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Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022

On February 3, 2022, U.S. Senators Martin Heinrich (D-N.M.) and Jim Risch (R-Idaho) introduced the bipartisan Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022, S. 3571, 117th Cong. (2022), establishing a pilot program under which the U.S. Environmental Protection Agency (EPA) may grant up to 15 Good Samaritan permits for remediation work at abandoned mine sites across federal, state, tribal, and private lands. To qualify as a Good Samaritan to receive a permit, a person must not be a past or current owner or operator of the site or any portion of the site, must not have had a role in the creation of the contamination onsite, and must not be potentially liable for the remediation, treatment, or control of the contamination. *Id.* § 2(6).

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Kathleen C. Schroder, Reporter

Fourth Circuit Vacates Biological Opinion and Incidental Take Statement for Mountain Valley Pipeline

In *Appalachian Voices v. U.S. Department of the Interior*, 25 F.4th 259 (4th Cir. 2022), the U.S. Court of Appeals for the Fourth Circuit vacated the biological opinion and incidental take statement prepared by the U.S. Fish and Wildlife Service (FWS) for the Mountain Valley Pipeline, a 300-mile interstate natural gas pipeline system that would run through Virginia and West Virginia.

A coalition of environmental nongovernmental organizations challenged the biological opinion, alleging that FWS did not adequately consider impacts of the pipeline to two endangered fish species, the Roanoke logperch and the candy darter. FWS had prepared the biological opinion following consultation with the Federal Energy Regula-

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Notable Provisions of the Infrastructure Investment and Jobs Act and President Biden's Invocation of the Defense Production Act Related to Renewable Energy and Domestic EV Battery Manufacturing

<u>Infrastructure Investment and Jobs Act</u>

In late 2021, the U.S. Congress passed the $1.2 trillion Infrastructure Investment and Jobs Act (Infrastructure Act), Pub. L. No. 117-58, 135 Stat. 429 (2021). President Biden signed the Infrastructure Act into law on November 15, 2021, making this legislation the country's largest federal spending initiative on infrastructure. The Infrastructure Act will provide federal funding not only for clean drinking water, roads, bridges, airports, and railroads but also for renewable energy initiatives and electric vehicle (EV) charging, including zero-emission school buses and ferries, transmission up-

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The Good Samaritan permit provides certain liability exemptions to the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and state and tribal law. In particular, the National Pollutant Discharge Elimination System permit and effluent requirements under the CWA do not apply to the work authorized by a Good Samaritan permit, and the authorizations, licenses, and permits under section 121 of CERCLA are not required. *Id.* § 4(f)(1)(B). If a Good Samaritan violates the terms of their permit resulting in surface water quality or other environmental conditions that are "measurably worse" than baseline conditions, EPA will notify the Good Samaritan of the violation and require that they undertake "reasonable measures" to return environmental conditions to pre-violation conditions. *Id.* § 4(n)(3)(C). If the Good Samaritan corrects the violations and noncompliance within a reasonable amount of time, the liability protections remain intact; otherwise, the Good Samaritan could be subject to enforcement and liability under the CWA and CERCLA. *Id.* § 4(n)(4).

The Act allows a Good Samaritan to reprocess materials recovered during the implementation of a remediation plan if the mine site is on federal land and the applicable land management agency has signed a decision document approving such activity. *Id.* § 4(f)(5)(B)(i)–(ii). The proceeds from the sale of the reprocessed materials are to be used to cover the remediation costs and, to the extent required by the permit, reimbursement for oversight costs. *Id.* § 4(f)(5)(B)(iii). The remaining proceeds will be deposited into the Good Samaritan Mine Remediation Fund. *Id.* § 4(f)(5)(B)(iv). Prior to engaging in a Good Samaritan permit, the applicant may apply for a time-limited permit to sample the environmental conditions at the site and determine whether or not to pursue a Good Samaritan permit. *Id.* § 4(d)(1). Should the sampling activities authorized by this time-limited permit result in worse environmental conditions, the applicant must complete additional activities to return the site to preexisting conditions. *Id.* § 4(d)(5)(B).

Notably different from earlier Good Samaritan legislation, the issuance or modification of a Good Samaritan permit in accordance with the Act is considered a major federal action for purposes of the National Environmental Policy Act. *Id.* § 4(*l*)(2)(A). A single environmental assessment may be prepared to cover the issuance of a Good Samaritan permit, the activities it authorizes, and any applicable permits required by the federal land management agencies. *Id.* § 4(*l*)(2)(E). The permit may only be issued if the agency makes a finding of no significant impact supported by the environmental assessment. *Id.* § 4(*l*)(2)(F).

To receive a permit, the applicant must demonstrate that the purpose of the proposed project is remediation, the activities as proposed are designed to achieve complete or partial remediation of the site, and the project as a whole poses a low risk to the environment. *Id.* § 4(b)(1)(B)–(D). The applicant must also demonstrate that they qualify as a Good Samaritan and that they possess, or are able to secure, the financial and other resources required to complete the permitted work. *Id.* § 4(b)(1)(E). The contents of an application must include a description of the abandoned mine site and the contamination proposed for remediation. *Id.* § 4(c)(1)–(4). It must also include a description of the baseline environmental conditions at the site, including the nature and extent of impacts to water quality, the flow rate and concentrations of any discharge from the site, and any other release or threatened release at the site. *Id.* § 4(c)(6). An application must also include a remediation plan describing the scope and nature of the activities as proposed, monitoring activities, engineering plans for the project, detailed plans for any proposed recycling or reprocessing of mine resi-

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dues, and the proposed contractor(s) to perform the remediation work. *Id.* § 4(c)(7).

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tory Commission (FERC) in accordance with section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536.

Section 7 of the ESA requires federal agencies to ensure that any federal action "is not likely to jeopardize the continued existence of any [listed] species." *Appalachian Voices*, 25 F.4th at 264 (alteration in original) (quoting 16 U.S.C. § 1536(a)(2)). An agency must consult with FWS whenever an agency action "may affect" a listed species, *id.* (quoting 50 C.F.R. § 402.14(a)), and FWS will develop a biological opinion as to whether the agency action is likely to jeopardize the continued existence of the listed species, *id.* (citing 50 C.F.R. § 402.14(g)).

The district court found FWS's biological opinion for the Mountain Valley Pipeline flawed in several respects. First, the court held that FWS did not adequately evaluate the environmental baseline for the two listed species. FWS provided only a "one-sentence recitation of general threats to the logperch," *id.* at 272, and described population-level conditions for the candy darter rather than offering analysis of the action area, *id.* at 273. The court explained that FWS should have discussed impacts to the species in the action area and the activities causing such impacts. *Id.*

Second, the court held that FWS did not properly evaluate cumulative impacts to the logperch and candy darter. The court pointed to information in the administrative record, including an environmental impact statement previously prepared by FERC, indicating that numerous activities would impact the species in the action area, and observed that the biological opinion did not identify any of these activities. *See id.* at 276.

Third, the court held that FWS failed to consider climate change in the biological opinion, either as part of the environmental baseline or cumulative effects analysis. *Id.* at 276–77.

Finally, the court held that FWS's no-jeopardy determination was arbitrary. The court reasoned that because FWS did not adequately assess the environmental baseline and cumulative effects for the logperch and candy darter, FWS necessarily could not incorporate these findings into its jeopardy analysis. *Id.* at 278.

Because of these flaws, the court vacated the biological opinion and incidental take statement and remanded them to FWS for further analysis. *Id.* at 282. The court's decision came shortly after it vacated records of decision issued by the U.S. Forest Service and Bureau of Land Management allowing the pipeline to cross a segment of the Jefferson National Forest. *See* Vol. 39, No. 1 (2022) of this *Newsletter*.

District of Colorado Vacates Oil and Gas Leases Because of Analysis of and Consultation over Gunnison Sage-Grouse

In *Board of County Commissioners of the County of San Miguel v. BLM*, No. 1:18-cv-01643, 2022 WL 472992 (D. Colo. Feb. 9, 2022), the U.S. District Court for the District of Colorado held that the Bureau of Land Management (BLM) did not comply with the National Environmental Policy Act (NEPA) and did not consult with the U.S. Fish and Wildlife Service (FWS) as required by the Endangered Species Act (ESA) prior to offering lands for oil and gas leasing. The San Miguel County Commissioners and a group of environmental nongovernmental organizations challenged BLM's decision to offer lands for oil and gas leasing at lease sales held in March 2017 and March 2018.

First, the court held that BLM did not comply with NEPA because it did not analyze impacts to the Gunnison sage-grouse from leasing. *Id.* at *16–17. BLM had not prepared any site-specific analysis of its leasing decision. Instead, BLM issued determinations of NEPA adequacy (DNA) finding that the 2013 final environmental impact statement (EIS) for the Tres Rios Field Office resource management plan (RMP) adequately analyzed impacts of leasing. The court disagreed with BLM's decision not to prepare site-specific analysis, reasoning that once BLM identified parcels for leasing, it could have evaluated the site-specific impacts of doing so, such as "the parcels' relative positions to each other, to Gunnison sage-grouse habitats, to proposed and existing [areas of critical environmental concern], to cultural resources, and to existing leased parcels in the area." *Id.* at *16. The court further observed that BLM was in the process of amending the Tres Rios Field Office RMP to address changed circumstances as evidence of a need for updated analysis. *See id.* at *19–20.

