies that predate the 2015 Rule. The Rule thus differs from its Obama- and Trump-era counterparts, which took strong, opposing stances on the governing standard under *Rapanos* (and were both vacated). While the new WOTUS Rule may not be conceptually different from the pre-2015 regulatory regime, it arguably provides the Federal Agencies with additional cover for asserting jurisdiction over wetlands and other waters. Notably, the Rule enumerates several factors that regulators could leverage to justify jurisdictional determinations, including distance, hydrologic connection, geomorphology, and climatological variables.

The Biden administration previously indicated it would take a two-step approach to defining WOTUS. *See* Press Release, EPA, "EPA and Army Announce Next Steps for Crafting Enduring Definition of Waters of the United States" (July 30, 2021). First, the administration intended to reinstate and confirm by rule the pre-2015 regulatory regime, as it has done in the new WOTUS Rule. Second, the administration stated it would further refine the rule to establish an "updated and durable" rule. The final notice for the new WOTUS Rule says nothing about further rulemakings. *See generally* 88 Fed. Reg. 3004. Whether that means the administration has abandoned a two-step process remains to be seen.

Uncertain Future of the New WOTUS Rule

The WOTUS Rule's middle-ground approach has not insulated it from attack. The American Farm Bureau Federation, American Petroleum Institute, and National Mining Association, among others, filed a lawsuit challenging the final rule the day it was published in the *Federal Register*. *See* Complaint, *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Jan. 18, 2023). The plaintiffs allege the WOTUS Rule impermissibly adopts the "significant nexus" test—which they claim has no basis in the CWA. They also assert that Justice Scalia's "relatively permanent" standard is the only "intelligible principle constraining agency action" and seek a return to the Trump-era 2020 Rule, *id.* at 5, which had been vacated by a district court in 2021. *See Pasqua Yaqui Tribe*, 557 F. Supp. 3d 949.

Additionally, due to pending litigation, the WOTUS Rule may not find safe harbor in its adoption of both *Rapanos* standards. On October 3, 2022, the Supreme Court heard oral argument in a case that may alter the rule governing CWA jurisdiction. *See Sackett v. EPA*, No. 21-454 (U.S. argued Oct. 3, 2022). In *Sackett*, landowners in Idaho challenged the Corps' exercise of jurisdiction over a wetland on their property. *See Sackett v. EPA*, 8 F.4th 1075, 1080–82 (9th Cir. 2021). The U.S. Court of Appeals for the Ninth Circuit held that Justice Kennedy's "significant nexus" test controlled and that the Corps thus properly exercised jurisdiction. *See id.* at 1091–93. EPA argued that the Supreme Court should not hear the appeal because the Federal Agencies were about to adopt a rule that could supersede the Ninth Circuit's decision. Now that the new WOTUS Rule has been finalized, it remains to be seen whether and to what extent the Supreme Court will pay deference to the Rule in evaluating the scope of CWA jurisdiction. Given that a majority of the Justices rejected the government's arguments to deny certiorari, some commentators expect the Supreme Court to reverse and eliminate the "significant nexus" test as an overly expansive interpretation of the CWA. The Court likely will issue a decision sometime in 2023.

While *Sackett* and the new WOTUS Rule have garnered much attention, another major development in CWA case law has received relatively less attention—the ongoing rollout of the Supreme Court's decision in *Hawaii Wildlife Fund v. County of Maui*, 140 S. Ct. 1462 (2020). In that case, the Supreme Court held that a discharge of pollutants to groundwater (which waters are not subject to federal CWA jurisdiction) may require a CWA permit if the discharge is the "functional equivalent of a direct discharge" to navigable waters. *Id.* at 1468. The *Maui* factors informing whether an indirect direct discharge (e.g., via land application) requires a CWA permit overlap in some respect with the new WOTUS Rule's "material influence" factors. Thus, even if the Supreme Court ultimately narrows CWA jurisdiction by restricting the definition of WOTUS, *Maui*'s "functional equivalence" test promises to continue catalyzing citizen suits on the basis that an entity's operations are indirectly impacting navigable waters—whether or not those operations discharge directly into such waters.

Regardless, *Sackett* and district-court challenges to the new WOTUS Rule may result in a paradigm shift in the scope of CWA jurisdiction. Businesses and other entities with potentially regulated discharges should closely watch for any court rulings and related agency actions that might affect the substance, implementation, or validity of the new WOTUS Rule.

Federal Court Enjoins Local Moratorium Prohibiting Activities Related to Carbon Sequestration

Energy industries across the United States have expressed exponential interest in the long-term underground storage of carbon dioxide (CO_2), known as geologic carbon sequestration. Geologic carbon sequestration is the process of capturing carbon from an industrial source, such as a steel or cement plant, and then injecting it through a well into porous underground geologic formations. The Safe Drinking Water Act (SDWA) is the primary federal statute governing underground injection control (UIC) wells in the United States, including those associated with geologic sequestration of carbon.

As industrial interest in carbon sequestration grows, some local governments have become increasingly apprehensive of emerging carbon sequestration projects. In October 2022, a local government in Louisiana—known as Livingston Parish—enacted a 12-month moratorium banning activities related to carbon sequestration after learning of a company's plan to begin developing a carbon sequestration project in its jurisdiction. In December 2022, in *Air Products Blue Energy, LLC v. Livingston Parish Government*, the U.S. District Court for the District of Louisiana issued a preliminary injunction enjoining Livingston Parish from enforcing the moratorium. In doing so, the court determined that the moratorium was preempted by state law. No. 3:22-cv-00809, 2022 WL 17904535 (M.D. La. Dec. 26, 2022).

The events that led to this litigation began in October 2021, when Air Products Blue Energy, LLC (Air Products), entered into an agreement with the State of Louisiana that granted Air Products the sole and exclusive right to conduct a variety of activities related to carbon sequestration—such as geological and geophysical surveys and seismic tests—in certain state-owned water bottoms. *Id.* at *1. Air Products had plans to begin conducting these activities, including the drilling of a UIC-regulated Class V test well, beneath a lake located within Livingston Parish. *Id.*

On October 13, 2022, Livingston Parish adopted a 12-month moratorium on "any activities associated with Class V wells where the well is specific to geologic testing of rock formation, monitoring, drilling, or injecting of CO_2 for long term storage." *Id.* Shortly after the moratorium went into effect, Air Products sought a preliminary injunction prohibiting the enforcement of the moratorium, arguing that the moratorium is preempted by state and federal law. *Id.* at *2.

In analyzing whether Air Products had a "substantial likelihood of success on the merits," which is the first element that must be satisfied to obtain a preliminary injunction, the court assessed whether the moratorium was preempted by federal or state law. The court began its analysis by explaining that the SDWA establishes a national program that "authorizes the EPA to issue regulations establishing standards for UIC programs and allows each state to seek approval to administer its own UIC program based on those federal requirements." *Id.* at *4. Louisiana is one of the states that has established a UIC program under the SDWA and has been granted primacy over all types of UIC wells. *Id.*

In assessing whether the moratorium was preempted by federal law, the court promptly pointed out that the SDWA has a "savings clause" that allows states or political subdivisions to regulate underground storage injection so long as the local rules do not impinge on EPA regulations. *Id.* at *5. The court determined that state and local regulations are preempted by the SDWA only if they conflict with the federal regulation, which was not the case here. *Id.*

The court then went on to analyze whether the moratorium—which is a local ordinance—is preempted by state law via the state's UIC program. *Id.* at *6. The court first noted that a provision of the Louisiana Constitution expressly states that the police power of the state shall never be abridged. *Id.* The court then explained that "[h]ere, the Louisiana Legislature granted the Louisiana Office of Conservation the power to regulate underground injection wells, pursuant to the state's EPA-approved UIC program" and that "[t]here is no doubt that the authority of the Office of Conservation to regulate underground injection wells is an exercise of the police power of the State." *Id.* The court then recognized that the state has enacted an extensive body of laws and regulations governing sequestration activities and that "the pervasive extent" of this body of law strongly suggests that the Louisiana legislature intended to preempt the field of underground injection control in its entirety. *Id.*

The court concluded that the "[m]oratorium is preempted insofar as it encroaches on the field of underground injection control and attempts to regulate the drilling of Class V test wells and other wells used for long term storage of [CO_2]." *Id.* at *7. The court also found that Air Products satisfied the other elements necessary to obtain a preliminary injunction—that it faces irreparable monetary harm if the moratorium stays in place and that because state law preempted the moratorium, a preliminary injunction to enjoin the moratorium's enforcement would serve the public interest and would not cause harm. *Id.*

This case is one of the first of its kind to establish that local moratoriums on carbon sequestration will be preempted in two general circumstances. First, if the moratorium conflicts with the SDWA the moratorium will likely be deemed preempted. Second, if a state has been granted authority to administer its UIC program under the SDWA and has enacted extensive regulations in that arena, local moratoriums are likely to be preempted.

CONGRESS/FEDERAL AGENCIES

John H. Bernetich & Dale Ratliff, Reporters

BLM Publishes Notice of Intent to Revise Western Solar Plan

On December 8, 2022, the Bureau of Land Management (BLM) published a notice of intent to update the 2012 Western Solar Plan and associated resource management plans (RMPs). *See* 87 Fed. Reg. 75,284 (Dec. 8, 2022).

The 2012 Western Solar Plan represented BLM's first significant efforts to incorporate renewable energy development into its land use planning at a programmatic level. The 2012 Western Solar Plan approved amendments to 89 RMPs in six western states: Arizona, California, Colorado, Nevada, New Mexico, and Utah. *See* BLM, Approved Resource Management Plan Amendments/Record of Decision (ROD) for Solar Energy Development in Six Southwestern States, at 27 (Oct. 2012) (2012 Solar ROD). The Western Solar Plan identified three categories of land use allocations for utility-scale solar development within each RMP: exclusion areas, solar energy zones (SEZs), and variance areas. *Id.* The Western Solar Plan defined SEZs as "locations where solar development is economically and technically feasible, where there is good potential for connecting new electricity-generating plants to the transmission distribution system, and where there is generally low resource conflict." BLM, Final Programmatic Environmental Impact Statement (PEIS) for Solar Energy Development in Six Southwestern States, at 2-23 (July 2012). The purpose was to prioritize solar development in these identified areas.

Since the adoption of the Western Solar Plan, however, the majority of solar projects have been proposed and developed in variance areas, and BLM continues to receive continued interest for development in exclusion areas. 87 Fed. Reg. at 75,285–86. To address these issues and promote renewable energy development on federal lands—consistent with the congressional direction in the Energy Act of 2020—BLM is proposing to revise and expand the Western Solar Plan. *Id.* at 75,825. BLM identifies six primary topics to be addressed in the planning effort:

(1) *Expanded Study Area*. BLM is proposing to expand the Western Solar Plan to include BLM-managed lands in five additional western states: Idaho, Montana, Oregon, Washington, and Wyoming. *Id.*

(2) *Exclusion Criteria*. The 2012 Western Solar Plan identified 32 exclusion criteria and identified approximately 78.6 million acres in the six states as solar energy exclusion areas. 2012 Solar ROD at 27. BLM intends to review its exclusion area as part of the renewed planning effort with a focus "on resource management on BLM-administered lands rather than specifying technology-based criteria for solar development on public lands." 87 Fed. Reg. at 75,285.

(3) *Land Use Allocations*. BLM is proposing to review the land use allocations established in the 2012 Western Solar Plan. *Id.* at 75,286. Because "the majority of authorized solar developments on public land have occurred in variance areas, not SEZs," *id.*, and BLM continues to receive interest for development in areas allocated as exclusion areas, *id.* at 75,285, it is important for BLM to properly identify land use allocations that can support effective project development and implementation.

(4) *Variance Process*. BLM is considering "modifications to the variance process to focus the review and improve efficiency," and also considering "whether the process should be included in the programmatic [environmental impact statement] or whether the variance procedures would more appropriately be effectuated by other means, such as through regulation or policy." *Id.* at 75,286.

(5) *Definition of Utility Scale*. BLM is considering whether to revise the Western Solar Plan to apply to projects capable of generating less than 20 megawatts of electricity. *Id.*

(6) *Incentivizing Development in SEZs*. Finally, BLM is considering the need to further incentivize development in the priority areas and requesting comments "on what additional incentives would facilitate faster and easier permitting in SEZs, improve and facilitate appropriate mitigation, and encourage solar energy development on suitable lands adjacent to SEZs." *Id.*

CEQ Publishes Agency Guidance on Climate Change Analysis in NEPA Reviews

The White House Council on Environmental Quality (CEQ) published interim guidance on January 9, 2023, advising federal agencies on how to analyze greenhouse gas (GHG) emissions and climate change impacts of proposed federal projects under the National Environmental Policy Act (NEPA). *See* 88 Fed. Reg. 1196 (Jan. 9, 2023). The interim guidance strengthens past agency guidance on the topic, including by recommending that agencies quantify a project's reasonably foreseeable direct and indirect GHG emissions and provide context for that analysis by monetizing the cost of those emissions using the social cost of GHG tool.

The guidance updates CEQ's 2016 guidance, which was issued during the Obama administration. *See* 81 Fed. Reg. 51,866 (Aug. 8, 2016). Shortly after President Trump took office, CEQ withdrew the 2016 guidance and issued its own draft guidance in 2019. *See* 82 Fed. Reg. 16,576 (Apr. 5, 2017); 84 Fed. Reg. 30,097 (June 26, 2019). CEQ rescinded the 2019 draft guidance in 2021. *See* 86 Fed. Reg. 10,252 (Feb. 19, 2021).

In the new guidance, CEQ recommends that agencies quantify the reasonably foreseeable GHG emissions both annually and over the lifetime of the proposed project, including direct and indirect emissions. Agencies should also quantify foreseeable emissions of the no-action alternative and other alternatives analyzed. 88 Fed. Reg. at 1200. Particularly for projects that would result in large amounts of GHG emissions, agencies should consider how the proposed action and alternatives will help or obstruct efforts to meet climate action goals and commitments, including federal goals, international agreements, and state or regional goals. *Id.* at 1203. For projects expected to result in a net reduction of GHG emissions, such as certain renewable energy projects, a less detailed analysis may be appropriate. The guidance does not establish a threshold amount of emissions that, if exceeded, means that the project results in "significant" impacts and requires a full environmental impact statement. *Id.* at 1200.

The guidance recommends agencies employ the social cost of GHG tool to estimate the cost of damages associated with an incremental metric ton of emissions and associated physical damages, such as temperature increase, sea-level rise, infrastructure damage, or human health effects. *Id.* at 1202–03. Some agencies have employed similar tools in past NEPA reviews, and use of the tool has been the subject of litigation. *E.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019); *Mont. Env't Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017). The guidance also encourages agencies to translate a project's forecasted emissions into a metric that the public may better understand, such as emissions from a certain number of cars on the road, or gallons of gasoline burned.

The guidance does not establish new legal requirements for agencies to comply with, and does not alter the requirements of NEPA itself. CEQ acknowledges that NEPA does not require agencies to choose the alternative with the lowest net GHG emissions, but CEQ recommends that agencies "use the information provided through the NEPA process to help inform decisions that align with climate change commitments and goals." 88 Fed. Reg. at 1204. Practically, the new guidance will place additional burdens on agencies while analyzing emissions in terms that the public may better understand.

The 2023 interim guidance follows the first major revisions to CEQ's implementing regulations since 1978, made during the Trump administration in 2021. *See* Update to the Regulations Implementing the Procedural Provisions of NEPA, 85 Fed. Reg. 43,304 (July 16, 2021) (to be codified at 40 C.F.R. pts. 1500–1518). In 2022, CEQ again revised its regulations (called the "Phase 1 rulemaking"). *See* NEPA Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508); *see also* Vol. 39, No. 2 (2022) of this *Newsletter*. In the notice announcing its 2023 interim guidance, CEQ indicated that it "will be proceeding with updates to the NEPA regulations as set forth in the 2022 Regulatory Agenda." 88 Fed. Reg. at 1198 n.16.

The interim guidance is effective immediately. Agencies should use it for all future NEPA reviews and should exercise judgment in determining whether to deploy the guidance for ongoing NEPA reviews. CEQ invited public comment on its interim guidance by March 10, 2023, and stated that it intends to either revise the guidance in response to public comments or finalize the interim guidance. *Id.* at 1196.

FEDERAL ENERGY REGULATORY COMMISSION

Rachael Novier Marsh, Boris Shkuta & Molly Behan, Reporters

Overview of FERC's Recent Efforts to Overhaul Policies in the Oil, Power, and Natural Gas Sectors

In 2022, under the leadership of then-Chairman Richard Glick, the Federal Energy Regulatory Commission (FERC) launched several notable efforts to overhaul policies in the oil, power, and natural gas sectors. This report provides an overview of these actions, which include (1) FERC's re-examination of policies on oil pipeline affiliate relationships under the Interstate Commerce Act (ICA), (2) FERC's interrelated notices of proposed rulemaking to overhaul transmission and generator interconnection policies under the Federal Power Act, and (3) FERC's proposals to update its natural gas project certificate policies under the Natural Gas Act (NGA). These policy efforts are now unfinished business in the hands of a new FERC Chairman, Willie Phillips. They will loom large as FERC shapes its 2023 agenda.

<u>Updated Oil Pipeline Policies Regarding Affiliate Relationships</u>

The agenda for FERC's December 2022 open meeting was atypically laden with oil pipeline-related matters. Notably, the agenda featured two issuances that have the potential to broadly impact the oil industry and reshape how regulated pipelines navigate transactions with their affiliates.

First, FERC issued a long-awaited rehearing order in *Magellan Midstream Partners, L.P.*, 181 FERC ¶ 61,207 (2022) (*Magellan II*). In the underlying 2017 order subject to review, FERC held that the ICA's prohibition on rebates bars a pipeline's marketing affiliates from transporting product on the affiliated pipeline at an economic loss, on the theory that such movements necessarily involve an affiliate subsidy for that loss. *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219, at P 4 (2017) (*Magellan I*). As context, section 2 of the ICA prohibits pipelines from using any special rate or rebate to accept different compensation "for like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." 49 U.S.C. app. § 2 (1988). In the aftermath of the 2017 order, numerous pipelines filed requests for rehearing and clarification, arguing that FERC had wrongly assumed that a marketing affiliate is always involved in an "uneconomic" transaction where it transports product on an affiliate pipeline at a loss; they argued that such movements often serve a legitimate business purpose. *See, e.g.*, Request of Enterprise Products Partners, L.P., for Clarification, or in the Alternative, Rehearing, Docket No. OR17-2-000, at 2, 25 (FERC filed Dec. 22, 2017); Request for Clarification, or, in the Alternative, Request for Rehearing of Plains Marketing, L.P., Docket No. OR17-2-000, at 2, 23 (FERC filed Dec. 22, 2017).

In the December 2022 *Magellan II* rehearing order, FERC did not budge from its presumption that a shipper receives an impermissible rebate when it transports product on its affiliate pipeline at an economic loss. However, FERC clarified and expressly acknowledged that there can be business factors that make such an affiliate transaction "economic" (and thus not an impermissible rebate) even where the transportation-related transaction occurs at an economic loss if viewed from a mathematical standpoint. *Magellan II*, at P 25. For example, FERC noted that it might be economic for a shipper to transport product on a pipeline to avoid breaching contractual obligations. *Id.* FERC also acknowledged that a shipper may move product at a loss to preserve rights to pipeline capacity under a prorationing policy. *Id.* In this way, FERC provided a roadmap for pipelines to, in future proceedings, overcome the presumption that specific affiliate transactions are an impermissible rebate. However, it will be difficult to surmise whether—and to what degree—FERC's action amounts to a win for pipeline-affiliate transactions until FERC begins to apply the new *Magellan* framework to specific transactions.

Second, FERC issued a proposed policy statement on Oil Pipeline Affiliate Committed Service (Proposed Policy Statement), proposing to alter FERC's approach to evaluating whether contractually committed transportation service between oil pipeline carriers and their shipper affiliates complies with the ICA. *Oil Pipeline Affiliate Committed Service*, Proposed Policy Statement, 181 FERC ¶ 61,206 (2022). In the Proposed Policy Statement, FERC reiterated a long-held concern that oil pipeline open seasons resulting in only shipper-affiliate contracts may indicate an unfair open season process—in contrast to open seasons resulting in contracts with unaffiliated third parties, in which case FERC can infer fairness. *Id.* at P 22. FERC repeatedly underscored its concern that an open season resulting only in contracts with affiliates may have been structured to unduly discriminate against nonaffiliates. *Id.* at P 1. This issuance may have caused déjà vu among some FERC observers, given that FERC issued a similar proposed policy statement in 2020 only to withdraw it in the face of strident pipeline industry protests highlighting the real-world implications of FERC's proposal. *Oil Pipeline Affiliate Contracts*, Proposed Policy Statement, 173 FERC ¶ 61,063 (2020); *see Oil Pipeline Affiliate Contracts*, Withdrawal of Proposed Policy Statement on Oil Pipeline Affiliate Contracts, 173 FERC ¶ 61,250, at P 1 (2020) (Glick, Comm'r, dissenting). A similar industry response on the new proposal is expected, though uncertainty lies ahead as this new iteration of FERC reconsiders the issues.

Both the *Magellan II* rehearing order and the Proposed Policy Statement indicate that FERC may be interested in taking a more activist stance on oil pipeline issues. However, stakeholders must stay tuned, as the nature and scope of industry impacts will be unclear until FERC takes its next steps.

<u>Electric Transmission and Generation Notices of Proposed Rulemaking</u>

This year, FERC issued two highly anticipated proposed rulemakings intended to overhaul its rules regarding two interrelated topics in the power sector: (1) transmission planning, and (2) generator interconnection. *See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,028 (2022) (Transmission Planning NOPR); *Improvements to Generator Interconnection Procedures and Agreements*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,194 (2022) (Interconnection NOPR). Stakeholders ranging from renewable energy advocates to state public utility commissions have long called on FERC to advance reforms in these areas to build out the "grid of the future" that is needed to keep pace with the energy transition. This report builds on the authors' prior work summarizing the Transmission Planning NOPR and the Interconnection NOPR when they were initially issued by FERC. *See* Lauren Johnstone et al., “FERC Issues Proposal to Overhaul Transmission Planning and Cost Allocation,” *Energy Legal Blog* (Apr. 26, 2022); Rachael Novier Marsh et al., “FERC Proposes Overhaul of Interconnection Procedures,” *Energy Legal Blog* (June 22, 2022).

The Transmission Planning NOPR stems from FERC’s recognition that the transmission planning reforms adopted more than a decade ago in Order No. 1000 have not ensured that regional transmission planning processes proactively identify transmission needs associated with a changing resource mix. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Similarly, the Interconnection NOPR arises out of a recognition by FERC that its current interconnection rules may be hampering grid modernization due to significant delays in interconnection queues that tend to impede the interconnection of a new generation of resources.

Industry stakeholders have submitted voluminous comments in each of the proceedings, debating whether the proposed changes go too far or not nearly far enough. A brief overview of the changes FERC has proposed in each of the proceedings is provided below.

Transmission Planning NOPR

According to FERC, the failure of existing transmission planning processes (largely based on Order No. 1000) to include a forward-looking assessment of regional transmission needs—one that takes into account changes in the resource mix and shifts in demand—has led to anemic regional development. Indeed, FERC notes with concern the shift towards greater transmission expansion occurring *outside* of the regional transmission planning process, including transmission-grid expansion that is driven by the generator interconnection process. Transmission Planning NOPR, at PP 24–26. In response to these deficiencies, FERC proposed to require transmission providers to modify their tariffs to evaluate transmission needs associated with changes in the resource mix and demand over a forward-looking, 20-year period through the use of long-term, portfolio scenarios. *See, e.g.*, *id.* at P 56.

The cornerstone reform outlined in the Transmission Planning NOPR is a requirement that public utility transmission service providers comply with the public policy planning requirement of Order No. 1000 by participating in a regional transmission planning process that includes a “Long-Term Regional Transmission Planning.” Such a process must:

- identify transmission needs driven by changes in the generation resource mix and demand through the development of long-term scenarios;
- evaluate the benefits, on a 20-year basis beginning with the estimated in-service date of the proposed transmission facilities, of regional transmission facilities to meet identified transmission needs; and
- include transparent and not unduly discriminatory criteria to select regional transmission facilities in the regional transmission plan for purposes of cost allocation that more efficiently or cost-effectively address transmission needs driven by changes in the resource mix and demand.

Id.

FERC went beyond proposing a new framework for planning regional transmission projects and proposed a new framework for determining who pays for them. Specifically, FERC proposes to require transmission providers to modify their tariffs to include long-term cost allocation methodologies that have also been agreed to by applicable state authorities or, in the absence of state agreement, an explanation of steps taken to attempt to secure such agreement. *Id.* at P 320. FERC also proposed—somewhat controversially—to reinstate a limited federal right of first refusal (ROFR) for incumbent transmission owners that was largely disposed of in Order No. 1000. *Id.* at P 336; *see also, e.g.*, *NextEra Energy, Inc.*, Reply Comments, Docket No. RM21-17-000 (FERC filed Sept. 19, 2022) (“NextEra . . . strongly opposes proposals to permit or mandate the reinstatement of federal rights of first refusal . . . for regionally planned transmission facilities that were eliminated pursuant to Order No. 1000.”). Under the proposed rule, incumbent utilities would be granted ROFR rights conditioned on a demonstration that the incumbent has established a qualifying joint ownership arrangement with an unaffiliated developer. Transmission Planning NOPR, at P 336.

It is also worth noting the thorny policy issues that FERC chose to leave out of the Transmission Planning NOPR, to be tackled (or not) in the future. First, FERC elected to reserve changes regarding *interregional* planning for a future proceeding. *Id.* at P 7. Second, FERC declined to squarely address FERC’s transmission incentive rules, which former Chairman Glick characterized—at the time of issuing the Transmission Planning NOPR—as ripe for reform. Statement, FERC, “Chairman Glick’s Press Conference Remarks” (Apr. 21, 2022). Third, FERC did not propose cost-containment reforms, which, in the views of former Chairman Glick, are necessary to “prevent customers from being saddled with unnecessary or excessive expenses.” *Id.*

Generator Interconnection NOPR

FERC’s Interconnection NOPR targets perceived inadequacies in FERC’s generator interconnection processes that may create barriers to the efficient and cost-effective integration of generation resources. *See* Interconnection NOPR, at P 3. FERC issued the unanimous, bipartisan proposed rule under mounting pressure to address clogged interconnection queues and long delays—which clock-in at more than three years in some regions—facing new resources seeking to come online. Many of these proposed reforms are widely viewed as non-controversial, common-sense measures.

The central aim of the proposed reforms is to transition the currently effective “first-come, first-served” approach found in many transmission providers’ open access transmission tariffs to the “first-ready, first-served” cluster model. *Id.* at PP 4, 39. The first-ready, first-served cluster approach—which is already in place in most organized wholesale markets—is intended to increase efficiency and decrease the number of speculative generation projects that enter interconnection queues. *Id.* at PP 102–03. Additional reforms aimed at accelerating the interconnection process include penalties for transmission providers that fail to timely conduct studies. For example, FERC proposes to impose a penalty of $500 for each day that a transmission provider is late in issuing an interconnection study, capped at 100% of the total study deposit received for the late study.

Under a first-ready, first-served cluster study process, interconnection requests are studied in groups and interconnection customers face increasing financial commitments and readiness requirements as they proceed through the queue. *See, e.g.*, *id.* at P 39. In contrast, a serial study approach assigns each interconnection request a unique queue position based on their date of entry into the queue. FERC's move from the serial method to the cluster method is unsurprising, given that versions of a first-ready, first-served cluster approach are already in place in most regional transmission organizations, including in PJM Interconnection, L.L.C. (PJM), following FERC's November 2022 order approving PJM's proposal to move to a cluster approach. *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,162 (2022).

In addition to the adoption of a clustered queue methodology, FERC also proposed revisions focused on the consideration and adoption of new technologies through the interconnection process.

- *Flexibility in Co-Location*: proposing changes to allow more than one resource to co-locate on a shared site, including resources of different technology and fuel types.
- *Changes to Material Modification Provisions*: proposing changes to the material modification analysis so that it is more permissive for technological changes that do not result in a change in a facility's output.
- *Incorporating Alternative Transmission Technologies*: proposing changes requiring transmission providers to evaluate alternative transmission solutions for interconnection-related upgrades such as advanced power flow control, transmission switching, dynamic line ratings, static synchronous compensators, and static VAR compensators.

The final comment deadlines for the Transmission Planning NOPR and the Interconnection NOPR passed in September 2022 and November 2022, respectively. Thus, both closely-watched proceedings are ripe for further FERC action in 2023, though FERC is not obligated to act pursuant to any specific deadline.

<u>Updated Natural Gas Certificate Policy Proceedings</u>

On February 18, 2022, FERC issued two related policy statements proposing significant changes to how it reviews natural gas infrastructure certificate applications: (1) an updated natural gas certificate policy statement, and (2) an interim policy statement on the assessment of greenhouse gas (GHG) emissions. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107, at P 100 (2022) (indicating that the updated certificate policy statement would be immediately applicable to pending certificate applications) (Updated Policy Statement); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, at P 1 (2002) (indicating that the updated GHG policy statement would be immediately applicable to pending certificate applications) (GHG Policy Statement). Combined, the two policy statements propose to overhaul FERC's decades-old approach to analyzing natural gas infrastructure project applications under section 7 of the NGA as well as the National Environmental Policy Act of 1969 (NEPA) and propose a new framework for FERC's consideration of a project's GHG emissions.

The policy statements were issued on a partisan basis over the dissents of two commissioners, reflecting a sharp partisan divide over FERC's role in reviewing and approving natural gas infrastructure in the United States. Democratic commissioners in the majority justified the policy statements as required by applicable federal court precedent; in the view of the majority, courts have directed FERC to take a closer look at GHG emissions in issuing NGA certificates. Updated Policy Statement, at P 75 (citing *Sierra Club v. FERC* (*Sabal Trail*), 867 F.3d 1357, 1375 (D.C. Cir. 2017)); *see also* GHG Policy Statement, at P 35 (citing *Sabal Trail*, 867 F.3d at 1374). The dissenting Republican commissioners, on the other hand, argued that the policy statements exceeded FERC's statutory authority and that the far-reaching actions were not required by federal court precedent. *See, e.g.*, Updated Policy Statement, at P 42 (Christie, Comm'r, dissenting) ("[W]hile I recognize that *Sabal Trail* and *Vecinos [para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021)] are presently applicable to [FERC], neither of those cases individually nor both of them together provide a lawful basis for *rejecting* a certificate for a facility that is otherwise found to be needed under the NGA solely because of its estimated potential impacts on global climate change.").

FERC's actions drew applause from some environmental groups and other stakeholders, but also drew strident criticism from the pipeline industry and others, including Senator Joe Manchin, who chairs the Senate Energy and Natural Resources Committee. *See, e.g.*, Public Interest Organizations, Reply Comments, Docket No. PL18-1-000 et al. (FERC filed May 25, 2022) (offering supportive comments on behalf of public interest groups such as Sustainable FERC Project, Natural Resources Defense Council, Earthjustice, and others). That committee swiftly convened a hearing to examine FERC's actions. *See Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines Before the S. Comm. on Energy & Nat. Res.*, 117th Cong. 5 (2022). In the wake of that hearing, just over a month after issuing the policy statements, on March 24, 2022, FERC issued an order downgrading both issuances to "draft" policy statements, inviting additional public comments, and backtracking on FERC's determination to apply the new policies to pending applications. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022).

By way of brief background, FERC is responsible for issuing certificates for proposed interstate natural gas projects under NGA § 7—developers may not proceed with construction of jurisdictional project in the absence of FERC approval. The 1999 policy statement currently governs FERC's approval process and sets forth the factors and analysis that FERC applies in determining whether an applicant's proposed project is in the public interest as provided in the NGA. *See generally Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000). The 1999 policy statement also addresses FERC's responsibility to review certificate applications under NEPA. Under the 1999 policy statement, FERC proceeded in a two-phase analysis: first, FERC would determine project need as required by NGA § 7. *Id.* at 61,745 ("Only when the benefits outweigh the adverse effects on economic interests will [FERC] then proceed to complete the environmental analysis where other interests are considered."). Having satisfied this requirement, FERC would proceed to a NEPA analysis focused on assessing the environmental impacts of the certificate to be issued and proposing possible environmental mitigation. *Id.*

In the now-draft policy statements, FERC proposed a number of significant changes in its approach to project review. For example, FERC proposed to require expanded evidence of project need. Going beyond the traditional evidence of precedent agreements, FERC proposed requiring project applicants to, for example, detail the end use of the gas to be shipped on the proposed project. Updated Policy Statement, at PP 54–56. FERC also proposed establishing a 100,000 metric tons of CO_2 (and CO_2-equivalent (CO_2e)) threshold, under which all projects with expected annual emissions of 100,000 CO_2e or more would require the preparation and issuance of an environmental impact statement (as opposed to the less onerous environmental assessment). GHG Policy Statement, at PP 80, 88. But perhaps most significantly, FERC proposed to alter the agency's longstanding approach of evaluating a proposed project almost exclusively on an economic basis. Under the new policy statements, FERC proposed to consider environmental impacts and the mitigation of such impacts in both its NEPA evaluation *and* its public interest evaluation under the NGA. Indeed, FERC expressly warned that it may deny an application based on environmental or other adverse impacts if those impacts outweigh the benefits and cannot be mitigated or minimized. FERC framed its intention as one to "fully consider climate impacts, in addition to environmental impacts," when making a public interest determination. Updated Policy Statement, at P 76.

As of the time of this report, FERC has not taken further action on the pending draft policy statements, leaving stakeholders to grapple with regulatory uncertainty that could affect the fate of some natural gas infrastructure projects, which often involve years of effort to develop and finance. In the meantime, however, FERC has found enough common ground to continue to process pending certificate applications in individual proceedings on a bipartisan basis: In each of the last five monthly FERC meetings of 2022, FERC issued at least one order issuing an NGA certificate. *See, e.g.*, *Spire STL Pipeline LLC*, 181 FERC ¶ 61,232 (2022) (order issuing certificate issued at December 2022 open meeting); *Gulf S. Pipeline Co.*, 181 FERC ¶ 61,145 (2022) (order issuing certificate issued at November 2022 open meeting); *Tex. Gas Transmission, LLC*, 181 FERC ¶ 61,049 (2022) (order issuing certificate issued at October 2022 open meeting); *Tex. E. Transmission, LP*, 180 FERC ¶ 61,186 (2022) (order issuing certificate issued at September 2022 open meeting); *Gas Transmission Nw. LLC*, 180 FERC ¶ 61,056 (2022) (order issuing certificate issued at July 2022 open meeting).