Second, the court found that BLM did not consult with FWS regarding the impacts of leasing on the Gunnison sage-grouse, as required by the ESA. In support of its decision not to consult at the lease stage, BLM relied on its consultation with FWS when BLM approved the Tres Rios Field Office RMP. *See id.* at *20. The court, however, observed that the biological opinion prepared with this RMP stated that subsequent actions that affect or may affect the Gunnison sage-grouse would be subject to additional consultation. *Id.* at *21. Moreover, the court reasoned that the prior consultation did not consider site-specific information about the leased parcels, such as the "locations, size, and timing of the leases." *Id.* Accordingly, the court held that this new information warranted further consultation to comply with the ESA. *Id.* at *23.

Notably, the court rejected the plaintiffs' claims that the Federal Land Policy and Management Act (FLPMA) required BLM to specifically analyze whether the leases would result in unnecessary or undue degradation and to attach certain protective stipulations to the leases. *Id.* at *23–24. The court reasoned that FLPMA provides BLM with a "great deal of discretion" in how to manage the public lands, *id.* at *23 (quoting *Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011)), and that BLM considered its obligation to prevent unnecessary or undue degradation in the Tres Rios Field Office RMP, final EIS, and DNA prepared for the lease sale, *id.* at *24.

Following the decision, the parties filed a stipulation as to the remedy, which the court adopted. By order dated April 22, 2022, the court vacated all but three of the challenged leases. *See* Order on Remedy and for Entry of Judgment, *Bd. of Cty. Comm'rs of the Cty. of San Miguel v. BLM*, No. 1:18-cv-01643 (D. Colo. Apr. 22, 2022), ECF No. 53.

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.

District of Wyoming Upholds BLM's Approval of Natural Gas Project

In *Upper Green River Alliance v. BLM*, No. 2:19-cv-00146, 2022 WL 1493053 (D. Wyo. Apr. 5, 2022), *appeal docketed*, No. 22-8022 (10th Cir. May 11, 2022), the U.S. District Court for the District of Wyoming upheld the Bureau of Land Management's (BLM) decision to approve the Normally Pressured Lance (NPL) Project, a 3,500-well natural gas project in Sublette County, Wyoming. A coalition of environmental nongovernmental organizations had challenged BLM's approval of the NPL Project, alleging that it violated the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA).

The plaintiffs argued that BLM violated NEPA by not adequately considering impacts from the NPL Project on the "Path of the Pronghorn" (a protected national migration corridor), by not considering alternatives to protect the Path of the Pronghorn, and by not adequately analyzing impacts to Wyoming's greater sage-grouse population. *Id.* at *9. The court rejected all three arguments. First, the court observed that the environmental impact statement (EIS) considered adverse impacts to pronghorn generally and that BLM followed state guidance in how to review and manage individual pronghorn migration routes. *Id.* at *12–14. Second, the court found that the alternative that the plaintiffs championed to protect pronghorn was not "significantly different" from the one that BLM considered in the EIS. *Id.* at *15.

Finally, the court found that BLM properly evaluated impacts to greater sage-grouse winter concentration areas. In the EIS, BLM recognized that information gaps existed regarding greater sage-grouse use of winter concentration areas. *Id.* at *16–17. In the record of decision, BLM authorized study of sage-grouse use of these areas concurrently with limited development. *Id.* at *18. The court rejected the plaintiffs' arguments that NEPA required BLM to obtain baseline data regarding greater sage-grouse use of winter concentration areas, reasoning that such information was not "essential to reasoned decision making" because BLM was aware of effects of natural gas development on greater sage-grouse use of winter concentration areas. *Id.*

Further, the court held that BLM's approval of the NPL Project complied with FLPMA. The plaintiffs had argued that the 2015 resource management plan (RMP) for the greater sage-grouse included a "required design feature" that obligated BLM to implement a phased approach to development. *Id.* at *19. The court found that "[u]nder the 2015 RMP, the BLM did not need to implement phased development if analysis showed there were better site-specific conditions." *Id.* at *20. The court further observed that BLM would evaluate reasonably foreseeable design features at the site-specific permitting stage. *Id.*

Accordingly, the court upheld BLM's approval of the NPL Project.

Editor's Note: The reporter is counsel of record for the project proponent in this case.

District of Montana Finds BLM Erred in Issuing Leases in Greater Sage-Grouse Range

In *Montana Wildlife Federation v. Bernhardt*, No. 4:18-cv-00069, 2022 WL 742477 (D. Mont. Mar. 11, 2022) (Phase 2 Decision), *appeal docketed*, No. 22-35365 (10th Cir. May 11, 2022), the U.S. District Court for the District of Montana held that the Bureau of Land Management (BLM) erred when offering leases in greater sage-grouse range.

The decision caps the second phase of this case. In the first phase (Phase 1), the district court held that BLM's Instruction Memorandum No. 2018-026 (Dec. 27, 2017) violated the Federal Land Policy and Management Act (FLPMA). *See Mont. Wildlife Fed'n v. Bernhardt*, No. 4:18-cv-00069, 2020 WL 2615631 (D. Mont. May 22, 2020). This instruction memorandum had attempted to implement a directive in BLM's resource management plans (RMPs) for the greater sage-grouse as to how BLM should prioritize fluid mineral leasing in greater sage-grouse habitat. Having found that the instruction memorandum violated FLPMA, the court then vacated the oil and gas leases that BLM issued in accordance with it. This instruction memorandum and the court's Phase 1 decision are summarized in Vol. XXXV, No. 1 (2018) and Vol. XXXVII, No. 3 (2020) of this *Newsletter*. The court later stayed vacatur of the Phase 1 leases pending appeal.

In the second phase of the case (Phase 2), the court considered identical challenges to leases sold at BLM's December 2017, March 2018, and June 2018 lease sales in Nevada and BLM's December 2017 and March 2018 lease sales in Wyoming. Phase 2 Decision, 2022 WL 742477, at *3–4. Citing its prior decision, the court held that the challenged lease sales violated FLPMA by failing to implement the prioritization requirement in the greater sage-grouse RMPs. *Id.*

The court also found vacatur of the challenged leases to be the appropriate remedy. *See id.* at *4–5. The court, however, stayed vacatur of the leases challenged in Phase 2 of the case pending appeal of the decision in Phase 1. *Id.* at *5. The court suspended the leases challenged in Phase 2, directing that "there shall be no further work developing the Phase 2 leases or obtaining production from such leases in any way pending appeal." *Id.*

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grades, and grid resiliency technologies. Concurrently with execution of the Infrastructure Act, President Biden issued an executive order on the Act's implementation. Exec. Order No. 14,052, 86 Fed. Reg. 64,335 (Nov. 15, 2021).

Joint Office of Energy and Transportation

As part of the Infrastructure Act, two federal agencies, the Department of Energy (DOE) and the Department of Transportation (DOT), have created the interagency Joint Office of Energy and Transportation (Joint Office). *See* Pub. L. No. 117-58, div. J, tit. VIII.

This new office will be charged with assisting with the deployment of EV infrastructure as part of federal implementation of the Infrastructure Act's National Electric Vehicle Charging Infrastructure program. *See* Joint Office, https://driveelectric.gov/. The Joint Office seeks to provide technical assistance to state transportation departments. This year, the Joint Office executed a memorandum of understanding with American Association of State Highway and Transportation Officials and the National Association of State Energy Officials that will provide for coordination between state, tribal, and local energy and transportation departments for the forthcoming EV infrastructure rollout.

Electric and Alternative Fuel Vehicle Charging

The Infrastructure Act, with help from the Joint Office, will spur development of EV charging stations along public highway corridors (also referred to as "alternative fuel corridors") by investing $7.5 billion to the build-out of a network of EV chargers across the country. Other alternative fuel vehicles such as natural gas, propane, and hydrogen vehicles are also incorporated into the alternative fuel corridors concept. *See* 23 U.S.C. § 151. This funding will in part prioritize rural, tribal, and historically disadvantaged comminutes. These charging-related investments are aimed to assist EV and other alternative fuel drivers with traveling longer distances, across different states and regions. An important change brought by the passage of the Infrastructure Act is a departure from a regulation within the Federal Aid Highway Act of 1956, ch. 462, tit. I, 70 Stat. 374, which had barred certain commercial activity at interstate rest stops. Electric chargers will now be permitted to be installed.

Relatedly, in December 2021, the Biden administration released the "Electric Vehicle Charging Action Plan" as an overview of agency action in light of the passage of the Infrastructure Act. Press Release, "The Biden-Harris Electric Vehicle Charging Action Plan" (Dec. 13, 2021). The action plan will help address the Biden administration's goal of half a million EV charger installations. The first tranche of $3.1 billion in funding is aimed at companies that can create new, retrofitted, or expanded processing facilities as well as battery recycling programs, officials with the DOE said. *See* Lisa Friedman, "Biden Administration Begins $3 Billion Plan for Electric Car Batteries," *N.Y. Times* (May 2, 2022).

School Bus and Waterway Transportation

In order to accelerate the electrification of school buses, the Infrastructure Act provides $5 billion to fund zero-emission and clean school buses through the Clean School Bus Program. *See* Pub. L. No. 117-58, div. G, tit. XI, § 71101. The Act appropriates $1 billion each fiscal year from 2022 through 2026 to change out diesel-powered school buses. Similar to the Infrastructure Act's prioritization of vehicle chargers to low-income and rural communities, this school bus enactment will in part focus on providing grant funding to governments and schools in low-income, tribal, and rural parts of the country. An additional $2 billion will be appropriated to replace ferry boats with low-carbon ferries in rural areas. One aspect of the Infrastructure Act directs the DOT Secretary to create a pilot program for grant funding in order for states to purchase low-emission or electric ferries. *See id.* § 71102. This includes ferries powered by hydrogen, natural gas, methanol, biofuels, liquefied petroleum gas, and other coal-derived biofuels. Overall, this $7.5 billion investment will help take diesel buses and ferries off America's roads and waterways, which may improve public health and result in carbon emission reductions.

Transmission

Finally, in terms of transmission the Infrastructure Act authorizes the Federal Energy Regulatory Commission (FERC) to permit transmission projects in national interest transmission corridors that may be held by a state governmental authority and also creates a transmission facilitation program.

As a way to bolster FERC's backstop transmission authority, the Act empowers it to issue federal permits for interstate transmission facility construction in the event a state commission acts to either deny or withhold siting approval. *See id.* div. D, tit. I, § 40105.

Additionally, the Act establishes a revolving loan fund in the amount of $2.5 billion in order to permit the DOE to serve in an "anchor tenant" role for either an upgraded or new transmission line. *See id.* § 40106. The Act further authorizes the DOE to acquire portions of planning capacity, but not more than 50%. *Id.* The DOE may then sell the capacity after a determination is made that the transmission facility project has become financially viable. *Id.* In this enhanced transmission role, the DOE is also authorized to enter into public-private partnerships and issue loans to eligible projects. *Id.* The Infrastructure Act has appropriated $10 million for each for fiscal years 2022 through 2026 in order to fund this transmission program. *Id.* This anchor tenant strategy is a new aspect of transmission build-out involvement by the DOE, which experienced lackluster results with its loan guarantee scheme out of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

<u>Defense Production Act</u>

On March 31, 2022, President Biden invoked the powers of section 303 of the Defense Production Act of 1950, as amended, 50 U.S.C. § 4533, with respect to EV raw materials. The memorandum of presidential determination under the Act allows the president to take certain actions that apply as mandates to industry. *See* Presidential Determination No. 2022-11, Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, 87 Fed. Reg. 19,775 (Mar. 31, 2022).

The Defense Production Act is intended to promote the national defense in that the United States must secure a reliable and sustainable supply of strategic and critical materials. Here, the national industry affected is the mining of "materials necessary for the clean energy transition—such as lithium, nickel, cobalt, graphite, and manganese for large-capacity batteries." *Id.* § 1. Section 303 of the Defense Production Act provides that the president may invoke the Act

> (A) for purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale;
>
> (B) for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials;
>
> (C) for the development of production capabilities; and
>
> (D) for the increased use of emerging technologies in security program applications and the rapid transition of emerging technologies—
>
> > (i) from Government-sponsored research and development to commercial applications; and
> >
> > (ii) from commercial research and development to national defense applications.

50 U.S.C. § 4533(a)(1).

The presidential determination also waives the requirements of section 303(a)(1)–(6) for the purpose of expanding the sustainable and responsible domestic mining, beneficiation, and value-added processing of strategic and critical materials necessary for the production of large-capacity batteries for the automotive, e-mobility, and stationary storage sectors. The presidential determination's waiver is effective against the provisions of the Defense Production Act that set terms on the use of the Act in terms of sales, delivery dates, and notifications to Congress of a shortfall. *See id.* § 4533.

CONGRESS/FEDERAL AGENCIES

John H. Bernetich & Dale Ratliff, Reporters

CEQ Partially Revokes Trump Administration's Changes to NEPA Regulations and Reinstates Prior Regulations

On April 20, 2022, the Council on Environmental Quality (CEQ) issued a final rule that revoked three key revisions made by the Trump administration to CEQ's regulations implementing the National Environmental Policy Act (NEPA). 87 Fed. Reg.

23,453 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508). The final rule restores provisions in place for decades prior to the Trump administration's action regarding significant components of the NEPA regulations. *See* 85 Fed. Reg. 43,304 (July 16, 2021) (to be codified at 40 C.F.R. pts. 1500–1518) (revising 1978 regulations). The April 2022 final rule is Phase 1 of the Biden administration's plan to roll back changes made by the Trump administration and make additional revisions to the NEPA regulations. The Phase 1 rule takes effect on May 22, 2022. CEQ contemplates a future Phase 2 rulemaking that will propose "comprehensive revisions" to the NEPA regulations. 87 Fed. Reg. at 23,456.

The April 2022 final rule (the "Phase 1 rule") revoked regulatory changes issued by the Trump administration and restored regulations adopted by CEQ in 1978 on three key topics: (1) the statement of purpose and need for a proposed action in an environmental impact statement (EIS), (2) agency NEPA procedures for implementing CEQ's NEPA regulations, and (3) the definition of "effects." These revisions largely finalize revisions proposed by CEQ in October 2021. *See* 86 Fed. Reg. 55,757 (proposed Oct. 7, 2021). We analyzed CEQ's proposed rule in Vol. XXXVIII, No. 4 (2021) of this *Newsletter*.

Purpose and Need. The CEQ regulations require each EIS to specify the proposed project's purpose and need. 40 C.F.R. § 1502.13. The purpose and need statement informs the alternatives to the proposed project and the scope of the environmental analysis in the EIS. The Trump administration fundamentally revised the focus of the purpose and need statement to describe only the "applicant's goals and the agency's statutory authority." 85 Fed. Reg. at 43,330. The Phase 1 rule unwinds this revision and reverts to the pre-Trump administration regulation, thus broadening agency authority to consider other factors in describing the project's purpose and need in addition to the applicant's goals and the agency's statutory authority. 87 Fed. Reg. at 23,458.

Agency NEPA Procedures. Regulations adopted in 1978 provided that the CEQ regulations represented the minimum requirements for agencies' compliance with NEPA, and permitted agencies to adopt stricter regulations of their own. *See id.* at 23,460; 40 C.F.R. § 1507.3. The Trump administration adopted changes providing that the CEQ regulations were the "ceiling" for agency NEPA compliance, and that agencies could not adopt their own stricter requirements. The Phase 1 rule reverts to the pre-Trump administration approach. Under the Phase 1 rule, agencies have "discretion to develop and implement procedures beyond the CEQ regulatory requirements; however, agency procedures cannot conflict with current CEQ regulations." 87 Fed. Reg. at 23,461. According to CEQ, this change "will promote better decisions, improve environmental and community outcomes, and spur innovation that advances NEPA's goals by giving agencies the flexibility" to develop their own NEPA procedures. *Id.* The Phase 1 rule also extended the deadline to September 14, 2023, for agencies to propose changes to their existing agency-specific NEPA regulations to conform to current CEQ regulations. *Id.* at 23,462.

Effects or Impacts. NEPA requires agencies to consider "any adverse environmental effects" and "impacts" of proposed actions. 42 U.S.C. § 4332(2)(C). The 1978 CEQ regulations defined "effects" to include "direct" and "indirect" effects. "Impacts" included "cumulative impacts" of the action, or impacts when added to other past, present, or reasonably foreseeable future actions. *See* 87 Fed. Reg. at 23,462. The Trump administration jettisoned these definitions and instead defined "effects or impacts" to mean effects of the proposed action that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." 85 Fed. Reg. at 43,343.

The Biden administration's Phase 1 rule largely restores the 1978 definitions, and requires agencies to consider direct effects, indirect effects, and cumulative impacts of the proposed action. The Phase 1 rule departed from the proposed rulemaking, however, by adding language to reflect the Supreme Court's ruling in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), that "NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause." 87 Fed. Reg. at 23,465. Under the revised rule, agencies must consider "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable." 40 C.F.R. § 1508.1(g). This change is largely symbolic, as *Public Citizen* already required agencies to consider only environmental impacts that are "reasonably foreseeable."