ARIZONA – MINING

Paul M. Tilley, Reporter

Arizona Department of Environmental Quality Must Adopt TMDLs for Queen Creek

On November 15, 2022, the Arizona Court of Appeals vacated a superior court order that upheld a June 2019 decision by the Water Quality Appeals Board (Board). *San Carlos Apache Tribe v. State*, 520 P.3d 670 (Ariz. Ct. App. 2022). The Board's June 2019 decision upheld the Arizona Department of Environmental Quality's (ADEQ) renewal of an Arizona Pollutant Discharge Elimination System permit for Resolution Copper Mining LLC (Resolution) that authorized the discharge of stormwater and non-stormwater, including treated mine water, industrial water, and seepage pumping, into an unnamed tributary to Queen Creek near Superior, Arizona. The court of appeals ruled that ADEQ must adopt total maximum daily loads (TMDLs) for Resolution's discharges into the tributary to Queen Creek before renewing Resolution's permit. Queen Creek is "impaired" for copper under the federal Clean Water Act.

The November 2022 decision focused on shaft 10, a shaft that is 30 feet in diameter and 6,943 feet below ground surface and was constructed by Resolution in December 2014. Shaft 10 is on Resolution's East Plant Site (EPS) and is intended to access an untouched copper ore deposit. Resolution's facility is comprised of the Superior Operations Mine on the northern boundary line of the Town of Superior, as well as the surface facilities north of Queen Creek referred to as the West Plant Site (WPS) and EPS. The previous owner, Magma, built the WPS surface facilities in 1912, and later built shafts 1 through 8 at the WPS. Magma constructed shaft 9 on the EPS in the 1970s to improve access to the known ore body and identify other ore bodies. Magma also built the Never Sweat Tunnel to connect the EPS to the WPS and to transport copper ore from shaft 9 to processing facilities at the WPS. Active mining stopped in 1996, but then-owner Broken Hill Proprietary Company, Ltd. (BHP), maintained the permit originally issued in 1975. BHP later discovered a new ore body at the EPS. Resolution acquired the broader mine facility in the early 2000s and undertook additional work to access the ore body discovered under the EPS, which included constructing shaft 10. The Never Sweat Tunnel and shafts 8 and 9 remain operational at the mine site. *Id.* at 674–75.

In 2015, Resolution applied to renew the permit. ADEQ issued the renewal in 2017. The renewed permit covered Resolution's ongoing operations, including those at shaft 10 and the facilities Resolution later installed. The permit treated those facilities as existing sources and expired on January 22, 2022. *Id.* at 675. The San Carlos Apache Tribe later challenged ADEQ's renewal of the permit and sought review from the Board. The Tribe argued that the facilities Resolution installed were new facilities. *Id.* An administrative law judge found that ADEQ's decision to renew the permit was not arbitrary and capricious; however, the administrative law judge recommended that the Board remand the matter to ADEQ to consider whether shaft 10 is a new source. *Id.* In November 2018, the Board remanded the matter to ADEQ. In 2019, ADEQ conducted a new source analysis and concluded that shaft 10 was not a new source. ADEQ's rationale was that the new source standards apply to an entire mine and not specific facilities or components of a mine. *Id.* at 676. The Tribe challenged the Board's November 2018 order. The Board issued its final administrative decisions upholding ADEQ's permit renewal. The Tribe appealed again and the superior court upheld the Board's decision. *Id.*

The court of appeals began by noting that the conclusion of the permit term on January 22, 2022, did not moot the appeal. Resolution applied to renew the permit 180 days before it expired and the court clarified that ADEQ has the discretion to administratively extend a permit if a renewal is properly submitted. *Id.* at 676–77. The court also clarified it would review ADEQ's new source analysis de novo. The court noted that a state agency's interpretation of a federal statute is not entitled to *Chevron* deference, unlike ADEQ's federal counterparts. Further, the court looked to the amendments to Ariz. Rev. Stat. § 12-910.F that disallows *Chevron* deference in Arizona. *San Carlos*, 520 P.3d at 679.

The court of appeals went on to address ADEQ's argument that the phrase "independently applicable standard" in 40 C.F.R. § 122.29(b)(2) implies that the U.S. Environmental Protection Agency made standards that are independently applicable to the sources Resolution built at its property, and that the only applicable standard under 40 C.F.R. § 440, subpt. J, is for "the mine as a whole." *San Carlos*, 520 P.3d at 679. The court agreed with ADEQ that the independently applicable standards focus on "mines." However, the court concluded that the definition of "mines" does not limit analysis to a review of the broader mine as a single unit. Rather, in the court's reading of 40 C.F.R. § 440.132(g), a "mine" could be a discrete structure or installation used "for extracting ore or minerals." *San Carlos*, 520 P.3d at 680. This led the court to its conclusion that shaft 10 could be considered a "mine" for purposes of the new source analysis. In the court's view, shaft 10 is an area where work and other activities to ore extraction will occur. The court also distinguished examples where National Pollutant Discharge Elimination System permits looked to the "whole mine" as they were not for underground copper mines. *Id.* at 681.

The court of appeals also concluded that shaft 10 is a new source based on the factors outlined in 40 C.F.R. § 122.29(b). These are: (1) "[i]t is constructed at a site at which no other source is located"; (2) "[i]t totally replaces the process or production equipment that causes the discharge of pollutants at an existing source"; or (3) "[i]ts processes are substantially independent of an existing source at the same site." *San Carlos*, 520 P.3d at 682 (alterations in original) (quoting 40 C.F.R. § 122.29(b)(1)(i)–(iii)). ADEQ's position was that shaft 10 should not be considered a new source because it is not "substantially independent" and is integrated into the broader Resolution facility. The court disagreed. The court viewed shaft 10 as a significant new addition to the Resolution property that is necessary to extract copper from a separate and untapped ore body. *Id.* at 683. The court stressed that while shaft 10 is not entirely separate and independent from the other sources, it is substantially separate enough to be considered a new source. *Id.* at 684.

The court of appeals went on to disagree with the Tribe's claim that ADEQ may not issue a permit to Resolution because shaft 10 is a new source and would discharge into an impaired waterway. *Id.* The court clarified that the regulations allow ADEQ to permit for a new source in an impaired waterway, but only if certain conditions are met. The conditions in this instance include (1) ADEQ finalizing a TMDL plan for the receiving water segment, (2) Resolution demonstrating sufficient copper load allocations to allow for the discharge, and (3) Resolution providing water quality compliance schedules for the receiving water segment. *Id.* The court clarified that since the tributary of Queen Creek that will receive water pursuant to the permitted discharges is impaired for copper, ADEQ first needs to finalize the TMDLs before renewing Resolution's permit. *Id.* at 685.

Editor's Note: The reporter represents Resolution Copper Mining LLC on unrelated matters regarding its project near the Town of Superior.

ARKANSAS – OIL & GAS

Thomas A. Daily, Reporter

Arkansas Court of Appeals Reverses Summary Judgment That Had Adopted Oil and Gas Commission's Wellsite Restoration Rule as the Standard for Lessee's Clean-Up Duty

In a 1986 decision, *Bonds v. Sanchez-O'Brien Oil & Gas Co.*, 715 S.W.2d 444 (Ark. 1986), the Arkansas Supreme Court recognized the existence of an "implied covenant" in an oil and gas lease that required the lessee "to restore the surface, as nearly as practicable, to the same condition as it was before drilling." Unfortunately, no subsequent decision of that court has defined the meaning of the phrase "as nearly as practicable."

Subsequently, on March 25, 2010, the Arkansas Oil and Gas Commission (Commission) adopted General Rule B-9(e), setting a standard for wellsite cleanup, at least to the degree required by the Commission.

The recent Arkansas Court of Appeals case *Taylor Family Limited Partnership "B" v. XTO Energy, Inc.*, 2022 Ark. App. 521, 2022 WL 17660326 (Dec. 14, 2022), involved the question of whether compliance by a lessee with General Rule B-9(e) satisfies the restoration "as nearly as practicable" standard of *Bonds*.

XTO Energy, Inc. (XTO), was the assignee of oil and gas leases and successor operator of gas wells drilled in 1959 and 1961 by a predecessor lessee. XTO plugged two of the wells in 2017. In doing so, it complied with the dictates of General Rule B-9(e) to the satisfaction of the Commission inspector who enforces compliance with the rule.

In 2018, Taylor Family Limited Partnership "B" sued XTO, contending that XTO's cleanup efforts failed to restore the surface of its land to the degree required by *Bonds*. The trial court then granted XTO's summary judgment motion, agreeing with XTO that, by enacting General Rule B-9(e), the Commission defined the standard of restoration mandated by the supreme court in *Bonds*. *Id.* at *4.

The Arkansas Court of Appeals reversed that summary judgment and remanded the case for trial, holding that a lessee's cleanup duties under *Bonds* and under General Rule B-9(e) were separate duties, both of which must be complied with. Thus, proof of its compliance with General Rule B-9(e) was a factor in determining whether XTO had performed its total cleanup duty, but was not conclusive, and issues of fact remained as to the extent of any remaining duty and compliance therewith. *Id.* at *6.

CALIFORNIA – OIL & GAS

Tracy K. Hunckler & Megan A. Sammut, Reporters

Setback Legislation Challenged by Referendum; CalGEM Issues Emergency Regulations

As reported in Vol. 39, No. 4 (2022) of this *Newsletter*, on September 16, 2022, Governor Gavin Newsom signed into law Senate Bill 1137 (SB 1137), establishing a 3,200-foot setback between new oil wells and sensitive receptors, such as homes, schools, and hospitals, and implementing new requirements for existing wells within the setback zone. That new law sidestepped the California Department of Conservation's Geologic Energy Management Division's (CalGEM) prior efforts at a public rulemaking, which was intended to achieve the same ends but was apparently put on hold when the legislature instead pushed SB 1137 through both houses and to the Governor. Opponents of SB 1137, however, timely submitted a referendum to the Attorney General's Office, which, if sufficient signatures were gathered, would theoretically stay implementation of the law pending a vote of the people on the November 2024 ballot.

By December 2022, the referendum had received enough signatures. The industry argued the law should therefore be stayed pending a vote in the 2024 election. The State, however, took the position that the law need not be stayed unless and until those signatures were verified—a process required to qualify the referendum, anticipated to be completed by February 7, 2023.

In a similar move, the State ignored the gathering of enough signatures for a referendum on a food-related bill. There, the fast-food industry sued, and the court recently issued a preliminary injunction preventing the State from implementing the law pending certification of the signatures. In issuing the preliminary injunction, the court wrote:

> There is no authority to support Respondents' position that if elections officials are still working to verify referendum petition signatures, the subject law goes into effect until the signature verification process is complete; rather a common sense reading of the Elections Code and Article II, section 10 of the California Constitution appears to support [an injunction].

Save Local Restaurants v. Hagen, No. 34-2022-80004062 (Cal. Super. Ct. Jan. 13, 2023).

Despite this legal authority and despite the industry gathering sufficient referendum signatures, the State nevertheless moved forward with emergency regulations to implement the new setback law over objections from the industry. CalGEM announced its intent to adopt an emergency rulemaking on December 19, 2022. On January 6, 2023, the emergency regulations were approved by the State's Office of Administrative Law (OAL), filed with the Secretary of State, and made effective the same day. According to CalGEM's website, as of January 6, "[a]ll operators [were] required to comply with the provisions established by Senate Bill 1137 and the SB 1137 First Emergency Implementation Regulations. Failure to do so may result in enforcement action." CalGEM, "Geologic Energy Management Laws and Rulemaking," https://www.conservation.ca.gov/calgem/Pages/Oil,-Gas,-and-Geothermal-Rulemaking-and-Laws.aspx. Industry argued that not only should SB 1137 be stayed due to sufficient signature gathering, but additionally that CalGEM lacked legal authority to issue emergency regulations pursuant to the provisions of SB 1137, which was itself not yet effective.

In any event, on February 3, 2023, the California Secretary of State certified that the requisite number of signatures had been submitted to qualify the referendum for the ballot. That same day, CalGEM sent a notice to operators announcing that the provisions of SB 1137 were suspended by operation of law pending a vote on the referendum, and that consequently CalGEM's emergency regulations were also suspended. As part of the same notice, CalGEM set forth guidelines for operators on the issuance and review of notices of intention (NOIs). With respect to NOIs issued before February 3, no further action is required. For NOIs submitted but not yet approved, they are no longer subject to the requirements of SB 1137, and any that were returned with a request for additional information under SB 1137 can now be resubmitted without that additional information.

Los Angeles City and County Continue Industry Shutdown; LA City Sued

As previously reported, in fall 2022 an ordinance to amend the Los Angeles City Zoning Code to make oil wells a nonconforming use, ban the drilling of new wells, and prohibit the maintenance, drilling, re-drilling, or deepening of existing wells was making its way through the City channels with haste. *See* Vol. 39, No. 4 (2022) of this *Newsletter*. At that time, the ordinance was awaiting approval by the Planning and Land Use Management Committee before it would go before the City Council and eventually the Mayor. As expected, and despite objection from opponents noting that the ordinance's environmental document (a mitigated negative declaration (MND)) was insufficient and that the ordinance itself would effect a taking of owner/operator property rights without just compensation, among other legal challenges, the City Council adopted the MND and ordinance, and the Mayor approved the same on December 8, 2022. *See* Ordinance No. 187709 (effective Jan. 18, 2023).

In response, four separate lawsuits were filed by industry members: Warren Resources, Inc., and related entities (collectively, Warren); E&B Natural Resources Management Corp. and related entities; Native Oil Producers and Employees of California (NOPEC) and Western States Petroleum Association (WSPA); and the National Association of Royalty Owners-California (NARO), along with royalty owners. The lawsuits—which have been related and assigned to the same judge—each contain some unique aspects, but broadly, all seek a writ of mandate, declaratory relief, and/or damages against the City and City Council, with some including the City Planning Commission and the Mayor in her official capacity, related to the adoption of the MND and ordinance. With the exception of NOPEC and WSPA, whose petition is limited to a single California Environmental Quality Act (CEQA) cause of action, the petitions and complaints generally assert that the City has violated CEQA, abused its discretion and acted in an arbitrary and capricious manner, violated the Government Code as well as the City's own General Plan and the Los Angeles City Charter and Administrative Code, effected a taking without payment of just compensation, infringed on the petitioners' vested rights and due process rights, and interfered with and impaired third-party contracts. *See Warren E&P, Inc. v. City of L.A.*, No. 23STCP00060 (Cal. Super. Ct. filed Jan. 10, 2023); *E&B Nat. Res. Mgmt. Corp. v. City of L.A.*, No. 23STCP00070 (Cal. Super. Ct. filed Jan. 10, 2023); *Native Oil Producers & Emps. of Cal. v. City of L.A.*, No. 23STCP00085 (Cal. Super. Ct. filed Jan. 11, 2023); *Nat'l Ass'n of Royalty Owners-Cal., Inc. v. City of L.A.*, No. 23STCP00106 (Cal. Super. Ct. filed Jan. 12, 2023).

With respect to CEQA, the alleged violations are numerous, including that the City should have prepared an environmental impact report when faced with competing expert opinion; the City improperly piecemealed the environmental review by, for example, leaving the definition of prohibited maintenance and the amortization study for later determination; and the MND failed to address the loss of availability of mineral resources, failed to account for cumulative and indirect impacts, failed to appropriately analyze noise and vibrations, and failed to describe an adequate baseline.

After adoption of the ordinance and one day before its effective date of January 18, 2023, the City Zoning Administrator issued a Zoning Administrator Interpretation (ZAI) to define what is meant in the ordinance (and elsewhere in the Zoning Code) by prohibited "maintenance" and a Zoning Administrator Memorandum (ZA Memo No. 141) to outline the process applicable to the health and safety exception set forth but not described in the ordinance.

Warren, E&B Natural Resources, and others have filed administrative appeals of the ZAI and ZA Memo No. 141. In addition to constituting proof of the City's improper piecemealing of the ordinance and the related environmental review, operators argue these documents impose additional and independent requirements, including by establishing a definition of "maintenance" that prohibits even routine work intended to prolong the productive life of wells. As such, the ZAI and ZA Memo No. 141 are themselves arbitrary and capricious, violate CEQA, effect a taking without just compensation, interfere with operator contracts, and further impair operators' vested rights, among other legal arguments.

Similarly, in Los Angeles County, the Board of Supervisors approved a parallel ban on January 24, 2023, and passed an ordinance to take effect February 23, 2023. It is likely the County's ordinance will face legal challenges similar to those brought against the City.

Editor's Note: The reporters serve as counsel for Warren E&P, Inc., Warren Resources of California, Inc., and Warren Resources, Inc., in its lawsuit against the City of Los Angeles.

CBD Sues CalGEM Again, This Time for Relying on Environmental Documents That CBD Claims Are "Old"

The Center for Biological Diversity (CBD) filed a lawsuit against the California Department of Conservation's Geologic Energy Management Division (CalGEM) on December 5, 2022, seeking to invalidate two sets of permits issued for 17 new wells in the Placerita and Elk Hills oilfields in Los Angeles and Kern Counties, respectively. *Ctr. for Biological Diversity v. CalGEM*, No. 22CV023134 (Cal. Super. Ct. filed Dec. 5, 2022). The petition for writ of mandate alleges that CalGEM issued the permits in reliance on "antiquated, inapplicable, and inadequate environmental reviews of other agencies" issued in 1991 (Placerita) and 1997 (Elk Hills). According to the petition, the "old" environmental documents do not take into account new developments or updated information about the environmental impacts of drilling. Moreover, it claims that the approved wells exceed the number allowed for in the old environmental documents. It asserts that the permits issued for the Placerita and Elk Hills wells are emblematic of CalGEM's pattern and practice of issuing permits with inadequate California Environmental Quality Act (CEQA) review. The writ seeks to have CalGEM vacate and set aside the approvals to drill until CalGEM complies with the requirements of CEQA.

This recent case has been related to CBD's other pending suit against CalGEM filed in Alameda County Superior Court in February 2021, which alleges that CalGEM has engaged in an ongoing pattern and practice of violating CEQA by performing insufficient environmental review. *Ctr. for Biological Diversity v. CalGEM*, No. RG21090952 (Cal. Super. Ct. filed Feb. 24, 2021); *see* Vol. XXXVIII, No. 2 (2021) of this *Newsletter*. Unlike the new suit, that case does not challenge any specific permit or decision by CalGEM, but rather challenges what it alleges is a common practice of the agency. *See* Notice of Related Case, *Ctr. for Biological Diversity v. CalGEM*, No. RG21090952 (Cal. Super. Ct. Dec. 6, 2022). In December 2021, the court in that matter denied CalGEM's motion for judgment on the pleadings, and the matter is now in discovery. According to CBD, the parties are engaged in settlement discussions. *See id.*

Kern County Ordinance Stayed Again

The battle over Kern County's oil and gas permitting ordinance and its associated supplemental recirculated environmental impact report continues. After the trial court's October 4, 2022, ruling on remedies and relief—in which the court left current project approvals in place but held projects on hold pending Kern County curing the California Environmental Quality Act-based deficiencies and the court discharging the writ, *see* Ruling on Remedies and Relief and Second Modified Judgment, *Vaquero Energy v. Cnty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. Oct. 4, 2022); Vol. 39, No. 4 (2022) of this *Newsletter*—the County filed a return to third peremptory writ of mandate and request for discharge of third writ. The trial court issued an order discharging the writ on November 2, 2022, lifting the suspension of the Kern County Ordinance. *See* Order Discharging the Third Peremptory Writ of Mandate, *Vaquero Energy v. Cnty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. Nov. 2, 2022). The County resumed permitting on November 5, 2022.

The petitioners have filed appeals of both the October 4 ruling and the discharge order, in addition to a previous order of the court on the merits of the third writ of mandate. On November 7, 2022, the petitioners filed a motion with the trial court seeking to stay the discharge order pending those appeals. The trial court denied the petitioners' motion on December 13, 2022, *Vaquero Energy v. Cnty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. Dec. 13, 2022), but the California Fifth District Court of Appeal stayed the same on January 26, 2023, *Vaquero Energy v. Cnty. of Kern*, No. F084763 (Cal. Ct. App., 5th Dist., Jan. 26, 2023). The court of appeal's stay had the immediate effect of again suspending all permitting by the Kern County Planning and Natural Resources Department for oil and gas operations in Kern County. The stay does not impact the over 1,000 permits issued by the County between November 5, 2022, and January 26, 2023, but the permit suspension will remain in place until the court of appeal orders otherwise.

COLORADO – OIL & GAS

Scott Turner & Kate LaNue, Reporters

Orphan Wells Mitigation Enterprise Board Holds First Meeting

On December 13, 2022, the Colorado Department of Natural Resources' Orphan Wells Mitigation Enterprise Board (Board) hosted its first hearing. *See* Press Release, Colo. Oil & Gas Conservation Comm'n, "Orphan Wells Mitigation Enterprise Board Hosts First Hearing" (Dec. 14, 2022). The Board was created by Senate Bill 22-198, 2022 Colo. Legis. Serv. ch. 331 (codified at Colo. Rev. Stat. § 34-60-133), and is tasked with overseeing the industry-funded enterprise for cleaning up orphaned oil and gas well sites in Colorado. The Board will meet at least annually to assess the fees collected from oil and gas operators to fund the enterprise. The first round of fees were due in August 2022 and the next round will be due in April 2023. The initial fees were $225 per well for operators with an average daily per well production of greater than 15 barrel of oil equivalent (BOE) or 22 thousand cubic feet of natural gas equivalent (MCFE) for the previous calendar year and $125 for operators with an average daily per well production of less than or equal to 15 BOE or 22 MCFE for the previous calendar year. The Board will meet again in September 2023.

LOUISIANA – OIL & GAS

Joe Heaton, Kathryn Gonski & Court VanTassell, Reporters

Louisiana Third Circuit Grants Writ of Mandamus, Ordering LDNR to Pay Judgment for Mineral Royalties; Louisiana Supreme Court Reverses

In *Crooks v. State ex rel. Department of Natural Resources*, 2022-00625 (La. 1/1/23), 2023 WL 526075, *rev'g* 2021-633 (La. App. 3 Cir. 3/16/22), 350 So. 3d 901, the Louisiana Supreme Court reversed the appellate court's decision to grant mandamus to force the Louisiana Department of Natural Resources (LDNR) to pay out a $4.7 million mineral royalties judgment. As illustrated by the court's opinion, satisfaction of this judgment—and any judgment against the LDNR—comes solely at the discretion of the state legislature.

The mineral royalties judgment arose from a property dispute over the Catahoula Basin, in which adjacent landowners claimed that they were the true owners of riverbanks held by the State. These landowners filed a lawsuit against the State and prevailed, becoming the record owners of the riverbanks. They also filed suit against the LDNR for repayment of mineral royalties attributable to ownership of the riverbanks that had been collected by the LDNR. The trial court subsequently awarded the landowners a judgment for nearly $4.7 million against the LDNR for misattributed mineral royalties.

The landowners tried and failed to collect on the judgment so they sought a writ of mandamus to compel payment from the LDNR. Their writ was denied by the trial court but subsequently granted by the Louisiana Third Circuit Court of Appeal. The Louisiana Supreme Court then granted supervisory writs filed by the LDNR and reinstated the trial court's denial of mandamus.

The court's opinion, authored by Justice Griffin, highlighted the "extraordinary" nature of mandamus. In order to respect the separation of powers between the judiciary and legislature, a court may only compel a public officer to perform "ministerial" duties, i.e., duties that the officer has no discretion in carrying out. *Id.* at *2. If an officer's duty involves any discretion whatsoever, the performance of that duty cannot be compelled by mandamus. *Id.* The court went on to point out that Louisiana law, under La. Const. art. XII, § 10(C), and La. Stat. Ann. § 13:5109(B)(2), mandates that judgments against the State and its agencies can only be satisfied through legislative appropriation—a process that is "by its nature, discretionary." *Crooks*, 2023 WL 526075, at *2. Thus, mandamus is an inappropriate remedy for judgment creditors seeking payment from the State and its agencies.

The landowner-plaintiffs disagreed, pointing to prior cases where judgments against state agencies were compelled by mandamus. However, the court responded that those cases involved specific injuries for which specific constitutional and/or statutory provisions require the State to pay those specific damages. *Id.* Those provisions are essentially appropriations themselves and take away all discretion from the State in rendering payment. *Id.* Given that the landowner-plaintiffs' claims are not covered by such provisions, legislative discretion remains and thwarts mandamus. *Id.* at *3.

Through the *Crooks* opinion, the Louisiana Supreme Court highlighted the potent insulation from judgment enforcement enjoyed by state agencies like the LDNR. Unless the legislature has already enacted a specific mandate to pay certain types of damages, the legislature retains total authority over when—or whether—to pay.

Editor's Note: The reporters' law firm represented some of the defendant-operators in the Catahoula Basin in the underlying suit for mineral royalties.

Defendants in Louisiana Coastal Land Loss Cases File Certiorari Petition in U.S. Supreme Court Regarding Fifth Circuit's Application of Federal Officer Jurisdiction

On January 30, 2022, petitioner-defendants Chevron U.S.A., Inc., Exxon Mobil Corp., and ConocoPhillips Company filed a petition for writ of certiorari in *Plaquemines Parish v. Chevron USA, Inc.*, asking the U.S. Supreme Court to reverse the U.S. Court of Appeals for the Fifth Circuit's holding that wartime oil and gas production does not entitle the defendants to federal officer jurisdiction. No. 22-30055, 2022 WL 9914869 (5th Cir. Oct. 17, 2022), *petition for cert. docketed*, No. 22-715 (U.S. Feb. 1, 2023). The Supreme Court's decision could have considerable impact on the trajectory of a number of pending lawsuits targeting oil and gas operations in Louisiana's coastal parishes.

Beginning in 2013, over 40 nearly identical lawsuits have been filed in the coastal parishes of Louisiana, alleging violations of Louisiana's State and Local Coastal Resources Management Act against nearly 200 oil and gas companies. These companies removed several of these cases to federal court based on federal officer jurisdiction, 28 U.S.C. § 1442, which grants federal jurisdiction to cases against persons "acting under" a United States officer for claims related to those acts. This argument was premised on the fact that many of the plaintiffs' claims arose from oil and gas operations during World War II, when the activities of oil companies were very highly controlled to ensure that there was enough fuel for the war effort. In early 2022, the U.S. District Court for the Eastern District of Louisiana held that the defendants were not "acting under" federal officers; instead, the defendants were merely complying with regulations and lacked the "special relationship" required for federal officer jurisdiction under *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007). *Par. of Plaquemines v. Riverwood Prod. Co.*, No. 2:18-cv-05217, 2022 WL 101401 (E.D. La. Jan. 11, 2022), *aff'd sub nom. Plaquemines Par. v. Chevron USA, Inc.*, No. 22-30055, 2022 WL 9914869 (5th Cir. Oct. 17, 2022). The Fifth Circuit affirmed, focusing on the lack of a contract between the defendants and the government. *Plaquemines Par.*, 2022 WL 9914869, at *3–4; *see* Vol. 39, No. 4 (2022) of this *Newsletter*.

The petitioners argue that the Fifth Circuit's ruling is in conflict with the Supreme Court's opinion in *Watson* because it interprets the "acting under" element to require a contract or other formal relationship with the federal government. To the contrary, the petitioners claim that *Watson* supports the argument that a private entity can "act under" a federal officer by voluntarily cooperating with the government to provide an item that it needs—such as the oil necessary to fight a war. Furthermore, the Fifth Circuit's decision appears to create a circuit split with the Seventh, Eleventh, and Third Circuits, all three of which have recognized federal officer jurisdiction based on highly regulated entities serving important governmental purposes. Finally, the petitioners point to a procedural circuit split regarding the proper standard of review; while the Fifth Circuit weighed the evidence and relied on factual findings in its decision to affirm remand, the Second and Seventh Circuits utilize the federal pleading standards and grant defendants the benefit of all reasonable inferences from the facts as alleged.

Whether or not the Supreme Court grants certiorari, its decision in this case impacts the more than 40 other coastal zone cases currently hinging on the same jurisdictional issues. Thus, this decision will directly impact the course of litigation in Louisiana's coastal parishes and, as a result, the course of the industry in those parishes as well.

Editor's Note: The reporters' law firm served as counsel of record for Exxon Mobil Corp., one of the defendants that submitted the petition for certiorari discussed above; and as counsel of record for several Louisiana operators in other lawsuits implicated by the jurisdictional outcomes of *Plaquemines Parish v. Chevron USA, Inc.*

Louisiana Supreme Court Denies Writ, Preserving Lower Court's Holding That LEQA Citizen Suits Are Imprescriptible

"Prescription" is Louisiana's civil law analogue of the common law "statute of limitations." When an action "prescribes" it can no longer be brought timely.

The Louisiana Supreme Court recently denied a writ application regarding the proper prescriptive period for citizen suits under the Louisiana Environmental Quality Act (LEQA). *State v. Shell Oil Co.*, 2021-01225 (La. 1/18/23), 2023 WL 234539 (mem.). While this writ denial is not legal precedent, it signals a tacit agreement with the lower court's opinion that LEQA suits are imprescriptible.

This lawsuit is the second of two lawsuits filed by a landowner alleging environmental contamination due to historical oil and gas operations on his property. After filing and dismissing his first suit in 2013, he filed again roughly four years later. The only material difference between these two lawsuits—other than the four-year gap—was that the second suit invoked the citizen suit provision of LEQA, La. Stat. Ann. § 30:2026. Under this provision, individuals may file suit on their own behalf to enforce LEQA.

Claims for environmental damage in Louisiana have been likened to conventional tort actions, which carry a one-year prescriptive period. The plaintiffs, however, argued that LEQA suits are imprescriptible because claims belonging to the State do not prescribe. While the trial court did not expressly hold that LEQA claims are imprescriptible, it suggested as much by determining that the conventional one-year period did not apply. The Louisiana Third Circuit Court of Appeal denied Shell Oil Company's (Shell) supervisory writs in a narrow 3-2 decision, wherein the dissenters would have applied a one-year prescriptive period to claims for the plaintiffs' damages but not to claims for injunctive relief. Shell subsequently filed a writ application with the Louisiana Supreme Court.

Prior to ruling on Shell's writ, the court faced the Third Circuit dissenters' damages/injunction dichotomy head-on in *State ex rel. Tureau v. BEPCO, L.P.*, 2021-0856 (La. 10/21/22), 351 So. 3d 297. *See* Vol. 39, No. 4 (2022) of this *Newsletter*. That case involved a citizen suit under another statute, La. Stat. Ann. § 30:16, which only provides for injunctive relief. The court compared this provision with federal citizen suits under the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act, noting that courts interpreting those statutes have applied statutes of limitations to claims for cost recovery and damages but not to suits seeking injunctive relief. Thus, because section 30:16 is simply an injunction mechanism with no provision for damages, claims under section 30:16 do not prescribe.

Unlike section 30:16, the LEQA citizen suit provision provides for both injunctive relief and damages. However, the court ultimately denied Shell's writ application by a narrow majority, 4-3. In dissent, Justice Weimer identified that *Tureau* involved a different statute than the instant case and therefore requires separate consideration.

Despite the narrow split in opinion at the Third Circuit and Louisiana Supreme Court, this latest writ denial suggests that Louisiana courts may be inclined to consider LEQA suits imprescriptible. If so, Louisiana operators should beware of a potential groundswell of section 30:16 and LEQA suits from plaintiffs whose private claims have prescribed.

Editor's Note: The reporters' law firm represented the Shell defendants.

NEW MEXICO – OIL & GAS

Melinda A. Branin, Reporter

New Mexico Supreme Court Hears Oral Arguments in Case Addressing Certainty of Title

On November 18, 2022, the New Mexico Supreme Court heard oral arguments in *Premier Oil v. Welch*, No. S-1-SC-38601 (N.M.). This case stems from a complicated sequence of events beginning in 1974 when Herbert and Marie Welch executed a joint last will and testament (1974 Will). *Last Will & Testament of Welch v. Welch*, 2021-NMCA-028, ¶ 6, 493 P.3d 400, *cert. granted*, 504 P.3d 531 (N.M. Aug. 5, 2021) (mem.). Herbert and Marie Welch owned certain mineral interests in New Mexico as community property, and in their 1974 Will, Herbert devised to Marie "all of [his] property of every kind, both real and personal, wherever the same be found or located." *Id.* (alteration in original). The 1974 Will also provided "[t]hat the survivor shall divide our estate, which is community property, in the following manner, to-wit: the community interest of HERBERT WELCH shall be equally divided between Joe H. Welch, his brother, and Grace Welch Phelan, his sister[.]" *Id.* (alterations in original).

After Herbert's death, Marie probated the 1974 Will in Eddy County, New Mexico (1975 Proceeding). *Id.* ¶ 7. There, the probate court entered a final decree ordering all property to be distributed to Marie, and Marie transferred the minerals to herself as "feme sole." *Id.* Marie then executed a 1976 will and a 1980 will, the latest will in the record (1980 Will). *Id.* ¶ 8. In the 1980 Will, Marie devised "my undivided one-fourth (1/4) interest in mineral rights that I received from my deceased husband to Joe H. Welch . . . ; however, if he should predecease me then I hereby give, devise and bequeath that share to [his] issue . . ." and "all mineral rights owned by me in my own name on properties in Montana and New Mexico in equal shares to Ralph S. Griffin . . . and Samuel G. Alderman . . . ." *Id.* Months after Marie's death in 1988, her nephew, Ralph S. Griffin, attempted to contact Samuel G. Alderman, even hiring a private investigator. *Id.* ¶ 10. Griffin knew of the 1976 will, but not of its contents or location. He was totally unaware of the 1980 Will. *Id.* Neither Griffin nor the private investigator located Alderman, who was hiding from creditors, and no one attempted to probate the 1980 Will or any other wills within three years of Marie's death. *Id.* ¶¶ 9–10.