In addition to once again requiring consideration of cumulative effects, the Phase 1 rule rolled back revisions in the Trump administration rule providing that (1) a "but for" causal relationship is insufficient to trigger consideration of a particular effect; (2) effects that are remote in time or geography, or the product of a lengthy causal chain, are generally outside NEPA's scope; and (3) effects that the agency has no ability to prevent need not be considered. 87 Fed. Reg. at 23,466. CEQ determined that reverting to prior definitions of direct effects, indirect effects, and cumulative impacts "is consistent with this Administration's policies to be guided by science and to address environmental protection, climate change, and environmental justice." *Id.*

CEQ plans a Phase 2 rulemaking that will "consider the NEPA regulations comprehensively" and assess whether to revise the NEPA regulations to revert to the pre-Trump regulations or to propose new language. *Id.* at 23,456. CEQ provided no timeline for a Phase 2 proposed rule, but we anticipate one by the end of 2022.

Department of the Interior Publishes First Report to Congress Under the Energy Act of 2020

We previously reported on the Energy Act of 2020 (Energy Act), Pub. L. No. 116-260, div. Z, 134 Stat. 1182, and its provisions aimed at incentivizing renewable energy development in Vol. XXXVIII, No. 1 (2021) and Vol. XXXVIIII, No. 1 (2022) of this *Newsletter*. To help achieve its ambitious goals, the Energy Act directed the Secretary of the Interior to submit an annual report to Congress by February 1 each year describing the progress to improve federal permit coordination for eligible renewable projects. 43 U.S.C. § 3002(f)(1). The Act provided that the annual report should include, among other items, (1) projections for renewable energy production and capacity installations on federal lands and (2) a description of any problems relating to leasing, permitting, siting, or production of eligible projects. *Id.* § 3002(f)(2).

The U.S. Department of the Interior published the first of the required annual reports in March 2022. *See* Report to Congress, Bureau of Land Mgmt. (BLM), "Public Land Renewable Energy – Fiscal Year 2021" (Mar. 2022). The report describes BLM's recent efforts to increase permitting of renewable projects on federal lands. BLM acknowledges in the report that because of the "expansive land area under its jurisdiction and its multiple-use mission," BLM is "uniquely position[ed] . . . to promote responsible development of onshore renewable energy in the western United States." *Id.* at 4. According to the report, BLM "authorized or facilitated 12 projects on public lands that directly support the development of 2,890 megawatts (MW) of onshore solar, wind, and geothermal energy generation capacity" in 2021, which represents a 35% increase over 2020. *Id.* at 7.

The report also provides projections for permitting in years 2022 through 2025. According to the report, as of December 2021, "BLM has prioritized the processing and environmental permitting review of 54 proposed renewable energy projects on Federal and non-Federal land with a combined potential capacity of 33,000 MW" and "has over 50 additional solar, wind, and geothermal projects pending early-stage conformance review prior to initiating the environmental and permitting review processes." *Id.* at 7. The vast majority of these projects appear to be solar development in Nevada and California. *Id.* at 8. Of the approximately 100 projects described, only four are wind energy projects. *Id.*

Finally, the report describes the challenges and opportunities facing BLM. The Energy Act directs BLM to facilitate development of renewable energy development on federal lands managed by the agency to help meet the nation's energy transition and climate goals. But under the Federal Land Policy and Management Act's multiple-use mandate, BLM must balance renewable energy development with other, sometimes competing, land uses, including recreation and conservation. And unlike oil and gas development, there is no separate statutory overlay that prioritizes renewable energy development or creates specific procedures that facilitate leasing and permitting.

Among the challenges outlined in the report are the following:

- BLM must adequately staff the renewable energy program, prioritize the staffing and workload of the program, and continually monitor staffing needs to ensure staffing capacity is adequate.
- BLM and the U.S. Fish and Wildlife Service need to increase coordination and streamline the review and permitting process between the two agencies.
- BLM needs to make appropriate rental rate adjustments and continually monitor rental rates to ensure that projects located in areas with increasing property values (e.g., California) do not pay above-market rates that disincentivize development.
- BLM must reassess and revise the competitive leasing program to address issues that have disincentivized participation in the competitive leasing process.

Id. at 10–11.

BLM has much work to do to meet the ambitious targets in the Energy Act. The agency has taken some positive steps toward this goal, including by conducting the evaluation included in the report. It remains to be seen which concrete, on-the-ground actions the agency implements.

ENVIRONMENTAL

Randy Dann & Nicole Rushovich, Reporters

Climate Impacts Will (Once Again) Require Robust Analysis Under NEPA

The Council on Environmental Quality (CEQ) and the U.S. Court of Appeals for the Ninth Circuit both recently weighed in on how federal agencies should analyze climate change and greenhouse gas (GHG) emissions under the National Environmental Policy Act (NEPA).

CEQ published a final rule last month reversing changes made under the Trump administration to CEQ regulations that implement NEPA. 87 Fed. Reg. 23,453 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508). For coverage of this rulemaking, see the Congress/Federal Agencies report in this *Newsletter*.

The Ninth Circuit also weighed in last month on how much scrutiny federal agencies must provide GHG emissions in NEPA analyses. *350 Mont. v. Haaland*, 29 F.4th 1158 (9th Cir. 2022). The Ninth Circuit held that the U.S. Department of the Interior (Interior) failed to take the required "hard look" at the climate impacts of a mining operation expansion project when it found the project's GHG emissions would have no significant impact on the environment. (This case pertains to a NEPA analysis completed in 2018. Because it was completed before the Trump administration's 2020 update to the NEPA regulations, Interior was required to consider the direct, indirect, and cumulative effects of the proposed agency action.) The court stopped short of requiring a particular scientific methodology on remand.

NEPA imposes procedural requirements on federal agencies to conduct a "full and fair" analysis of the environmental impacts of their proposed actions. 40 C.F.R. § 1502.1. Agencies must take a "hard look" at the environmental consequences of their actions. *350 Mont.*, 29 F.4th at 1169 (citing *League of Wilderness Defs./Blue Mtns. Biodiversity Project v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014)). "To satisfy the 'hard look' requirement, an agency must provide 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Id.* (quoting *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008)).

In its analysis, the federal agency is required to "consider 'both context and intensity' when determining whether an action ha[d] a significant effect on the human environment." *Id.* at 1169 n.15 (quoting 40 C.F.R. § 1508.27 (2018)). "Context . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." *Id.* (quoting 40 C.F.R. § 1508.27(a) (2018)). "Intensity . . . refers to the severity of impact." *Id.* (quoting 40 C.F.R. § 1508.27(b) (2018)).

NEPA analyses have consequences for proposed federal actions: the NEPA process must be complete before an agency makes a final decision on a proposed action. *See* 40 C.F.R. § 1500.1. If a federal agency determines that the proposed action will not significantly affect the quality of the human environment, the agency must prepare a finding of no significant impact (FONSI). *Id.* § 1501.6.

In this case, Signal Peak Energy, LLC, sought to expand its mining operations. Interior published an environmental assessment (EA) describing the projected GHG emissions for the duration of the mine's operations. Based on the EA, Interior approved the mine expansion, finding that the project's GHG emissions would have no significant impact on the environment. *350 Mont.*, 29 F.4th at 1163.

Interior based this determination on three comparisons: (1) a comparison of the total projected GHG emissions generated by the mine expansion against total annual global GHG emissions, (2) a comparison of the projected GHG emissions from the mine expansion's activities against the United States' annual GHG emissions, and (3) a comparison of the projected GHG emissions from the mine expansion against Montana's annual GHG emissions. *Id.* at 1167. (The court views these comparisons as "somewhat misleading," as the national and

Montana comparisons "did not account for combustion of the coal overseas" and only considered limited emissions data. *Id.*)

350 Montana, the Montana Environmental Information Center, Sierra Club, and WildEarth Guardians challenged the EA, FONSI, and approval of the mine expansion project. The plaintiffs argued that Interior violated NEPA by failing to take a "hard look" at the environmental effects of the mine expansion's GHG emissions and not using the "social cost of carbon" (SCC) metric to quantify the costs of GHG emissions. *Id.* at 1165.

The Ninth Circuit agreed, holding that Interior failed to take a "hard look" at the actual environmental effects of the mine expansion's GHG emissions, and did not provide a convincing statement of reasons for its finding that the mine expansion will not have a significant effect on the environment. *Id.* at 1172.

The court highlighted the following portions of the EA:

- The EA calculated that the GHG emissions generated over the life of the mine expansion would total "approximately 0.44 percent of annual (single year) global GHG emissions";
- The EA asserted that the mine expansion contributions to climate change "would be minor in the short- and long-term on an annual basis"; and
- The EA summarily concluded that the mine expansion would not have a significant impact on the environment.

Id. at 1170 (emphasis omitted). The court also noted that Interior did not cite any scientific evidence to support its analysis that the GHG emissions were minor. *Id.* Interior also did not dispute that the mine expansion was anticipated to generate more GHG emissions annually than the "largest single point source of GHG emissions in the United States." *Id.* at 1171.