About 20 years later, Griffin petitioned for a determination of Marie's heirship, declaring that he was Marie's sole heir and that Marie died intestate (2007 Proceeding). *Id.* ¶ 11. Griffin made no renewed attempts to contact Alderman, but he did give notice by publication. *Id.* By final decree in the 2007 Proceeding, the court found that Marie died intestate and awarded the minerals to Griffin as her sole heir. *Id.* Premier Oil & Gas, Inc. (Premier), purchased Griffin's interests, relying on the 2007 Proceeding. *Id.*

Then, in 2012, Alderman filed a formal petition to probate the 1980 Will (2012 Proceeding). *Id.* ¶ 12. The district court admitted Marie's 1980 Will to probate and appointed Alderman as personal representative of Marie's estate despite Griffin's objection. *Id.* Griffin appealed, claiming the 2007 Proceeding barred probate of the 1980 Will. *Id.* ¶ 13. *But see* N.M. Stat. Ann. § 45-3-412(A)(4) (establishing exceptions to probate final orders where notice insufficient and ability to modify or vacate final order by probate of later-offered will). On remand from the appellate court, Premier and the Welches, successors to Herbert's siblings, joined. *Id.* ¶ 14. The Welches asserted rights under the 1974 Will and the 1980 Will and argued the 2007 Proceeding was void for due process violations such that Premier was not a bona fide purchaser. *Id.* ¶ 15. The district court quieted title to the minerals in Premier and Griffin, and the Welches appealed. *Id.*

On appeal, the Welches claimed they were interested persons entitled to notice of the 2007 Proceeding. *Id.* ¶ 29. Griffin argued the Welches were unknown to him and therefore the notice by publication was sufficient. *Id.* ¶ 37. The New Mexico Court of Appeals held that the Welches were interested persons entitled to notice based on the probate code. *Id.* ¶ 33; *see* N.M. Stat. Ann. § 45-1-201(A)(26) (defining "interested person" to include "heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or a claim against a trust estate or the estate of a decedent . . ."). Further, the court held that attempts by Griffin to locate Alderman some 17 years prior to filing the 2007 Proceeding fell short of the requirement of reasonable diligence, rendering the 2007 Proceeding void as to the Welches. *Welch*, 2021-NMCA-028, ¶¶ 35–43.

As to Premier's bona fide purchaser status, the Welches reasoned Premier was on notice of title defects because of a title opinion drafted by Premier's title attorney in 2010 shortly before purchasing the contested interests. *Id.* ¶ 51. The title opinion examined the 1974 Will, the 1975 Proceeding, the deed to Marie as "feme sole," and the 2007 Proceeding. *Id.* The title opinion regarded the 2007 Proceeding as "somewhat cursory," but that given lawful publication of notice and the absence of claims, "[b]arring a showing of fraud or a violation of procedural due process, the [heirship] determination . . . will prevail." *Id.* (first alteration in original). The appellate court agreed with Premier and its title attorney because no person ever directly challenged the validity of the 1975 Proceeding or the 2007 Proceeding, making Premier's reliance on those facially valid decisions justified, especially where nothing in the record would have put Premier on notice as to Marie's 1976 or 1980 wills. *Id.* ¶¶ 52–53. The Welches filed a writ of certiorari which was granted.

As of the date of this report, the New Mexico Supreme Court has heard oral arguments in the case but has not issued an opinion. Questions raised by the justices centered on the impact of the 1974 Will on Premier's position that it purchased the interests without notice and whether a statute of repose precludes challenges to facially regular judgments in favor of state policy affording certainty of title. The decision will provide important guidance for both reasonable diligence requirements as they relate to notice, as well as the ability of purchasers to rely on facially valid judgments, even when aware of contradictory facts. Depending on the decision, a potential purchaser may have a heightened duty of inquiry in the future to look behind facially valid judgments before claiming bona fide purchaser status under New Mexico's recording statute, N.M. Stat. Ann. § 14-9-3.

PENNSYLVANIA – MINING

Joseph K. Reinhart, Sean M. McGovern,
Gina N. Falaschi & Christina M. Puhnaty, Reporters

Litigation Surrounding Pennsylvania's RGGI Rule Continues

As previously reported in Vol. 39, No. 2 (2022) of this *Newsletter*, the Pennsylvania Department of Environmental Protection's (PADEP) CO_2 Budget Trading Program rule, or RGGI Rule, which links the commonwealth's cap-and-trade program to the Regional Greenhouse Gas Initiative (RGGI), was published in the *Pennsylvania Bulletin* in April 2022. *See* 52 Pa. Bull. 2471 (Apr. 23, 2022). RGGI is the country's first regional, market-based cap-and-trade program designed to reduce carbon dioxide (CO_2) emissions from fossil fuel-fired electric power generators with a capacity of 25 megawatts or greater that send more than 10% of their annual gross generation to the electric grid.

A number of legal challenges were filed in response to the publication of the final rule. On April 25, 2022, owners of coal-fired power plants and other stakeholders filed a petition for review and an application for special relief in the form of a temporary injunction. *See Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022). Briefing has been filed and the court heard 30 minutes of oral argument in the case on November 16, 2022. The parties await the court's ruling.

Additionally, on July 13, 2022, natural gas companies Calpine Corp., Tenaska Westmoreland Management LLC, and Fairless Energy LLC filed a third legal challenge to the rule with arguments similar to those brought in the other two cases. *See Calpine Corp. v. PADEP*, No. 357 MD 2022 (Pa. Commw. Ct. filed July 12, 2022). Constellation Energy Corporation and Constellation Energy Generation LLC petitioned to intervene in the case, but later filed a joint motion to stay intervention proceedings on October 31, 2022, which the court granted. The stay on the application for intervention remains in place. Briefing in this case has been filed and oral argument is set for February 8, 2023.

In a third suit filed by the acting Secretary of PADEP against the Pennsylvania Legislative Reference Bureau in February 2022, PADEP filed suit in the Pennsylvania Commonwealth Court seeking to compel the Pennsylvania Legislative Reference Bureau to publish the Pennsylvania Environmental Quality Board's final-form rulemaking for the CO_2 Budget Trading Program in the *Pennsylvania Bulletin*. *See McDonnell v. Pa. Legis. Reference Bureau*, No. 41 MD 2022 (Pa. Commw. Ct. filed Feb. 3, 2022). By law, the House and Senate each have 30 calendar days or 10 legislative days—whichever is longer—to vote on a disapproval resolution to stop a new rule from taking effect. PADEP argued that the periods should have run simultaneously for the House and Senate, rather than one after the other, and the Pennsylvania Legislative Reference Bureau's improper interpretation delayed issuance of the rule. On January 19, 2023, the commonwealth court dismissed the case as moot, as the rule was published in April 2022, without ruling on the merits.

On an interlocutory appeal in PADEP's action, the Supreme Court of Pennsylvania upheld a preliminary injunction of the RGGI Rule granted by the commonwealth court. On July 8, 2022, the commonwealth court granted a preliminary injunction preventing the state from participating in RGGI pending resolution of the case. *See* Vol. 39, No. 3 (2022) of this *Newsletter*. Governor Wolf appealed the injunction to the Supreme Court of Pennsylvania. On August 31, 2022, the supreme court denied the state's emergency request to reinstate the automatic supersedeas, thereby maintaining the preliminary injunction while litigation on the merits proceeds before the commonwealth court. *See* Ziadeh v. Pa. Legis. Reference Bureau, No. 79 MAP 2022 (Pa. Aug. 31, 2022); Vol. 39, No. 4 (2022) of this *Newsletter*. The regulation remains stayed.

On January 18, 2023, every member of the Pennsylvania Senate Republican Caucus signed a letter to the newly inaugurated Governor Josh Shapiro that urged him to repeal the final RGGI regulation. *See* Letter from the Senate Republican Caucus to Gov. Shapiro (Jan. 18, 2023). The letter highlighted the economic burden that would be placed on Pennsylvania electric generating units and subsequently passed on to businesses and consumers. The letter also referenced Governor Shapiro's previous statements that implied doubt as to whether participation in RGGI was the best approach for the commonwealth.

Further information regarding the rule and the history of the rulemaking can be found on PADEP's RGGI webpage at https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx.

EQB Withdraws Proposed Water Quality Standard for Manganese

On November 18, 2022, the Pennsylvania Environmental Quality Board (EQB) notified Pennsylvania's Independent Regulatory Review Commission (IRRC) that it was formally withdrawing its widely-opposed proposed rulemaking to change the water quality criterion for manganese in the commonwealth. *See* Letter from Laura Griffin, Regulatory Coordinator, EQB, to David Summer, Exec. Dir., IRRC (Nov. 18, 2022); see also Proposed Rulemaking Preamble, "Water Quality Standard for Manganese and Implementation" (Dec. 17, 2019). The manganese rule would have added a numeric water quality criterion for manganese of 0.3 mg/L to Table 5 at 25 Pa. Code § 93.8c and deleted the existing water quality criterion of 1.0 mg/L from 25 Pa. Code § 93.7. *See* Executive Summary at 1, "Final-Form Rulemaking: Water Quality Standards and Implementation—Manganese" (Aug. 9, 2022). In its rule proposal, the EQB and the Pennsylvania Department of Environmental Protection identified the parties affected by the manganese rule to be "[a]ll persons, groups, or entities with proposed or existing point source discharges of manganese into surface waters of the Commonwealth," but specifically identified "[p]ersons who discharge wastewater containing manganese from mining activities" as affected parties, and expected that mining operators would need to perform additional treatment to meet this criterion. *Id.* at 3.

The EQB's withdrawal of the rule follows the November 2022 disapproval of the rulemaking by the IRRC and the Pennsylvania House and Senate Environmental Resources and Energy standing committees. *See* Vol. 39, No. 4 (2022) of this *Newsletter*.

PENNSYLVANIA – OIL & GAS

Joseph K. Reinhart, Sean M. McGovern, Matthew C. Wood & Gina N. Falaschi, Reporters

EQB Adopts Regulations Reducing Emissions from Unconventional and Conventional Operations

On December 10, 2022, the Pennsylvania Environmental Quality Board (EQB) published in the *Pennsylvania Bulletin* a final-omitted rulemaking (Conventional VOC Rule), 52 Pa. Bull. 7635, and a final-form rulemaking (Unconventional VOC Rule), 52 Pa. Bull. 7587, adopting reasonably available control technology (RACT) standards to control volatile organic compound (VOC) and methane emissions from existing and future conventional oil and gas operations and unconventional oil and gas operations. These regulations establish RACT requirements for conventional and unconventional oil and natural gas sources of VOC emissions. These sources include natural gas-driven continuous bleed pneumatic controllers, natural gas-driven diaphragm pumps, reciprocating compressors, centrifugal compressors, fugitive emissions components and storage vessels installed at unconventional well sites, gathering and boosting stations, and natural gas processing plants, as well as storage vessels in the natural gas transmission and storage segment.

The Conventional VOC Rule was effective on notice from the Pennsylvania Department of Environmental Protection (PADEP) on December 2, 2022. Members of the Pennsylvania House Environmental Resources and Energy (ERE) Committee had disapproved the final-omitted regulation, Regulation #7-579, in a November 14, 2022, letter to the Independent Regulatory Review Commission (IRRC). On November 17, 2022, the IRRC approved the final-omitted rulemaking, and the EQB subsequently adopted an emergency certified final-omitted regulation, Regulation #7-580, on November 30, 2022. *See* Press Release, PADEP, "EQB Adopts Emergency Air Quality Regulation for Existing Conventional Oil and Gas Sources" (Nov. 30, 2022). Regulation #7-580 is identical to Regulation #7-579 except that it received an emergency certification of need from then-Governor Tom Wolf. PADEP said that the final-omitted regulation was appropriate under the Commonwealth Documents Law because notice and comment from the public was unnecessary, impractical, and contrary to the public interest. PADEP recommended that EQB adopt the regulation as a final-omitted regulation as part of the process to meet the U.S. Environmental Protection Agency's (EPA) December 16, 2022, deadline for the state to adopt methane emission controls for oil and gas operations. *See* Executive Summary, "Control of VOC Emissions from Conventional Oil and Natural Gas Sources—25 Pa. Code Chapter 129" (Oct. 12, 2022); *see also* Vol. 39, No. 4 (2022) of this *Newsletter*. Failure of the state to adopt the required regulations reportedly could have resulted in the loss of over $500 million in federal highway assistance. On December 5, 2022, the Pennsylvania Independent Oil & Gas Association, Pennsylvania Independent Petroleum Producers, and Pennsylvania Grade Crude Oil Coalition filed a lawsuit challenging the legality of the Conventional VOC Rule. *See* Petition for Review in the Nature of a Complaint for Declaratory Relief, *Pa. Indep. Oil & Gas Ass'n v. Commonwealth*, No. 574 MD 2022 (Pa. Commw. Ct. filed Dec. 5, 2022).

The Unconventional VOC Rule, which became effective upon publication in the *Pennsylvania Bulletin*, was adopted by the EQB at its June 14, 2022, meeting. The House ERE Committee met on July 11, 2022, and approved a letter to the IRRC announcing its opposition to the final EQB regulation on a number of grounds, including that the revised regulation had not gone through public notice and comment. During its July 21, 2022, meeting, the IRRC unanimously voted to approve the regulation. The House ERE Committee met on August 2, 2022, to vote on a concurrent resolution disapproving of the rule, and the resolution was voted out of committee. The House and Senate each had 30 calendar days, or 10 legislative voting days (whichever is later), to adopt the concurrent resolution. Neither took further action and the regulation was published in the *Pennsylvania Bulletin*.

A rule substantially similar to those published on December 10 was approved by the EQB in March 2022, but it did not distinguish between conventional and unconventional emission sources. That rulemaking had advanced to the Pennsylvania House and Senate ERE Committees and the IRRC for consideration, but the House ERE Committee issued a disapproval letter for the rulemaking on April 26, 2022. Three trade associations also filed a petition for review of the rulemaking in the Commonwealth Court of Pennsylvania. The petition and the House ERE Committee's disapproval letter alleged that PADEP failed to comply with Act 52 of 2016, which requires that any rulemaking concerning conventional oil and gas wells be undertaken separately and independently from those concerning unconventional oil and gas wells or other subjects. As a result, PADEP withdrew the regulation from IRRC consideration on May 4, 2022. *See* Vol. 39, No. 2 (2022) of this *Newsletter*.

PADEP submitted both the Unconventional VOC and Conventional VOC Rules to EPA as a revision to Pennsylvania's state implementation plan (SIP). On December 14, 2022, EPA issued a completeness determination for PADEP's revision to Pennsylvania's SIP, which avoided the imposition of federal highway funding sanctions that were set to take effect on December 16, 2022. EPA is now evaluating whether it will approve the SIP revision.

Governor Enacts Law Amending Oil and Gas Lease Act to Provide Additional Royalty Payment Transparency

On November 3, 2022, then-Pennsylvania Governor Tom Wolf signed Senate Bill 806 into law as Act 153 of 2022. The Act, effective March 3, 2023, amends the Oil and Gas Lease Act to clarify the minimum amount of information that a conventional or unconventional oil and gas operator is required to provide to a royalty owner on a royalty payment check stub or in an attachment to other forms of payment. The Act requires that an operator/payor furnish the following items (the complete details of which are available in the Act's text):

- identifying information for the lease, property, unit, or wells for which payment is being made;
- the month and year of oil, gas, or natural gas liquids production for which the payment is being made;
- the total volume of oil, gas, or natural gas liquids produced and sold per well;
- the price received per unit of oil, natural gas, or natural gas liquids sold;
- the aggregate amounts for each category of deductions for each well incurred that reduces the royalty owner's payment, including all severance and other production taxes;
- net and gross value of the payor's total sales from each well less any deductions;
- the royalty owner's legal and contractual interest in the payor's share, expressed as a decimal or fraction;
- the royalty owner's share of the gross value of the payor's total sales before any deductions;
- the royalty owner's share of the sales value less the royalty owner's share of taxes and any deductions; and
- the payor's contact information, including an address and telephone number.

See 58 Pa. Stat. §§ 35.2, .3(a).

The Act allows an unconventional operator and royalty owner to agree that the operator may provide this information in a summary format, so long as the operator provides the complete information upon the royalty owner's request by certified mail. *Id.* § 35.3(b). If an unconventional operator fails to provide complete payment information without good reason within 60 days of a royalty owner's request, the amendments authorize a royalty owner to bring a civil action against the operator to obtain the information and recover any incurred associated attorney's fees and court costs in doing so. *Id.* § 35.3(c). The Act also sets deadlines for payment for unconventional operators (within 120 days from the date of first sale; thereafter, within 60 days after the end of the month when the production is sold), subject to certain exceptions, and imposes interest penalties for late payments. *Id.* § 35.3(e).

Governor Enacts Law Creating Orphan Well Plugging Grant Program

On November 3, 2022, then-Pennsylvania Governor Tom Wolf signed House Bill 2528 into law as Act 136 of 2022. The Act, effective January 3, 2023, amended Pennsylvania law to create the Orphan Oil and Gas Well Plugging Grant Program and bring the program into compliance with the requirements for the use of federal funding for well plugging. Among the significant amendments, the Act requires that no less than 20% of the funds allocated from the federal Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), be made available for plugging conventional oil and gas wells (unless funds remain uncommitted six months prior to any deadline for recapture of the funds by the federal government, in which case they may be used for other purposes). 58 Pa. Cons. Stat. Ann. § 2811(a). The Act also increases the maximum grant amounts from $10,000 to $40,000 (or the actual cost, whichever is less) for wells up to 3,000 feet deep and from $20,000 to $70,000 (or the actual cost, whichever is less) for wells deeper than 3,000 feet. *Id.* § 2822(b).

The Act includes additional criteria an applicant must submit to the Pennsylvania Department of Environmental Protection (PADEP) to be considered a qualified well plugger (e.g., a demonstration that the applicant has access to the necessary equipment, materials, resources, and services required to plug wells). *Id.* § 2824(a). A qualified well plugger must also attest that (1) it will provide necessary documentation to allow PADEP to demonstrate it is complying with funding allocation requirements, and (2) each well plugged by the qualified well plugger will be plugged in accordance with applicable requirements. *Id.* § 2825(b).

The Act also requires that PADEP allow Pennsylvania companies of any size to bid on well plugging contracts. *Id.* § 3271.1. To qualify, any such company must be headquartered or have its main offices in Pennsylvania and conduct at least 50% of its business activities in the commonwealth. *Id.* Alternatively, other companies may qualify as "Pennsylvania companies" if they subcontract the work to subcontractors selected through a competitive bidding process that gives priority to subcontractors, when possible, that satisfy the location and business activity thresholds described above. *Id.* These requirements do not prohibit PADEP from accepting bids from or awarding contracts to companies that are not "Pennsylvania companies" if taking such action is not otherwise prohibited. *Id.*

PADEP Considering Revising Applicable Regulations After Release Event at Natural Gas Storage Facility

On December 9, 2022, the Pennsylvania Department of Environmental Protection (PADEP) announced that it had issued an administrative order and two compliance orders related to a natural gas storage facility release event that occurred in Jackson Township, Cambria County, Pennsylvania, in November 2022. *See* Press Release, PADEP, "DEP Issues Three Orders to Equitrans in Wake of Rager Mountain Storage Reservoir Natural Gas Release" (Dec. 9, 2022) (at which the three orders are available). In the press release, PADEP said its investigations into the event are ongoing.

At the December 1, 2022, Oil and Gas Technical Advisory Board (TAB) meeting, Kurt Klapkowski, Acting Deputy Secretary for PADEP's Office of Oil and Gas Management, referenced the release event and indicated that it will inform PADEP actions in 2023. After praising Pennsylvania's current regulations, which were adopted in 1994, as "very good" in terms of the requirements they place on the gas storage industry, Klapkowski said that in response to the release event, stakeholders can probably expect "significant development of potential proposed rulemakings, potential proposed statutory changes, [and] potential proposed administrative and implementation changes." TAB Meeting at 29:10, 30:50 (Dec. 1, 2022). To achieve these goals, Klapkowski said that he expected significant interaction between PADEP and operators, as well as coordination with TAB and the Crude Development Advisory Council (CDAC). *Id.* at 32:13. CDAC, which reports to TAB, will be involved in any proposed rulemakings, guidance, or other administrative changes because storage wells are defined as conventional wells governed by 25 Pa. Code ch. 78.

Although Klapkowski did not provide specific details about PADEP's potential actions and the form of the process, he said the changes may be proposed to chapter 78 and "[e]verything is on the table for consideration in terms of making sure that this industry is regulated appropriately and the public gets protected and the environment is protected from potential incidents like this happening again in the future." *Id.* at 34:53. Prior to answering questions from attendees, Klapkowski said that PADEP is going to be spending significant effort on this in the coming weeks and months. *Id.* at 35:22. PADEP further addressed the release event and its response applicable to Pennsylvania gas storage operations, now under the new Shapiro administration, at CDAC's February 16, 2023, meeting.

TEXAS – OIL & GAS

William B. Burford, Reporter

Assignment's Broad Granting Clause Held to Have Conveyed Lease Not Specifically Described

The Hogg family executed two oil and gas leases to Three B Oil Company (Three B) covering land in Winkler County, Texas, one in 1994 and the other in 1998. The 1994 lease covered the SE¼ of Section 24, Block B-10, Public School Lands, and the 1998 lease covered the N½ of the SE¼ and the SE¼ of the SE¼ of Section 24, part of the same land covered by the 1994 lease. In 2005 Three B and others executed an assignment to Stanolind Oil & Gas Corp. (Stanolind) that assigned their interests in oil and gas leases described in Exhibit A to the assignment, which exhibit included a description of the 1994 lease but not of the 1998 lease, as well as any interests in the lands covered by the described leases, "including, but not limited to, those lands that are described on the Exhibit 'A' that is attached hereto and made a part hereof." *Mark S. Hogg, LLC v. Blackbeard Operating, LLC*, 656 S.W.3d 671, 676 (Tex. App.—El Paso 2022, no pet.) The description of the leases being assigned in Exhibit A to the assignment was followed by the statement that the leases were conveyed "INSOFAR AND ONLY INSOFAR as the above Leases cover . . . [t]he SE/4 of Section 24, Block B-10, PSL Survey . . . ." *Id.* at 680.

In 2019, Mark S. Hogg, LLC (Hogg), having acquired any interest remaining in Three B, questioned whether the 1998 lease had been assigned to Stanolind. Blackbeard Operating, LLC (Blackbeard), successor to the Stanolind interest, filed suit to establish its title to the 1998 lease, and Hogg counterclaimed for a declaration that the assignment had not included the 1998 lease. In *Hogg*, the court of appeals affirmed the trial court's summary judgment for Blackbeard.

The assignment, the court pointed out, broadly assigned not only the leases specifically described in its Exhibit A but also the assignors' interests in any lands covered by those leases. *Id.* at 679. The court could see from the 1994 lease, it said, that the lease covered all of the SE¼ of Section 24, which encompassed the land covered by the 1998 lease. *Id.* The exhibit also, the court observed, contained a specific description of all of SE¼ of Section 24. *Id.*

Editor's Note: The reporter's law firm has represented Blackbeard in this case.

Royalty Owner's Ratification of Lease Resulted in Pooling of the Royalty but Did Not Alter Owner's Interest in Production Allocable to Pooled Tract

Hahn v. ConocoPhillips Co., No. 13-21-00310-CV, 2022 WL 17351596 (Tex. App.—Corpus Christi-Edinburg Dec. 1, 2022, no pet. h.) (mem. op.), reversed the trial court's summary judgment for oil and gas lessee ConocoPhillips Company (Conoco) against Kenneth Hahn, the owner of a nonparticipating royalty interest in oil and gas production under Conoco's lease.

Hahn owned his royalty interest by reservation in a 2002 deed in which he conveyed the surface and his undivided 1/4 mineral interest in a 37.07-acre tract in DeWitt County, Texas, to William Paul and Lucille Fay Gips. The reserved interest was determined by the same court to be a fixed 1/8 royalty interest in total production from the tract in *Hahn v. Gips*, No. 13-16-00336-CV, 2018 WL 771908 (Tex. App.—Corpus Christi-Edinburg Feb. 8, 2018, pet. denied) (mem. op.). The Gipses, owners of the executive rights, in 2010 executed an oil and gas lease with Conoco, with a pooling provision, covering the mineral interest out of which the Hahn royalty interest had been created. Conoco then obtained a ratification of the lease by Hahn and pooled the tract into a 307.41-acre unit called the Maurer Unit B, on which it established production. After Hahn's royalty interest was established as 1/8 of production from the tract, Conoco took the position that Hahn's ratification of the Gips lease had the effect of subjecting his interest to the lease royalty, thereby reducing it to 1/8 of the 1/4 royalty.

The ratification, the court held, only made Hahn's royalty interest subject to Conoco's pooling; it did not convert the fixed 1/8 royalty to a "floating" 1/8 of the royalty. *Hahn*, 2022 WL 17351596, at *9. The owner of the executive right has the power to make and amend leases but, because pooling affects a nonparticipating royalty owner's entitlement to royalty payment, ordinarily lacks the power to bind the royalty owner's interest to a pooling provision absent his or her consent. *Id.* at *10. Outside a provision in the lease purporting to affect Hahn's interest, the court reasoned, there was no reason to seek his ratification. *Id.* at *11. In ratifying the lease, it concluded, Hahn agreed to render his fixed 1/8 royalty interest subject to the allocation of production according to tract acreage effected by Conoco's pooling, nothing more. *Id.* The court emphasized that it was not holding that a nonparticipating royalty owner may never diminish its interest by ratifying a lease with provisions explicitly accomplishing that result, but the Gips lease did not do that. *Id.* at *15.

Royalty Reservation Held Not Voided Under *Duhig* Doctrine

The court in *Davis v. COG Operating, LLC*, No. 08-20-00205-CV, 2022 WL 17477948 (Tex. App.—El Paso Dec. 6, 2022, no pet. h.), considered a 1939 deed from Andreas and Johanna Sessler, as grantors, to Dora Roberts, as grantee, conveying a section of land in Upton County, Texas. The underlying lawsuit was filed after James H. Davis and his associates asserted to COG Operating, LLC (COG), the oil and gas lessee of the land, ownership of a royalty interest purportedly reserved to Andreas and Johanna Sessler in the 1939 deed that COG and prior lessees had failed or refused to recognize.

The Sesslers, at the time of their deed to Dora Roberts, owned all of the surface of the section of land and all of the minerals except for an undivided 1/4 mineral interest they had conveyed in a 1926 deed to W. H. Haun. (The 1926 deed had been entitled "Royalty Deed," and in its granting clause purported to convey a "1/32 interest in and to all of the oil, gas, and other minerals" in the land, *id.* at *5, but no one disputed that its other provisions clearly expressed the intention to convey a 1/4 mineral interest.) The 1939 deed at issue included an exception after the granting clause conveying the land: "It is understood, however, that 1/32 of the oil, gas and other minerals has heretofore been conveyed to W. H. Haun, and this conveyance does not include such mineral interests so conveyed." *Id.* at *6. After that clause was the following paragraph:

> It is further understood and agreed that we [the Sesslers] reserve unto ourselves, our heirs and assigns, one-fourth (1/4) of the 1/8 royalty usually reserved by and to be paid to the land owner in the event of execution of oil and gas leases, so 1/4 of the 1/8 royalty to be paid to us, our heirs or assigns, if, as and when produced from the above described land, but it is

> understood that the mineral interest so reserved by and for us is a royalty interest only and in the event said land shall be leased for oil and gas, we are not to participate in any down payment, bonus or rentals, nor will it be necessary, in order to make a valid oil and gas lease on said land, that we join in said lease, but in case of production, we are to receive 1/4 of the 1/8 royalty, and this conveyance is executed subject to the mineral interest heretofore conveyed to W. H. Haun, and also to the 1/4 royalty interest reserved by us as hereinbefore stated.

Id. (alteration in original). The Neal family, successors to the interest of Dora Roberts, argued that the reference to the earlier conveyance to W. H. Haun was insufficient to have excepted anything more than the 1/32 mineral interest expressly mentioned so that the 1939 deed, purporting to convey all of the minerals except that 1/32 and except an additional 1/4 of the royalty, must be construed to have conveyed all of the Sesslers' 3/4 mineral interest except 1/32 of the royalty. *Id.* at *7.

Reversing summary judgment for the Neals, the court concluded that because of the estate misconception (that a lessor retained only a 1/8 interest in the minerals after granting an oil and gas lease) prevalent at the time of the 1939 deed, the fact that the 1/32 referred to as having been previously reserved was a multiple of 1/8, and the parties' own use of a double-fraction multiple of 1/8 in the 1939 deed's reservation, the intention behind the 1/32 exception was to place the grantee on notice that the deed excluded the full 1/4 mineral interest conveyed to Haun. *Id.* Thus, the deed purported to convey only 3/4 of the mineral estate before reserving 1/4 of the royalty. *Id.* at *8. In that case the rule of *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940), that a purported reservation to a grantor will not be given effect to the extent of an outstanding interest not expressly excluded from the grant, did not apply. *Davis*, 2022 WL 17477948, at *8. (The court did not discuss whether, as Davis might have argued but presumably did not, the reference to the prior conveyance to Haun should be regarded to have excepted from the deed whatever interest was in fact conveyed to Haun in the recorded deed to him even if the recited quantum of the interest had been wholly baseless.)

The court also rejected the Neals' argument that they were free of the Sessler reservation because it had long gone unrecognized, including by way of the payment of royalties, so that they should be deemed vested with the Sessler interest under the presumed-grant doctrine. *Id.* at *9. The presumed-grant doctrine only creates a presumption of ownership, according to the court's reading of the case law, "where there is a gap in title, particularly regarding ancient documents, usually from the nineteenth or very-early twentieth centuries at the latest." *Id.* Here, the parties had agreed on the chain of title up until the 1939 deed. Although they disagreed on the effect of that instrument, said the court, there were no gaps in title after that conveyance. *Id.*

"Mineral Deed" Construed Not to Include Surface

The question before the court in *In re Estate of Renz*, No. 08-21-00042-CV, 2022 WL 17721604 (Tex. App.—El Paso Dec. 15, 2022, pet. filed), was whether an instrument entitled "Mineral Deed," describing four tracts of land in West Texas, conveyed only mineral interests or instead included the grantor's interest in the surface of the land.

The deed, executed by Diana Renz, individually and as executor of the estate of her deceased husband Oliver Renz, was in favor of Oliver's three adult children as grantees. It was given as part of a settlement agreement that called for the children to be conveyed the surface estate of two particular tracts and 25% of all interests in oil, gas, and other minerals owned in Oliver's name. *Id.* at *1. The Mineral Deed's wording conveyed "the hereinafter described surface, mineral and royalty interests listed in Exhibit 'A,'" which Exhibit "A" set out legal descriptions of four tracts. *Id.* at *4. The deed then stated that "[t]he mineral interests herein conveyed is an undivided twenty-five percent (25% or 0.25) of all minerals in the name of Oliver Lee Renz, Deceased at the date of his death," that "any mineral interest conveyed" that was subject to lease would include 25% of the grantor's ownership, and that the grantees would receive 25% of the "mineral interest in the total community property." *Id.* (alteration in original).

The parties, the court concluded, intended to convey a mineral interest, but not a surface interest, in the properties described in the Mineral Deed. *Id.* at *6. Notwithstanding the deed's reference to surface, according to the court (undoubtedly influenced by the parties' settlement agreement but not relying on it), its conclusion harmonized all portions of the Mineral Deed so that, when construed as a whole, including its title, the only reasonable reading of the document resulted in a conveyance of mineral, but not surface, interests. *Id.*

Court of Appeals Reverses Summary Judgment Enforcing Mediated Settlement Agreement on Contested Farmout Rights

The parties to the appeal in *Rustic Natural Resources LLC v. DE Midland III LLC*, No. 11-21-00033-CV, 2022 WL 17684305 (Tex. App.—Eastland Dec. 15, 2022, no pet. h.), had asserted claims against each other in the underlying litigation regarding their respective rights under farmout agreements and assignments executed in the 1960s and 1970s. Those involved rights under oil and gas leases on land in Midland County, Texas, and had been made by parties referred to as the Baxter Group in favor of John L. Cox. After each side filed motions for summary judgment that were never ruled upon, Rustic Natural Resources LLC, Rustic Land Holdings, LLC, and Tortoise Holdings, LLC, having acquired the Baxter Group's retained rights in the land, and DE Midland III LLC (DE Midland) and Endeavor Energy Resources, L.P. (Endeavor), the successors to the Cox interests, entered into a brief mediated settlement agreement (MSA) in an effort to settle the dispute.

The MSA, in pertinent part, called for the parties to execute several documents by an agreed deadline, including a stipulation and cross-conveyance and joint operating agreements (JOAs) "based on" the 2015 AAPL Model Form. After executing the MSA, the parties began negotiating the terms of those required documents. After three extensions of the MSA's deadline, the contentious negotiations ultimately failed, whereupon the trial court granted DE Midland's and Endeavor's motion for summary judgment to enforce the MSA and require the appellants to execute the most recent versions of the disputed documents the MSA called for. The court of appeals reversed, holding that there existed a fact issue whether the MSA was enforceable.

"An agreement to enter into contracts in the future is enforceable," the court observed, "if the agreement addresses all of its essential terms with 'a reasonable degree of certainty and definiteness.'" *Id.* at *4 (quoting *Fischer v. CTMI, LLC*, 479 S.W.3d 231, 237 (Tex. 2016)). "Whether a settlement agreement fails for lack of essential terms is a question of law," it went on, "unless the agreement is ambiguous, or the surrounding facts and circumstances demonstrate a factual issue." *Id.* It is difficult to definitively establish which terms of the agreement are essential, the court acknowledged, the critical inquiry being whether the parties intended for their agreement to be binding even in the absence of an agreement on the remaining unresolved terms. *Id.* at *4–5.

The crux of the appeal, in the court's view, was the content of the model form JOAs the MSA required. *Id.* at *5. The MSA clearly specified that the JOAs would be "based on" the model form, but beyond certain specific conditions set out in the MSA, it did not elaborate on other terms and conditions to be contained in the contemplated JOAs. *Id.* JOAs are complex documents, the court pointed out, that, among other things, require the parties to populate various fields and choose among various "options." *Id.* The parties had attempted for months, but ultimately were unable, to negotiate what additional provisions the JOAs should include. *Id.* It was unclear from the MSA, the court concluded, whether the parties intended for the "based on" language to allow one party to unilaterally populate the required fields and select the options or instead intended that the MSA be merely an unenforceable "agreement to agree." *Id.* Either construction was reasonable, and a question of fact therefore existed. *Id.* Remand to the trial court for a determination of that question was necessary notwithstanding DE Midland's and Endeavor's contention that the JOAs were not essential to the MSA's primary purpose of resolving the underlying title dispute. *Id.*

For similar reasons the court held improper the trial court's order that the appellants execute the agreements that DE Midland and Endeavor had proffered during the settlement negotiations. *Id.* at *6. It also declined to consider DE Midland's and Endeavor's alternative argument that the court should rule for them on the merits of the underlying title dispute. *Id.* at *8. Although the title issues had been before the trial court on motions for summary judgment, that court had only ruled on enforcement of the MSA. *Id.*

Editor's Note: The reporter's law firm has been involved in this case on behalf of persons and entities affiliated with prior owner John L. Cox.