The court reasoned that by comparing GHG emissions from this project against total global GHG emissions, the project's GHG emissions were predestined to appear relatively minor. *Id.* at 1170. The EA also failed to provide science-based criteria in support of its FONSI, instead relying on a conclusory determination that the project's GHG emissions would be relatively "minor." *Id.* Therefore, the court held that Interior's FONSI did not measure up to the "high quality" and "[a]ccurate scientific analysis" that NEPA's implementing regulations require, and remanded to the district court. *Id.* at 1174 (alteration in original) (quoting 40 C.F.R. § 1500.1(b) (2018)).

The Ninth Circuit stopped short, however, of holding that Interior acted arbitrarily and capriciously when it failed to use the SCC metric to quantify the environmental harms that may result from the project's GHG emissions. *Id.* at 1176–77.

> The SCC is a method of quantifying the impacts of GHGs that estimates the harm, in dollars, caused by each incremental ton of carbon dioxide emitted into the atmosphere in a given year. The SCC was developed in 2010 by the Interagency Working Group on the Social Cost of Carbon . . . , which consisted of experts from various federal agencies, including Interior.

Id. at 1175 (internal quotation marks omitted).

The court noted that "NEPA does not require that we decide whether an [EA] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." *Id.* at 1176 (alteration in original) (quoting *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985)). NEPA only requires that agencies provide "high quality" information and "[a]ccurate scientific analysis." *Id.* (alteration in original) (quoting 40 C.F.R. § 1500.1(b) (2018)).

Although Interior was not required to use the SCC, the court held that Interior must use some methodology that satisfies NEPA and the Administrative Procedure Act. *Id.* "At a minimum, this approach requires providing the information that is known . . . . [T]he bare comparisons employed in the 2018 EA are of almost no utility in the absence of additional information concerning the Mine Expansion's scale and scope relative to the industry and commodity." *Id.* at 1176–77.

The final rule and the Ninth Circuit's recent opinion will affect the future analyses of proposed fossil fuel projects throughout the federal government. The final rule provides further detail about what effects must be included in a climate analysis. The Ninth Circuit's decision clarifies that a robust analysis of climate impacts is needed. In particular, agencies cannot disregard the climate impacts of fossil fuel projects by stating that they represent a small portion of global or national GHG emissions. Agencies must rely on evidence-based assessments in analyzing the climate effects of the project under review.

CALIFORNIA – OIL & GAS

Tracy K. Hunckler & Megan A. Sammut, Reporters

Court Grants Anti-SLAPP Motion and Strikes the Petition in *County of Kern v. Newsom*

In Vol. XXXVIII, No. 4 (2021) of this *Newsletter*, we discussed the case of *County of Kern v. Newsom*, in which Kern County asserted that the State, under the direction of Governor Gavin Newsom, has engaged in a pattern and practice of delaying and blocking oil and gas permits. The County's petition—which named only Governor Newsom as a respondent—asserted that these actions violated the separation of powers doctrine and the Administrative Procedure Act (APA), and further sought declaratory relief that the Governor's executive orders and directives, and the California Department of Conservation's Geologic Energy Management Division's (CalGEM) actions in response to those directives, violate the California Constitution, exceed their statutory powers, are arbitrary and capricious, and violate the APA. Filed in Kern County, the case was transferred to Fresno County Superior Court upon motion by the State. *See* Vol. 39, No. 1 (2022) of this *Newsletter* (discussing transfer).

On March 10, 2022, the State filed a special motion to strike—also known as an anti-SLAPP motion—asserting that the County's claims arise from Governor Newsom's acts in furtherance of his free speech rights under the federal and state constitutions in connection with a public issue. "SLAPP" stands for "Strategic Lawsuit Against Public Participation." Anti-SLAPP laws essentially provide a means to strike claims that are aimed at chilling protected speech. Claims that are premised on activities or conduct "in furtherance of [a] person's right of petition or free speech . . . in connection with a public issue" are subject to strike. Cal. Code Civ. Proc. § 425.16(b)(1). As such, a successful anti-SLAPP motion that attacks each claim of a pleading will have the effect of striking the entire lawsuit.

As discussed in the State's motion, "'Resolution of an anti-SLAPP motion involves two steps.' (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) At the first step, a defendant must establish that plaintiff's claims targeted by the motion arise from activity that the anti-SLAPP statute protects." Memorandum of Points and Authorities [in support of Special Motion to Strike Petition for Writ of Mandate, Prohibition or Other Relief (Code of Civil Procedure §§ 1085, 1102) and Declaratory Relief], *Cty. of Kern v. Newsom*, No. 21 CE CG 03695 (Cal. Super. Ct. Mar. 10, 2022) (Anti-SLAPP Motion). If the claim or claims are based on allegations arising from an activity done in furtherance of the respondent's exercise of free speech in connection with a public issue, the court reaches the second step, wherein the petitioner has the burden of demonstrating a probability of prevailing on its claims by showing they are "legally sufficient and factually substantiated." *Id.*

As to the first step of the analysis, the motion argues that "[u]nlike a petition directly challenging CalGEM's individual permit denials—which would be a legitimate 'action[] challenging *government decisions*, not the acts of individual officials'—the County's Petition challenges only the Governor's pure speech, requests for policy change by legislative and executive bodies, and intra-government communications that allegedly preceded CalGEM's decisions." *Id.* (quoting *City of Montebello v. Vasquez*, 376 P.3d 624, 635 (Cal. Ct. App. 2016)). The County conceded this point. *See* Law and Motion Minute Order, *Cty. of Kern v. Newsom*, No. 21 CE CG 03695 (Cal. Super. Ct. Apr. 6, 2022) (Minute Order).

On the second step, the State cross-references its concurrently filed demurrer and argues that the County cannot meet its burden of demonstrating the legal sufficiency and factual substantiation of its claims because—among other arguments—it has failed to join CalGEM, who the State claims is an indispensable party; the County's separation of powers claim separately fails because it asserts a non-justiciable claim, the Governor's actions are within his authority, and his actions are not ministerial acts; the County's claim for APA violations challenges a discretionary determination; and the County's claim for declaratory relief would violate the First Amendment and separation of powers doctrine because the relief sought would limit the Governor's public statements and prevent him from performing his duties as a governor. Anti-SLAPP Motion at 11; Minute Order at 4–6.

The trial court agreed. In its April 6, 2022, Minute Order, the court ruled that the County had failed to meet its burden with respect to any of its claims asserted in the petition for the reasons set forth in the State's motion. The court discussed the fact that the CalGEM supervisor, not the Governor, has the authority to supervise the drilling and operation of wells, as well as the discretion to approve or deny permit applications. Minute Order at 5. The court also noted the lack of evidence supporting the claim that Governor Newsom *directed* CalGEM to cease approving well stimulation treatment permits. *Id.* at 5–6. Because the County failed to meet its burden with respect to each asserted claim, the County's petition was stricken in its entirety. The parties thereafter filed a stipulation wherein the State agreed not to seek attorney's fees and costs of the suit, and the County agreed not to seek review of or otherwise challenge the court's orders granting the anti-SLAPP motion and striking the petition.

State's Demurrer Largely Overruled in *WSPA v. Newsom*

Vol. XXXVIII, No. 4 (2021) and Vol. 39, No. 1 (2022) of this *Newsletter* have similarly discussed the Western States Petroleum Association's (WSPA) related but distinct lawsuit in Kern County Superior Court against Governor Gavin Newsom, State Oil and Gas Supervisor Uduak-Joe Ntuk, the California Department of Conservation's Geologic Energy Management Division (CalGEM), and Department of Conservation Director David Shabazian, challenging the State's "establishment and implementation of a *de facto* moratorium on well stimulation treatments [(WSTs)]." Verified Complaint for Declaratory and Injunctive Relief, and Petition for Writ of Mandate ¶ 1, *W. States Petroleum Ass'n v. Newsom*, No. BCV-21-102380 (Cal. Super. Ct. Oct. 8, 2021). Most recently in that litigation, the court heard the defendants' demurrer to the complaint and issued a written order largely overruling the same, but sustaining with leave to amend as to a single cause of action seeking a writ of mandate. Notice of Entry of Minute Order Ruling on Defendants' Demurrer to Complaint, Ex. A, *W. States Petroleum Ass'n v. Newsom*, No. BCV-21-102380 (Cal. Super. Ct. Feb. 2, 2022) (Ruling on Demurrer).

More specifically, as to the first cause of action—asserting that the "No-WST Policy" violates Cal. Pub. Res. Code § 3106(d)'s encouragement of the development of oil and gas resources in the state and recognition of WSTs as a method of enhanced oil recovery—the court found that WSPA's complaint properly seeks a declaration that the defendants are overreaching their authority by denying WST permits without proper basis, and that the claim asserts an actual, ripe controversy. Ruling on Demurrer at 2–3. Similarly, the court found WSPA's second cause of action asserting that the No-WST Policy violates separation of powers and is ultra vires is a proper subject of declaratory relief and asserts a ripe actual controversy because it is based on allegations of the actual denial of permit applications, all of which were denied for reasons outside of the authority of the Supervisor and based on a mandate from the Governor (which mandate is also outside of his authority). *Id.* at 3. The court found that the fourth cause of action, asserting that the No-WST Policy is arbitrary and capricious, also states a ripe justiciable controversy because it asserts that the denials are not "made on any specific basis but rather on general information." *Id.* at 5.