Foreclosure of Old Judgment Lien Against Oil and Gas Interests Upheld

Following a jury trial in 1997, Patricia Love Stephens and other individuals obtained a money judgment in their breach of contract, fraud, and conversion action against brothers Frank and Michael Cass, the owners of, among other properties, working interests in an oil and gas lease called the Branch lease covering land in Reagan County, Texas. In *Hibernia Energy III, LLC v. Ferae Naturae, LLC*, No. 08-21-00092-CV, 2022 WL 17819744 (Tex. App.—El Paso Dec. 20, 2022, no pet. h.), the court upheld the trial court's summary judgment for the foreclosure of the lien held by Ferae Naturae, LLC (Ferae Naturae), based on the 1997 judgment, against Hibernia Energy III, LLC (Hibernia), owner of the leasehold interest in the Branch lease that had once been owned by the Cass brothers.

The judgment creditors had obtained and filed an abstract of judgment in Reagan County in 2008, after the judgment had become final following several appeals, thus imposing a lien against property owned by the Casses in the county, and the assignee of the judgment, Patco Energy, Ltd. (Patco), had kept the lien alive by obtaining and filing another abstract of judgment in 2018. Patco then made a partial assignment of the judgment to Ferae Naturae in August 2019, limited to any interests in oil, gas, and other minerals owned by the Casses in Reagan County. Ferae Naturae filed suit against Hibernia in January 2020 to foreclose the judgment lien against the leasehold under the Branch lease that it had acquired from the Casses, and the trial court, finding that the amount still due on the judgment, with interest, amounted to more than $50 million, granted summary judgment to Ferae Naturae for foreclosure of the judgment lien, ordering the sale of Hibernia's leasehold.

The court of appeals first held that the trial court had not erred in failing to order other judgment creditors joined as parties to the foreclosure suit. *Id.* at *8. While other creditors had interests in the judgment and a mutual interest in collecting it, the court observed, none of them had an interest in Ferae's judgment lien. *Id.* And Hibernia had presented no evidence to suggest that the sale of Hibernia's interest in the Branch lease would have impacted the other creditors' right to collect on their shares of the judgment, especially given its extremely large amount. *Id.*

Beyond evidentiary issues that the court found not to have been preserved for appeal, the crux of Hibernia's remaining argument was that it had raised a genuine issue of material fact whether the underlying judgment against the Casses had been partially or fully satisfied by payments the plaintiffs or their assignee, Patco, had previously received from the third parties. The sum of $20.2 million that Patco had received in 2016 for the sale of oil and gas leases it owned in Upton County, Texas, which included any interest Patco had in judgment liens against the Casses in the county, Hibernia argued, should have been credited against the underlying judgment. *Id.* at *12. The court disagreed, noting that the sale of a judgment, or a partial interest in a judgment, is not considered a credit against the judgment; rather, it gives the transferee the right to maintain any action the transferor might have brought against the judgment debtor for collection. *Id.* at *14. In other words, said the court, "an assignment keeps the judgment alive and in full force by giving the assignee the right to collect on it." *Id.*

On the other hand, a $300,000 payment the judgment creditors had received from PCORE Exploration and Production, LLC, in exchange for a release of the judgment lien against an oil and gas lease in which Frank Cass had held an interest possibly should have been credited against the amount of the judgment. *Id.* at *15. That transaction was not a sale or assignment of an interest in the underlying judgment, based on the record before the court, but a release of the lien itself. *Id.* Nothing in the record, though, supported a finding that the amount of such a credit would have satisfied the underlying judgment or extinguished Ferae's judgment lien, according to the court. *Id.* Finally, a declaration by Patricia Stephens, one of the plaintiffs and general partner of Patco, that her deceased landman had left her 16 boxes of documents that might contain documents relating to properties formerly belonging to Frank Cass was insufficient to have raised a fact question on the issue of whether the judgment had been satisfied. *Id.* at *16. Hibernia had failed, the court held, to timely move for a continuance to afford it time for discovery of the boxes' contents or otherwise adequately complain to the trial court about its inability to review them. *Id.*

Assignment Construed to Include All Depths Owned by Assignor, Not Limited to Depths Set Out in Land Descriptions

The court in *Citation 2002 Investment LLC v. Occidental Permian, Ltd.*, No. 08-21-00029-CV, 2022 WL 17850986 (Tex. App.—El Paso Dec. 22, 2022, no pet. h.), construed a 1987 assignment of oil and gas leases from Shell Western E&P, Inc. (Shell Western), predecessor to the interest, if any, of Occidental Permian, Ltd. (Occidental), to Citation 1987 Investment Limited Partnership, predecessor to the interests of Citation 2002 Investment LLC (Citation) and Endeavor Energy Resources, L.P. (Endeavor), in the leases included in the assignment.

The assignment assigned, according to its granting clause, "all of Shell Western's right, title and interest in and to the oil and gas fee, mineral and leasehold estates described in EXHIBIT A, attached hereto" and in and to, among other things, any "working interests, subleases and rights above or below certain footage depths or geological formations, affecting the property described in EXHIBIT A." *Id.* at *4. A later paragraph stated that the intent of the assignment was to convey "all rights and interests now owned by SHELL WESTERN, its successors and assigns, in the leases and other rights described herein, regardless of whether the same may be incorrectly described or omitted from Exhibit A . . . ." *Id.* Exhibit A to the assignment described, in columnar form, numerous oil and gas leases by date, recording information, and lessor and lessee, followed by columns for "tract description" and descriptions of agreements to which the leases were subject. *Id.* at *5. Some of the lease descriptions, in addition to describing tracts of land that presumably were covered by the leases, included descriptions of certain depths, such as "down to 8,393 feet." *Id.* Occidental argued that those descriptions of only certain depths limited the Shell Western assignment to the specifically described depths, so that rights in any deeper depths then owned by Shell Western had passed to Occidental. *Id.* Citation and Endeavor maintained that the assignment included all depths owned by Shell Western at the time of the assignment, notwithstanding any depth references. *Id.* Reversing the trial court's summary judgment, the court of appeals agreed with Citation and Endeavor.

The court focused on the assignment's granting language and its statement of intent. Exhibit A provided information relevant to the parties' agreement, it explained, referencing third-party interests to which the leases being conveyed were subject, but it was not intended to preclude a transfer of all of Shell Western's interest in the leases. *Id.* at *6. It rejected Occidental's argument that the assignment's paragraph addressing intent was merely a Mother Hubbard clause meant to clean up small errors. *Id.* at *7. Nothing in the paragraph discussed strips of land, as Mother Hubbard clauses are intended to encompass, or limited the paragraph's application to small errors, the court pointed out. *Id.*

When all of the assignment's provisions were harmonized, including Exhibit A, the court concluded, its express language demonstrated an intent to convey all of Shell Western's interest then owned in the leases. *Id.* The references to depth in Exhibit A did not limit the conveyance but simply described portions of the leases that were subject to some type of third-party agreement. *Id.*

Summary Judgment for Unpaid Operating Expenses Affirmed

Siana Oil and Gas Co. LLC (Siana) was a non-operating working interest owner in oil and gas properties in Webb County, Texas, operated by White Oak Resources VI, LLC, through its affiliate and contract operator, White Oak Operating, LLC (collectively, White Oak). Siana stopped paying White Oak's joint interest billings after White Oak refused to negotiate a reduction in the fixed monthly rate per well chargeable for overhead expenses under the applicable operating agreement. In *Siana Oil & Gas Co. v. White Oak Operating, LLC*, No. 01-21-00721-CV, 2022 WL 17981572 (Tex. App.—Houston [1st Dist.] Dec. 29, 2002, no pet. h.) (mem. op.), the court of appeals affirmed summary judgment for White Oak on its breach of contract claim and against Siana's counterclaims.

Most of the court's opinion relates to procedural matters. Its significance for oil and gas practitioners, if any, resides in the court's treatment of Siana's counterclaims. Siana, the court held, cited no authority for its argument that it had a viable unjust enrichment claim notwithstanding the existence of an express contract governing the subject matter. *Id.* at *15. It also had not produced any evidence countering White Oak's no-evidence motion for summary judgment against Siana's assertion that White Oak breached its duty to act as a prudent operator under the operating agreement by failing to reduce fixed rates, thereby rendering some wells unprofitable. *Id.*

Reservation of "One-Half of the Usual One-Eighth Royalty" Really Means "One-Half of Any Lease Royalty"

The court in *Bridges v. Uhl*, No. 08-21-00130-CV, 2022 WL 17985705 (Tex. App.—El Paso Dec. 29, 2022, no pet. h.), construed a 1940 deed conveying a section of land in Upton County, Texas, subject to the following reservation to the grantors:

> Grantors, their heirs and assigns, reserve unto themselves, their heirs and assigns, an undivided one-half (1/2) of the usual one-eighth (1/8) royalty in, to and under the above[-]described land, covering the oil, gas and other minerals, said royalty reservation, however being wholly non-participating, . . . if, as and when production is obtained, grantors, their heirs and assigns, shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one-sixteenth (1/16) of the total production, it being the intention that this royalty reservation is wholly non-participating in bonuses, delay rentals, etc.

Id. at *2.

After Concho Operating, LLC, established production under oil and gas leases that provided for royalty to be paid at the rate of 1/4 of the oil and gas produced, it calculated the interest payable to Mary Ann Bridges, the successor to the royalty interest reserved in the 1940 deed, as 1/16 of production. Contending that she was instead entitled to 1/2 of the 1/4 lease royalty, she sued the numerous owners of the mineral interest burdened by the royalty. Both sides filed motions for summary judgment, and the trial court granted that of the mineral owners who asserted that the royalty interest was a fixed 1/16 of production. The court of appeals reversed and rendered judgment declaring the royalty to be a "floating" 1/2 of the current lease royalty.

The court's rationale for its conclusion is not made altogether plain. Because, apparently, the standard royalty rate under oil and gas leases executed at the time of the deed was 1/8 and because the reserved interest was stated as a double fraction that was a multiple of 1/8, the court declared that when the deed was interpreted holistically, not mathematically, the descriptive language in the text, as well as the deed's overall structure, confirmed the grantors' intent to reserve a "1/2 floating royalty interest" (evidently meaning a floating 1/2 of the royalty), not a 1/16 fixed royalty interest. *Id.* at *8. The court explained away the deed's express reference to the interest as 1/16 of total production on the basis that it was set off by a comma, indicating it was a nonrestrictive dependent clause on which no emphasis should be placed. *Id.*

The court's opinion relies largely on *U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*, 551 S.W.3d 148 (Tex. 2018), and *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016), but seems not to recognize that those cases involved instruments that, unlike the wording of the 1940 deed at issue here, expressed the interest being created in terms that conflicted with each other, some wording pointing to a fixed-royalty intention and some to a floating-royalty one, requiring the court to harmonize the apparent conflicts in arriving at a floating-royalty interpretation. *Laborde* and *Hysaw* did not overrule the many cases in which wording similar to that of the 1940 deed has been construed to create a fixed royalty interest, however, and the opinion nowhere explains whether or why those cases no longer apply as precedent.

The court's opinion comments that Texas courts have long noted that fixed versus floating royalty disputes are common when a deed contains double fractions or two or more differing fractions. *Bridges*, 2022 WL 17985705, at *6. Actually, this case and another recent one, *Hoffman v. Thomson*, 630 S.W.3d 427 (Tex. App.—San Antonio 2021, pet. filed), *see* Vol. XXXVIII, No. 2 (2021) of this *Newsletter*, are the only two Texas appellate decisions holding that a double fraction, standing alone without other indicators of a contrary intention within the instrument's wording, expresses the intention to create a floating royalty interest rather than a fixed one. (Oddly, the opinion here mentions *Hoffman* only in passing, without a full citation.) At the time of this report the petition for review in *Hoffman* has been before the Texas Supreme Court for well over a year without being granted or denied. Cases similar to the reported one have arisen frequently in the last several years; possibly some clarification of the law is forthcoming.

Editor's Note: The reporter's law firm has represented some of the defendants, mineral owners whose interests are subject to the *Bridges* royalty, in this case.

Venue in Dispute over Alleged Overpayment for Production Held Mandatory at Location of Property

In re Brooks, No. 14-22-00720-CV, 2023 WL 139185 (Tex. App.—Houston [14th Dist.], orig. proceeding) (per curiam) (mem. op.), decided the appropriate venue for a suit between Melissa Blassingame Brooks, the owner of a mineral interest in land in Howard County, Texas, and Surge Operating LLC (Surge), the operator of wells producing oil and gas from the land.

Surge began paying Brooks royalty on production under two leases from her in 2017, apparently consistent with division orders executed by Brooks, prepared by Surge in Harris County, Texas, and returned to it there. Surge filed suit against Brooks in Harris County, alleging that it had overpaid royalty to her, amounting to over $500,000, between 2017 and 2019 because of a clerical error by which it had credited to Brooks a much larger interest in part of the land than she actually owned. Surge claimed the right to be reimbursed for the overpayment, asserting claims for money had and received and for breach of contract based on the division orders' provisions that Brooks must reimburse Surge for payments made to her if she did not have merchantable title to the product sold. Brooks responded with a motion to transfer venue to Howard County, coupled with counterclaims alleging that Surge's initial calculation had been correct and, further, that the underlying leases had terminated before production began so that she was entitled to an even greater share of production.

The court's decision turned on whether the mandatory venue statute, Tex. Civ. Prac. & Rem. Code § 15.011, applied to the facts of the case. Section 15.022 states:

> Actions for recovery of real property or an estate or interest in real property, for the partition of real property, to remove encumbrances from the title to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located.

That determination, according to the court, depends on the "essence" of the parties' dispute. *In re Brooks*, 2023 WL 139185, at *3.

Brooks argued that whether Surge was entitled to recovery depended on the amount of her mineral interest, and the court found support for that position in Surge's pleadings. Surge had alleged that Brooks lacked merchantable title, entitling it to reimbursement for payments for production attributable to an "interest she did not own." *Id.* Unlike *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368 (Tex. 2001), a case relied upon by Surge in which the basis for calculation of the lessor's royalty was at issue but the parties did not dispute the ownership or extent of the underlying royalty interest, the parties' dispute here hinged on the extent of Brooks's ownership in the Howard County property. *In re Brooks*, 2023 WL 139185, at *4. The essence of Surge's claims, the court concluded, made Howard County the mandatory venue for their resolution. *Id.*

Deed's Clause Subjecting Mineral Interest to Existing Leases Held to Subject It Also to Outstanding NPRI

The court in *Brooke-Willbanks v. Flatland Mineral Fund, LP*, No. 11-21-00105-CV, 2023 WL 162773 (Tex. App.—Eastland Jan. 12, 2023, no pet. h.), construed a mineral deed from Kay Brooke-Willbanks to Flatland Mineral Fund, LP, and Flatland Sidecar, LLC (collectively, Flatland). Prior to the deed Brooke-Willbanks had owned a 45% mineral interest in a 320-acre half-section of land in Howard and Martin Counties, Texas, proportionately subject to outstanding nonparticipating royalty interests (NPRIs). The deed to Flatland conveyed an undivided 72 "net mineral acres" in the land, with the customary provision that the conveyance was made subject to any valid and subsisting oil and gas lease or leases and conveyed the stated interest in the royalties and other benefits accruing under those. It did not include any reference to previously reserved or conveyed mineral or royalty interests.

Brooke-Willbanks sued Flatland for a judgment that her deed had conveyed one-half of her mineral interest to Flatland, subject to a proportionate one-half of the outstanding NPRIs. Flatland counterclaimed and was granted summary judgment that its interest was free of the NPRIs so that Flatland was entitled to a full 72/320 of the 3/16 royalty provided for in the current lease. The court of appeals agreed with Brooke-Willbanks and reversed.

The court focused on the lease's "subject to" clause, making it subordinate to any existing oil and gas lease. That clause, the court concluded, limited Flatland's interest to the same interest in the royalties associated with the 72-acre interest that Brooke-Willbanks had possessed at the time of her deed, so that it was burdened by a proportionate share of the NPRIs. *Id.* at *5.

The rationale for the decision is not made especially clear. The court's opinion cites *Wenske v. Ealy*, 521 S.W.3d 791, 797 (Tex. 2017), for the proposition that a severed royalty interest "generally would burden the entire mineral estate," *Brooke-Willbanks*, 2023 WL 162773, at *5 (quoting *Wenske*, 521 S.W.3d at 797), without observing that the deed at issue in *Wenske*, unlike the Brooke-Willbanks deed to Flatland, was made expressly subject to prior burdens. And it rejected Flatland's reliance on *Selman v. Bristow*, 402 S.W.2d 520 (Tex. Civ. App.—Tyler 1966), *writ ref'd n.r.e. per curiam*, 406 S.W.2d 896 (Tex. 1966), a case that might seem to be practically controlling authority, on the basis that *Selman* had followed *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940), and that the Texas Supreme Court, in *Trial v. Dragon*, 593 S.W.3d 313, 318

(Tex. 2019), had held *Duhig* to be "narrow in scope and confined to the specific facts of that case." *Brooke-Willbanks*, 2023 WL 162773, at *5. In *Trial*, though, the supreme court in no way questioned the continued application of *Duhig* to similar circumstances and in fact explained at length how the case differed from *Duhig*. *Id.*

The opinion here offers no further explanation of why *Selman* and *Duhig* should not be followed other than that, in its view, the "subject to" clause in the deed construed here expressed the intent to convey a lesser interest than the full 72-acre interest. *Id.* at *6. Here, the court asserted, the conveyance was made *subject to* "the above stated interest of Grantor's interest in and to the . . . royalties . . . accruing or to accrue under said lease." *Id.* It seems an unwarranted stretch to construe wording that makes a plain grant of a stated mineral interest subject to a lease, without mention of outstanding royalty interests burdening the grantor's interest, to subject the grant to those unmentioned burdens.