With respect to the third cause of action asserting a violation of the Administrative Procedure Act (APA), the court overruled the defendants' demurrer that argued that WSPA has not pled facts supporting an underground regulation in violation of the APA. The court found WSPA did indeed

> identify a general application agency action—the universal denial of WSPA permits for WSTs, or, in other words, the action to deny all WST permit applications regardless of the information provided by the applicant and lack of information in denying the applications so that the applicant knows the actual basis denial was made.

Id. at 4. The court found the third cause of action therefore states facts sufficient to allege that the No-WST Policy is an underground regulation. *Id.* at 5.

Finally, with respect to WSPA's fifth cause of action seeking a writ of mandate directing the defendants to set aside the No-WST Policy and to issue appropriate WST permits, and barring the issuance of blanket permit application denials, the court sustained the defendants' demurrer on grounds that WSPA's request that the court direct CalGEM to issue WST permits based on technical sufficiency is not appropriate writ relief. *Id.* Rather, the court provided that if it "were to find that CalGEM used an incorrect basis to deny the applications, the court could only direct CalGEM to go back and reconsider the applications based on the correct standard." *Id.* The court cannot substitute its own judgment in place of the agency's judgment. *Id.* The demurrer with respect to this cause of action was therefore sustained with leave to amend. WSPA has timely filed a first amended complaint and the defendants have again demurred, noticing their motion for a May 26, 2022, hearing.

Lawsuits Filed Challenging the State's "WST Ban"

Two more lawsuits have been filed against Governor Gavin Newsom, State Oil and Gas Supervisor Uduak-Joe Ntuk, and the California Department of Conservation's Geologic Energy Management Division (CalGEM), challenging the State's "WST Ban." Chevron U.S.A. Inc. (Chevron) filed its petition for writ of mandamus and complaint for declaratory and injunctive relief and damages in Kern County Superior Court on March 17, 2022 (Chevron Petition). Aera Energy LLC (Aera) filed its petition for writ of mandamus and complaint for damages and declaratory relief in Kern County Superior Court on March 30, 2022 (Aera Petition). The two petitions contain striking similarities, though each relies on its own respective permit denials as the factual basis for its legal claims.

Both Chevron and Aera assert 11 causes of action: four seek a writ of mandate, six seek declaratory relief, and one seeks damages based on a taking. The petitioners specifically seek a writ of mandate (and related declaratory relief) directing the respondents to set aside their respective permit denials and prohibiting the respondents from implementing the WST Ban "on the grounds that Respondents have acted arbitrarily and capriciously and have abused their discretion as indicated by" the fact that the WST Ban and permit denials (1) are contrary to law, (2) violate the separation of powers doctrine and are ultra vires as exceeding the respondent's authority, and (3) are "inconsistent with CalGEM's prior conclusions and authoritative findings" concerning the environmental impacts of WST operations. Chevron Petition ¶ 14; Aera Petition ¶ 16. The petitioners additionally seek a writ directing CalGEM to issue their respective WST permits or, alternatively, to reconsider the applications based on the law, and directing the respondents to consider their WST permit applications only based on the correct standard. Aera Petition ¶¶ 17, 101; Chevron Petition ¶ 85.

Both the petitioners also seek declaratory relief based on the same five grounds: (1) the WST Ban is an underground regulation adopted in violation of the Administrative Procedure Act, (2) the denial of permit applications that were "deemed approved" under the Permit Streamlining Act is contrary to law, (3) the respective petitioner has a vested right to continue its operations, (4) the permit denials constitute a taking of the petitioners' property without just compensation in violation of federal and state constitutions, and (5) the permit denials pursuant to the WST Ban violate the petitioners' substantive and procedural due process rights under federal and state constitutions. Chevron Petition ¶ 15; Aera Petition ¶ 18.

The responsive pleading deadline has been extended in both actions by stipulation of the parties. The respondents' deadline to respond to Chevron's petition is May 23, 2022, and their deadline to respond to Aera's petition is June 6, 2022. Though each may be met with a demurrer, it seems from the framing of their requests for writs of mandate that the petitioners may have learned from the respondents' demurrer to the Western States Petroleum Association's fifth cause of action, as discussed above.

Preliminary Injunction Denied in Separate *Aera Energy LLC v. CalGEM* Lawsuit

Two months before filing its petition challenging the "WST Ban," Aera Energy LLC (Aera) filed a separate lawsuit—also in Kern County—against the California Department of Conservation's Geologic Energy Management Division (CalGEM) and State Oil and Gas Supervisor Uduak-Joe Ntuk. *See* Petition for Writ of Mandamus [CCP Section 1085] and Complaint for Declaratory Relief, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. Jan. 18, 2022) (Petition). The case has been identified as related to the lawsuits discussed above, but it deals with a different category of oil and gas permitting. Unlike Aera's March 2022 petition that challenges the State's WST Ban, Aera's January 2022 petition "seeks a writ of mandamus compelling Defendants to process and issue determinations as to Aera's [notices of intention, "NOIs"] that have been pending for more than 10 business days and that seek to drill new wells within established oil fields." Petition ¶ 2. Aera additionally seeks a declaration "that Defendants have a ministerial duty to issue permits for new wells within established oil fields, subject to confirming that the NOIs conform to existing field rules and regulations." *Id.* ¶ 3.

Aera's petition is primarily based on a 2014 petition for writ of mandate challenging the issuance of drilling permits to Aera on grounds that CalGEM was required to conduct further environmental review (that case is *Ass'n of Irritated Residents v. Cal. Dep't of Conservation*, No. S1500CV283418 (Cal. Super. Ct. 2014)). As discussed in the petition, the trial court in *Association of Irritated Residents* held—and the appellate court affirmed—that CalGEM's issuance of permits in this context was a ministerial duty because CalGEM's role in issuing permit approvals was limited to reviewing the proposals to ensure they conformed with the regulations and field rules for the relevant existing oil field. Petition ¶¶ 24–25, 27, 29, 31. In the present litigation, Aera asserts that its submitted NOIs are indistinguishable from the permit approvals deemed ministerial in the 2014 litigation because they seek approval to drill new wells in established oil fields that have existing field rules. *Id.* ¶ 38.

Just one week after filing the petition, Aera filed a motion for preliminary injunction. Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. Jan. 25, 2022) (Motion). The Motion was heard on February 22, 2022, and was denied through adoption of a proposed order filed by the court on March 21, 2022. Order Denying Petitioner's Motion for Preliminary Injunction, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. Mar. 21, 2022). The order expresses no determination on the merits of Aera's claims or its asserted harms, but rather denies the request for preliminary injunction because the petitioner "has failed to meet its burden to show that it is likely to suffer greater injury if the Court denies the injunction than Respondents will suffer if the Court grants the injunction." *Id.* at 2. Apparently, the court rejected Aera's argument that CalGEM would suffer no harm by an order that prevents CalGEM from unlawfully delaying permit issuance and instead compels CalGEM to "issu[e] a routine permit in accordance with its own rigorous standards." Motion at 14. The litigation will continue, but for the time being nothing compels CalGEM to timely process Aera's pending NOIs.

Updates on CalGEM's Proposed Setback Regulation and WST Phase-Out Regulation

As of our update in Vol. XXXVIII, No. 4 (2021) of this *Newsletter*, the California Department of Conservation's Geologic Energy Management Division (CalGEM) had held two public workshops discussing its proposed 3,200-foot oil drilling setback draft rule and accepted public comment through December 21, 2021. According to CalGEM's website, "[m]ore than 83,500 public comments were received during the comment period, including comments received during two public workshops in December with more than 800 total attendees." Cal. Dep't of Conservation, "Public Health Rulemaking: Update (February 15, 2022),” https://www.conservation.ca.gov/calgem/Pages/Public-Health.aspx.

The California Department of Finance’s 2022 Major Regulations Rulemaking Calendar (which lists all anticipated major regulations for every agency for the year) reflects the setback regulation with a projected notice of proposed action (NOPA) date of December 2022. The agency must complete its rulemaking and submit a final rulemaking package to the California Office of Administrative Law (OAL) within one year of publishing the NOPA. Submitting a complete package to OAL then begins the formal rulemaking process. At this time, CalGEM has indicated its next steps are “review of [the 83,500 public] comments, targeted stakeholder outreach, finalization of regulation text, and development of the Standardized Regulatory Impact Assessment (SRIA).” Cal. Dep’t of Conservation, “Public Health Rulemaking: Update (February 15, 2022),” https://www.conservation.ca.gov/calgem/Pages/Public-Health.aspx. It seems it may take some time for this regulation to move forward, and the formal rulemaking process is unlikely to begin before the end of the year.

By comparison, the proposed well stimulation treatment (WST) permitting phase-out draft rule, previously discussed in Vol. XXXVIII, No. 3 (2021) of this *Newsletter*, closed public comment in July 2021, and according to CalGEM’s website, comments “are being reviewed and considered in developing proposed regulations for formal rulemaking.” Cal. Dep’t of Conservation, “Active Rulemakings,” https://www.conservation.ca.gov/index/Pages/rulemaking.aspx#wellstim. This regulation has a projected date of NOPA of August 2022 on the Department of Finance’s 2022 Major Regulations Rulemaking Calendar, so we may see additional developments by the end of summer.

CalGEM Releases Pre-Rulemaking Cost Estimate Regulations for Oil and Gas Operations

On April 4, 2022, the California Department of Conservation’s Geologic Energy Management Division (CalGEM) released another pre-rulemaking discussion draft on cost estimate regulations for oil and gas operations. *See* Preliminary Discussion Draft, CalGEM, “Cost Estimate Regulations for Oil and Gas Operations” (Apr. 4, 2022). As drafted, the proposed rule would add sections 1753 through 1753.3.2 to title 14 of the California Code of Regulations and would require well operators to submit certain cost estimates to CalGEM, including costs associated with well abandonment, production facility decommissioning, and site remediation. The proposed rule outlines two methods for estimating costs, prescribes due dates for cost estimate reports, and sets forth documentation requirements for those cost estimates.

The preliminary discussion draft is CalGEM’s response to the passage of Senate Bill 551 in 2019, which required CalGEM to develop criteria by which well operators will submit their operator cost estimates for abandonment, decommissioning, and remediation. Cal. Pub. Res. Code § 3205.7; *see* Vol. XXXVI, No. 4 (2019) of this *Newsletter*. Public comment was accepted through May 20, 2022. Notice of Public Comment Period, CalGEM, “Pre-Rulemaking Public Comment Period on Cost Estimate Regulations for Oil and Gas Operations” (Apr. 4, 2022). Interestingly, CalGEM is specifically seeking recommendations for alternatives to the proposed draft rule and data concerning the cost of complying with the rule, indicating perhaps the State is concerned with the possibly high costs of compliance and is willing to consider other methods.

Proposed Legislation Would Prohibit CCS Projects for EOR Operations

On the topic of state legislation surrounding oil and gas operations, Senate Bill 1314 (SB 1314), was introduced on February 18, 2022, and—as amended March 16, 2022—would add section 3132 to the Public Resources Code. As presently written, SB 1314 provides in pertinent part that “[a]n operator shall not inject a concentrated carbon dioxide fluid produced by a carbon dioxide capture project or carbon dioxide capture and sequestration project into a Class II well for purposes of enhanced oil recovery [(EOR)], including the facilitation of [EOR] from another well.” SB 1314, § 2. Under the federal underground injection control program, *see* 40 C.F.R. §§ 144.1–.89, Class II wells are permitted and regulated for injection of fluids (including carbon dioxide) into the subsurface for oil and gas production (including EOR) operations. Section 1 of the bill provides the declaration of the legislature “that the purpose of carbon capture technologies, and carbon capture and sequestration is to facilitate the transition to a carbon-neutral society and not to facilitate continued dependence upon fossil fuel production.” SB 1314, § 1. This reveals the legislature’s intent to prohibit the use of carbon capture technologies and carbon capture and sequestration (CCS) projects to facilitate EOR operations in the state.

According to the bill analysis from the Senate Committee on Natural Resources and Water, supporters of the bill note the potential negative impacts of EOR operations, and argue the bill will support the state’s climate goals by preventing CCS projects that result in increased oil production, while not limiting present EOR operations. Bill Analysis at 3–4. Arguments in opposition include a statement from the Western States Petroleum Association (WSPA) discussing the federal incentives that encourage CCS operations as a way of meeting national climate goals. WSPA concludes: “The transition to a lower carbon economy should be focused on reducing emissions associated with energy use, not banning specific methods of producing energy that reduce carbon emissions.” *Id.* at 5.

COLORADO – OIL & GAS

Scott Turner & Kate Mailliard, Reporters

COGCC Approves Financial Assurance Rules

In early March 2022, the Colorado Oil and Gas Conservation Commission (COGCC) approved new regulations requiring financial assurance, also known as bonding, to cover the cost of plugging abandoned wells and reclaiming well sites. *See* Press Release, COGCC, “Colorado Oil & Gas Conservation Commission Votes Unanimously to Adopt SB 19-181 New Financial Assurance Rules” (Mar. 1, 2022). The financial assurance rulemaking began over a year ago and was one of the three remaining mandated rulemakings from Senate Bill 19-181 (SB 19-181). *Id.* The rules became effective April 30, 2022. *Id.* Significant changes to the rules include (1) a requirement that operators have the financial capability to meet their obligations under SB 19-181 through an operator-specific financial assurance plan, (2) increasing financial assurance for transferred and inactive wells, (3) requiring financial assurance accounts for new wells funded in the initial years of operations, (4) creating an orphan well fund, (5) applying Colorado’s new rules to federal wells for the first time, (6) broadening access for local governments regarding the plugging of wells, and (7) developing an out-of-service plugging program. *Id.* Companies can also propose their own financial assurance plans to the COGCC for approval. The final draft rules are available on the COGCC website at https://cogcc.state.co.us/documents/sb19181/Rulemaking/Financial%20Assurance/COGCC%20Draft%20Financial%20Assurance%20Rules%20-%203-1-22%20Final%20Draft.pdf.

Colorado Appeals Court Upholds District Court Holding That the Weld County Board of County Commissioners Lacks Standing to Obtain Judicial Review of an Action of the Air Quality Control Commission

In *Weld County Colorado Board of County Commissioners v. Ryan*, 2022 COA 26, the Board of County Commissioners of Weld County, Colorado (Weld County) brought suit against the Colorado Department of Public Health and Environment (Department) and its subagency, the Air Quality Control Commission (Commission), to challenge the Commission's rulemaking under the rule from *Martin v. District Court*, 550 P.2d 864, 866 (Colo. 1976), which held that, absent "an express statutory right, a subordinate state agency . . . lacks standing or any other legal authority to obtain judicial review of an action of a superior state agency."

Under Senate Bill 19-181, passed in April 2019, the Colorado General Assembly directed the Commission to adopt new rules and revise existing rules to address the effects of oil and gas operations on air quality in Colorado. *See* Colo. Rev. Stat. § 25-7-109(10). The Department's Air Pollution Control Division proposed changes to Regulation 7, 5 Colo. Code Regs. § 1001-9, addressing the control of volatile organic compound emissions from oil and gas operations. The revisions would impose additional requirements on oil and gas operators, including more frequent leak detection and repair inspections at well production facilities and natural gas compressor stations, as well as additional emissions controls for storage tanks. The Commission initiated rulemaking processes to revise Regulation 7, and Weld County actively engaged in the rulemaking process, submitting comments and offering expert testimony. Ultimately, the Commission adopted substantial revisions to Regulation 7 consistent with those proposed, and the adopted rules became effective on February 14, 2020.

Weld County was dissatisfied with these revisions and filed a complaint in district court asserting claims against the Commission and the Department under the State Administrative Procedure Act, Colo. Rev. Stat. §§ 24-4-101 to -204. Weld County alleged that the Commission and the Department allowed a late-amended proposal to be submitted into rulemaking without time for response, and that the Commission failed to consider Weld County's concerns regarding the impact of the changes to the county's economy and land use powers. The Commission and the Department moved to dismiss Weld County's complaints under Colo. R. Civ. P. 12(b)(1) for lack of jurisdiction and failure to establish an injury-in-fact to a legally protected interest to establish standing. The district court agreed and dismissed Weld County's complaint. Weld County then appealed, arguing that it had standing to challenge the Commission's rulemaking, and that the lower court erred in dismissing its complaint.

The appeals court found that the district court correctly dismissed Weld County's complaint for lack of jurisdiction, and affirmed the judgment. The court held that "[b]ecause (1) the County is subordinate to the Commission in the context of air quality control and (2) the legislature has not granted the County an express statutory right to seek judicial review of the Commission's rulemaking, the County does not have standing to challenge the rulemaking under *Martin*." 2022 COA 26, ¶ 1.

KANSAS – OIL & GAS

David E. Bengtson, Matthew J. Salzman & Logan Fancher, Reporters

Supreme Court of Kansas Applies Law of the Case Doctrine to Prevent Second Bite at the Apple in Royalty Class Action Case

In *L. Ruth Fawcett Trust v. Oil Producers Inc. of Kansas* (*Fawcett II*), 507 P.3d 1124 (Kan. 2022), the Supreme Court of Kansas considered whether the law of the case doctrine precluded a class of royalty owners from reforming and relitigating its claim that Oil Producers Inc. of Kansas (OPIK) breached its implied duty of good faith and fair dealing by violating its duty to market the gas and underpaying royalties. This is the second time this case has come before the supreme court, the first being the well-publicized opinion *Fawcett v. Oil Producers, Inc. of Kansas* (*Fawcett I*), 352 P.3d 1032 (Kan. 2015), discussed below. *See* Vol. XXXII, No. 3 (2015) of this *Newsletter*.