Reservation Held 1/16 Mineral Interest, Entitling Owner to 1/16 of Lease Royalty, Not 1/16 Royalty Interest in Total Production

The court in *Devon Energy Production Co. v. Enplat II, LLC*, No. 08-00217-CV, 2023 WL 362014 (Tex. App.—El Paso Jan. 23, 2023, no pet. h.), construed a 1940 deed from Rosa Thomason Harris and J.M. Harris to John Lopoo, conveying four sections of land in Reeves County, Texas. The deed included the following reservation to the grantors:

> However, this conveyance is made with the express understanding that there is reserved to the Grantors, their heirs and assigns an undivided one-sixteenth (1/16) of any and all oil, gas or other mineral produced on or from under the land above described. John Lopoo [Grantee], or his heirs and assigns shall have the right to lease said land for mineral development without the joinder of Grantors or their heirs and assigns, and to keep all bonus money, as well as all delay rentals, but when, if and as Oil, Gas or other mineral is produced from said land, one-sixteenth (1/16) of same, or the value thereof, shall be the property of Grantors, their heirs and assigns.

Id. at *1 (alteration in original).

Before 2017, the successors to the Harris interest had been credited with 1/16 of the 1/5 royalty under the current oil and gas lease, or 1/80 of production. When Enplat II, LLC (Enplat II), acquired 2/3 of the Harrises' reserved interest that year, though, it claimed that it amounted to a 1/16 royalty interest in total production, not just 1/16 of the current lease royalty. In Enplat II's declaratory judgment action against Devon Energy Production Co. and others (collectively, Devon), who had succeeded to the Lopoo interest, the trial court granted Enplat II's motion for summary judgment and denied that of Devon. The court of appeals reversed, holding that the deed had reserved a 1/16 mineral interest, entitling the owner to only 1/16 of the royalty.

Enplat II pointed out that rather than reserving an interest in the minerals "in and under" the property, words traditionally associated with a mineral interest, the 1940 deed stated that the reservation was in the minerals "produced" on or from the land. *Id.* at *4. That phraseology, it contended, reflected the grantor's intent to reserve the minerals after they were produced in that it was similar to that of deeds construed in cases holding that words such as "produced and saved" denote a royalty interest. *Id.* The court was unpersuaded. "Produced and saved" in a deed, the court remarked, "refers to the minerals *after* they have already been produced and made ready for market, thereby indicating that the interest is in the actual production rather than in the minerals themselves," whereas the 1940 deed did not use those terms, which to the court was a material distinction. *Id.* at *5. The 1940 deed did, however, include words the court found to be similar to the "in and under" language traditionally associated with a mineral interest, particularly "produced on and from under the land." *Id.*

The court agreed with Devon that the remaining provisions of the reservation clause, dealing with the right to lease and to receive bonuses and delay rentals, served to demonstrate the parties' intention that the reserved interest be treated as a mineral interest. *Id.* at *6. Like the wording construed in *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795 (Tex. 1995), and *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986), the clause's segregation of the attributes of the mineral estate other than the right to receive royalty (which the court said is referred to as "attribute-stripping," although it does not appear that term has been used in any prior appellate decision) did not transform the reserved interest into a royalty interest. *Devon*, 2023 WL 362014, at *6. *Temple-Inland Forest Products Corp. v. Henderson Family Partnership, Ltd.*, 958 S.W.2d 183 (Tex. 1997), a case on which Enplat II placed a great deal of reliance, made it clear that the attribute-stripping approach of *French* and *Altman* was still good law, the court pointed out, and the *Temple-Inland* court had found it significant that the term "royalty" interest appeared several times in the deed construed in that case to have reserved a royalty, unlike the 1940 deed at issue here, which never called the interest royalty. *Devon*, 2023 WL 362014, at *7. The interpretation of the 1940 deed to have reserved a mineral interest, the court concluded, best harmonized and gave meaning to all provisions of the deed. *Id.* Enplat II's interpretation, on the other hand, would create multiple redundancies and inconsistencies: if the Harris grantors had intended to reserve a royalty interest, there was no reason for them to apportion the various attributes of the mineral estate between themselves and their grantee. *Id.*

The court acknowledged that the final clause of the deed—that the grantors would be entitled to the stated interest in the minerals "if and as Oil, Gas or other mineral is produced from said land"—was indicative of a royalty interest. *Id.* The court would agree that the grantors intended to reserve a royalty interest, it said, if that language were the only provision in the deed; but it was not. *Id.* at *8.

Editor's Note: The reporter's law firm has represented parties included in the Devon group in this case.

WYOMING – OIL & GAS

Jamie Jost & Amy Mowry, Reporters

Wyoming Supreme Court Affirms Award of Double Damages Against Oil and Gas Operator Under Split Estate Act

EOG Resources, Inc. v. JJLM Land, LLC, 2022 WY 162, 522 P.3d 605, considered whether an award of double damages for an oil and gas operator's underpayment under a surface use and damage agreement (SUA) was authorized by section 30-5-405(b) of Wyoming's Split Estate Act, among other issues. The case was originally filed in the District Court of Campbell County by JJLM Land, LLC (JJLM), the surface owner, against EOG Resources, Inc. (EOG), the oil and gas operator. JJLM sued EOG for breach of its contractual obligation under the SUA and sought double damages under Wyo. Stat. Ann. § 30-5-405(b). The court granted JJLM's motion for summary judgment and awarded double damages under the statute. EOG appealed.

The facts presented show the SUA was entered into by the parties' predecessors in February 2011. After it became the surface owner, JJLM discovered that between 2011 and 2020, certain installment amounts due under the SUA were insufficiently paid or unpaid. JJLM demanded EOG cure the deficiencies, subject to a suit for double damages under section 30-5-405(b). EOG failed to timely cure the alleged default, and JJLM filed its complaint on December 8, 2020. *EOG Res.*, 2022 WY 162, ¶¶ 3–6.

In its defense, EOG admitted it owed the amount claimed by JJLM, but that section 30-5-405(b) applies only when an operator does not pay *any* portion of an installment amount. Since EOG did pay a portion of the amounts due, EOG claimed JJLM was not entitled to double damages on those payments for which a partial payment was made. EOG also argued JJLM's claim was barred by the applicable statute of limitations and/or laches. The district court disagreed, rejecting EOG's argument that either the one-year statute of limitations under Wyo. Stat. Ann. § 1-3-105(a)(v)(D) or laches applied to JJLM's double damages claim. EOG filed a motion to reconsider the damages award under Wyo. R. Civ. P. 59(e) and also appealed the district court's summary judgment award in favor of JJLM while its Rule 59(e) motion was pending. The district court denied EOG's Rule 59(e) motion, and EOG did not amend its notice of appeal to include the denial of that motion. *EOG Res.*, 2022 WY 162, ¶¶ 8–11.

The Wyoming Supreme Court agreed with the district court that section 30-5-405(b) applies to underpayments of amounts due under SUAs as well as to non-payments of those amounts. The court cited the language of section 30-5-405(b), which states:

> An oil and gas operator who *fails to timely pay* an installment under any annual damage agreement negotiated with a surface owner is liable for payment to the surface owner of twice the amount of the unpaid installment if the installment payment is not paid within sixty (60) days of receipt of notice of failure to pay from the surface owner.

Id. ¶ 14. The court agreed with the district court's determination that

> the plain meaning of the statutory word "fails" is "to leave undone," "to be deficient in," or "to be unsuccessful." The court decided: "Whichever variation on the definition one chooses, each leads to the same conclusion[.] If an oil and gas operator like EOG does not pay an installment, whether it fails to do so in whole or in part, as [it is] required to do . . . under an SUA, and does not cure that deficiency within sixty days of being notified, . . . § 30-5-405(b) mandates payment to the surface owner of twice the unpaid amount."

Id. ¶ 15 (alterations in original). Applying standard rules of legislative interpretation, the court found section 30-5-405(b) to be unambiguous, *id.* ¶ 17, and that the definition of "fail" advanced by the district court, as applied to EOG's insufficient payments, supported the district court's "plain and ordinary interpretation" of the statute, *id.* ¶ 19 (quoting *WPX Energy Rocky Mountain, LLC v. Wyo. Dep't of Rev.*, 2022 WY 104, ¶ 27, 516 P.3d 449). The court further concluded, contrary to EOG's arguments, that the statute was not ambiguous, *id.* ¶ 20, unconstitutionally vague, *id.* ¶ 21, inconsistent, *id.* ¶ 22, or contrary to the legislature's intent, *id.* ¶ 23. The court observed that

> [g]iven the remedial nature of § 30-5-405(b), the legislature obviously intended it to ensure surface owners are timely paid the full and correct amount to which they are entitled under a surface use agreement. If an operator disputes the amount owed, it can avoid double damages by paying under protest and suing the surface owner to recover any overpayment.

Id. ¶ 24.

As to EOG's statute of limitations argument, the court disagreed that JJLM's claim was barred by the one-year statute of limitations provided in section 1-3-105(a)(v)(D) for penalty or forfeiture under a statute. *Id.* ¶ 26. The court found that under the plain language of section 30-5-405(b) "a cause of action for double damages does not accrue until (1) the operator fails to timely pay or underpays an installment, (2) the surface owner provides notice of the default, and (3) the operator fails to cure the default within 60 days of receiving the notice." *Id.* ¶ 29. In this case, the cause of action did not accrue until JJLM sent notice of default of the insufficient payments on September 14, 2020, *and* EOG did not cure that default within 60 days of such notice. Suit was filed in this case less than one month after EOG's failure to cure, within both the one-year statutory period under section 1-3-105(a)(v)(D) and the 10-year statutory period under section 1-3-105(a)(i) for breach of contract, which the court found to be the applicable statutory period for an operator's failure to timely pay an installment under an SUA. *Id.* ¶ 30.

The court dispensed with EOG's equitable laches defense, which "bars a claim when a party has delayed in enforcing its rights to the disadvantage of another." *Id.* ¶ 33 (quoting *Tram Tower Townhouse Ass'n v. Weiner*, 2022 WY 58, ¶ 44, 509 P.3d 357). The defense of laches requires (1) "inexcusable delay"; and (2) "injury, prejudice, or disadvantage to the defendants or others." *Id.* (quoting *Tram Tower*, 2022 WY 58, ¶ 44). The court agreed with the district court's finding that EOG failed to show both that JJLM inexcusably delayed in bringing its lawsuit given the complexity of the surface areas involved, and that EOG was prejudiced by any delay, noting EOG had an opportunity to cure and failed to do so months after receiving notice of its payment failures. *Id.* ¶¶ 34–38.

Finally, the court acknowledged its lack of jurisdiction to consider EOG's Rule 59(e) motion, since EOG did not amend its appeal notice to include that issue or identify the judgment or order being appealed, pursuant to Wyo. R. App. P. 2.02(c) and 2.07. *Id.* ¶¶ 39–41. The court also awarded JJLM its attorney's fees and costs, as provided under the SUA, in light of EOG's failure to appeal that award by the district court. *Id.* ¶ 44. The amount of fees and costs is subject to the submission of proper documentation by JJLM. *Id.* ¶ 45.

CANADA – OIL & GAS

Sander A.J.R. Grieve, Martin Ignasiak, Christopher J. Doucet, Geoffrey Davis, Evan Hall & David Wainer, Reporters

Canada's Plan to Capitalize on Critical Minerals

The federal government of Canada released *The Canadian Critical Minerals Strategy* (Strategy) on December 9, 2022, a comprehensive multi-disciplinary policy package designed to facilitate the production and processing of critical minerals that are vital to the green and digital economy. The federal government committed to, among other things, reviewing the regulatory processes and red tape faced by Canadian-regulated mining companies attempting to bring mines from exploration to production, with a view to placing Canada at the forefront of the increasing global demand for clean energy. The Strategy notes that "[c]ritical minerals represent a generational opportunity for

Canada's workers, economy, and net-zero future," and sets out six key objectives to seize that opportunity:

- driving research, innovation, and exploration;
- accelerating project development;
- building sustainable infrastructure;
- advancing reconciliation with Indigenous peoples;
- growing a diverse workforce and prosperous communities; and
- strengthening global leadership and security.

To be considered "critical" under the Strategy, a mineral must be:

- essential to Canada's economic security and its supply is threatened;
- required for Canada's national transition to a low-carbon economy; or
- a sustainable source of highly strategic critical minerals for Canada's partners and allies.

Using that analysis, Canada has identified 31 critical minerals; however, the Strategy will initially focus on six minerals deemed to have the greatest potential to spur Canadian economic growth: lithium, graphite, nickel, cobalt, copper, and rare earth elements. The Strategy also notes that Canada is the only Western nation that has an abundance of lithium, graphite, nickel, and cobalt, further placing Canada in a position to capitalize on the green and digital economy.

Regulation: Revamp, Not Remodel

Although the development of these resources falls under provincial jurisdiction pursuant to the Canadian Constitution's division of powers, the Government of Canada has established its own regulatory regime that applies to most mining projects. As a result, Canadian-regulated mining companies may be required to seek approvals from both the federal and provincial governments, and deal with different regulatory regimes with different requirements depending on the jurisdiction in which they are currently operating. Further, Canada's high environmental and social standards result in rigorous federal, provincial, and territorial assessments. The Impact Assessment Agency of Canada (IAIC), the federal entity charged with responsibility for environmental assessments of major infrastructure projects including critical mineral mines, indicates that a mine project may be expected to take about five years to complete from initial application. The Strategy outlines that it can sometimes take up to 25 years for a mining project to become operational under the current regime. The Strategy is committed to reviewing the IAIC's processes to increase the efficiency of mining project construction applications. In this review, the Strategy commits to identifying opportunities for advancing clean growth projects (including critical mineral mines) in a timely and predictable manner, while safeguarding the interests of Canadians, protecting the environment, and respecting the rights of Indigenous peoples.

Under the Strategy, the current federal regime and regulatory framework will not be overhauled; however, the Strategy does aim to create regulatory certainty by seeking to harmonize the regulatory and permitting regime for mine project applications. For major development projects that would ordinarily require both federal and provincial impact or environmental assessments, the Government of Canada has committed to meeting the "one project, one assessment" approach that has been called for by industry participants in recent years, which will be a welcome development to both Canadian-regulated mining companies and foreign investors alike. The Critical Minerals Centre of Excellence (CMCE) is mandated to assist project developers to navigate regulatory processes and access federal support measures and will lead the development and coordination of Canada's policies and programs on critical minerals in collaboration with the federal, provincial, and territorial governments.

Executing the Strategy will require collaboration between the federal, provincial, and territorial governments to harmonize regulatory regimes across provincial and territorial lines and reduce red tape in order to capitalize on the value potential of these critical minerals. A proposed result of this alignment is that world-class critical mineral value chains, and all the activities across that chain, are undertaken in Canada by default. The Strategy outlines the benefits having a domestic value chain will provide, including: increased foreign investment, reducing Canada's dependency on foreign supply chains, which can often be unpredictable, domestic sustainability, and positioning Canada as a world leader in the industry. The Strategy also seeks to explore regulatory harmonization opportunities with the United States, which would only improve the North American critical mineral value chain.

Capitalization: Credits, Not Carbon

The Strategy further lays out the importance of developing a clear and prudent strategy with respect to critical minerals in order to properly position Canada amongst the global leaders in supplying clean energy and the critical minerals essential to foster the necessary transition. Between the North American zero-emission vehicle market and the battery production supply chain alone, 300,000 new jobs will be created by 2030 to fulfill the increasing demand for critical minerals in these sectors. To capitalize on this opportunity presented by the Canadian energy sector, Canada's federal government also committed to providing financial and administrative support to accelerate the development of strategic projects in critical mineral mining. The Government of Canada's 2021 and 2022 budgets included C$1.5 billion for the Strategic Innovation Fund to support critical minerals projects targeting manufacturing, processing, and recycling processes, C$40 million to support northern regulatory processes in reviewing and permitting critical minerals projects, and C$21.5 million to support the CMCE to develop federal policies and assist project developers through regulatory processes. Further financial support is promised via a 30% Critical Mineral Exploration Tax Credit, almost C$80 million toward public geoscience and exploration, C$47.7 million for targeted upstream critical mineral research and development, and C$144 million for critical mineral research and development and the deployment of technologies and materials to support critical mineral development.

The Government of Canada is also developing a national benefits sharing framework to ensure Indigenous communities directly benefit from critical minerals projects that take place within their territories.

Looking Ahead

Moving forward, the Strategy notes that it will be an iterative document and requires a coordinated approach among multiple partners and stakeholders, and will include input from international stakeholders including the United States under the Canada-U.S. Joint Action Plan on Critical Minerals announced in 2020, the European Union through the Canada-EU Strategic Partnership on Raw Materials, and Japan through the Canada-Japan Sectoral Working Group on Critical Minerals. A draft action plan to implement the Strategy is legislated for release in 2023, which is expected to include specific policy changes that will promote regulatory certainty, advance Indigenous reconciliation, and balance environmental protection. Overall, the Strategy represents an ambitious statement by the Canadian government to position the country as a leader in the critical mineral industry. If Canada can establish a harmonized regulatory framework and refine regulatory processes to materially shorten the current permitting timelines, this could provide regulatory certainty and increased efficiency without sacrificing environmental protection, and alongside the national benefits sharing framework, create real and lasting benefits for affected Indigenous groups.

The Foundation
FOR NATURAL RESOURCES AND ENERGY LAW
FORMERLY ROCKY MOUNTAIN MINERAL LAW FOUNDATION

9191 Sheridan Blvd., Ste. 203
Westminster, Colorado 80031
www.fnrel.org

Volume 40 | Number 1 | 2023
ISSN 2768-7821