The L. Ruth Fawcett Trust was the named party representing a class of more than 2,200 royalty owners with mineral rights in Seward County, Kansas. The class members leased their mineral rights to OPIK in exchange for a royalty interest in the oil and gas produced under 25 different lease forms. *Fawcett II*, 507 P.3d at 1129.

Whether OPIK satisfied its implied duty to market the gas was a central issue in *Fawcett I*. OPIK sold the gas at the well to third-party purchasers. The purchasers took title to the gas at the wellhead, transported it to a processing plant, processed the gas, and sold the processed liquids and residue gas downstream. The third-party purchasers paid OPIK for the gas they bought at the wellhead. OPIK, in turn, paid royalties to the class based on the proceeds it received from that sale. The class claimed OPIK violated its implied duty to market the gas by failing to make the gas "marketable" at its own expense. Specifically, the class argued that the raw gas was not marketable unit it was sold into the interstate pipeline, OPIK was responsible for the costs of gathering and processing to transform the raw gas into interstate pipeline quality gas, and OPIK underpaid royalties by calculating payments based on its proceeds from selling raw gas. *Id.* at 1129–30.

In *Fawcett I*, the class presented its claim as a legal issue, arguing that gas is not in a marketable condition until it is enhanced and sold in the interstate market. *Id.* at 1130. The class also argued OPIK improperly deducted statutory conservation fees from proceeds before calculating royalties. *Id.* The Kansas Supreme Court held that

> when a lease provides for royalties based on a share of proceeds from the sale of gas at the well, and the gas is sold at the well, the operator's duty to bear the expense of making the gas marketable does not, as a matter of law, extend beyond that geographical point to post-sale expenses.

Fawcett I, 352 P.3d at 1042. The court also held that "the duty to make gas marketable is satisfied when the operator delivers the gas to the purchaser in a condition acceptable to the purchaser in a good faith transaction." *Id.*

Following *Fawcett I*, the class moved to amend its petition, arguing that *Fawcett I* created a new precedent by stating that the marketable condition rule includes an implied duty of good faith and fair dealing. *Fawcett II*, 507 P.3d at 1131. Accordingly, the class sought to amend its petition to allege OPIK breached its duty of good faith and fair dealing by selling gas at the well and before it was interstate pipeline quality. *Id.* The district court denied the class's motion to amend and granted OPIK summary judgment on the class's implied duty to market claim. The court of appeals affirmed both lower court rulings. *Id.* at 1132.

In *Fawcett II*, on review before the Kansas Supreme Court, the class claimed the district court and the court of appeals erred by (1) denying the class's motion to amend, (2) granting OPIK summary judgment on the class's implied duty to market claim, and (3) applying a more specific statute regarding prejudgment interest rates on payments in oil and gas cases. *Id.* OPIK cross-petitioned for review of the court of appeals' affirmation of the district court's finding that OPIK was equitably estopped from asserting a statute of limitations defense against the class's claim that OPIK wrongfully deducted conservation fees. *Id.*

The court noted that "[t]he law of the case doctrine provides that when a second trial or appeal is pursued in a case, the first decision is the settled law of the case on all questions addressed in a first appeal." *Id.* The only exception to that rule is when a change in the applicable law occurs after the first decision was made. *Id.* at 1134. Thus, to determine whether the law of the case doctrine foreclosed the class's implied duty to market claim hinged on whether *Fawcett I* changed the existing law by introducing for the first time an implied duty of good faith into the duty to market. *Id.*

The court held that *Fawcett I* was not the first time it had recognized a good-faith requirement in the implied duty to market. In fact, the implied duty of good faith in sales between a lessee and third-party purchaser had been a component of the implied duty to market in Kansas for at least 45 years. *Id.* at 1135. Thus, because *Fawcett I* did not change existing law, the law of the case doctrine applied to prevent the class from amending its petition. Additionally, the court affirmed summary judgment in favor of OPIK on the class's implied duty to market claim. *Id.* at 1141. The court found that the class had not claimed that the leases precluded the produced gas from being sold at the wellhead, nor did the class challenge the terms of the wellhead sale.

On the remaining issues, the court held that the class was not entitled to prejudgment interest because the parties' stipulated award for damages did not become liquidated until they entered into the stipulation. *Id.* at 1143. Additionally, the court held that the court of appeals properly applied the equitable estoppel doctrine to prevent OPIK from asserting a statute of limitations defense against the class's claim that OPIK wrongfully deducted conservation fees. *Id.* at 1146.

LOUISIANA – OIL & GAS

Kathryn Gonski, Court VanTassell, Joe Heaton & John Parker, Reporters

Western District of Louisiana Enjoins Executive Order on Social Cost of Carbon; Fifth Circuit Subsequently Stays the Injunction

On February 11, 2022, the U.S. District Court for the Western District of Louisiana enjoined President Biden's executive order that required federal agencies to consider the "social cost of carbon." *Louisiana v. Biden*, No. 2:21-cv-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022); *see* Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021). While that injunction has since been stayed by the U.S. Court of Appeals for the Fifth Circuit, *see Louisiana v. Biden*, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022), the Western District of Louisiana's ruling marks the grounds upon which the battles over this policy are likely to be waged going forward.

The social cost of carbon refers to estimated damages caused by the various potential impacts of greenhouse gas emissions on sea levels, agriculture, availability of water, extreme weather patterns, and related negative impacts. In 2009, the Obama administration required all government agencies to consider these estimates in their cost/benefit analyses when making agency decisions. Furthermore, the agencies were required to consider these costs on a global scale.

The first estimates under the Obama administration calculated the social cost of carbon at roughly $51 per ton of carbon dioxide emissions. When President Trump was elected, his administration ordered that agencies should only consider the estimated costs to the United States, rather than global costs. Accordingly, the social cost of carbon estimate fell sharply to $7 per ton of carbon dioxide emissions. President Biden has since restored the standard estimate to $51 via executive order. In April 2021, Louisiana filed suit along with nine other energy producing states, challenging the executive order and seeking an injunction therefrom.

The Western District of Louisiana determined that these states had standing to challenge the executive order due to the numerous ways in which the order would injure them. The states argued that the order would deliver a one-two punch to the finances of energy producing states by reducing taxes collected on production while increasing the costs of the energy each state needs to function. Additionally, the higher estimated costs would impose additional duties on states when participating in cooperative federalism programs.

The district court then granted a preliminary injunction to the states, holding that they had a substantial likelihood of success and that they faced a substantial threat of irreparable injury. The court cited to current law restricting agencies from considering negative impacts on other countries. The court also struck down President Biden's authority to execute the executive order under the major questions doctrine, which prohibits agencies from imposing new obligations of "vast economic and political significance" onto private properties in the absence of a clear mandate from Congress. 2022 WL 438313, at *15 (internal quotation marks omitted) (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Finally, the court held that the Biden administration must follow the notice and comment rulemaking process when amending rules that were put into place under that process. *Id.* at *17.

This injunction has since been lifted by the Fifth Circuit, which found that the Biden administration made a strong showing that it is likely to succeed in proving that the plaintiff states lack standing. More specifically, the states' claims that increased regulatory burdens could result from the social cost of carbon considerations are unlikely to meet the "injury in fact" prong of the standing analysis. 2022 WL 866282, at *2. In contrast, the court held that the injunction would do irreparable harm to the Biden administration's ability to direct its agencies within the bounds of applicable law. *Id.* at *3. Finally, the court pointed out that the executive order had been in place for a year prior to the injunction without any incidence of increased regulatory burdens on the plaintiff states; thus, the states face minimal injury arising from a stay of the injunction. *Id.*

Louisiana Third Circuit Affirms That LDNR Can Only Recover Emergency Response Costs from the Operator of Record and Its Working Interest Owners

In *Litel Explorations, LLC v. Aegis Development Co.*, 2021-741 (La. App. 3 Cir. 4/6/22), 2022 WL 1023248, the Louisiana Third Circuit Court of Appeal held that, when the Louisiana Department of Natural Resources (LDNR) spends from the Oilfield Site Restoration Fund (Fund) to respond to an emergency at a well site, only the well's last operator of record and working interest owners are liable for reimbursing the Fund.

The Louisiana Oilfield Site Restoration Law (OSRL), La. Rev. Stat. §§ 30:80–:97, established the Fund in 1993 with the goal of financing the restoration and plugging of orphaned wells. In 1999, the legislature expanded the utility of the Fund by allowing the LDNR to also spend it on emergencies: situations requiring "immediate action to prevent substantial or irreparable damage to the environment or a serious threat to life or safety." *Id.* § 30:6.1(A).

The LDNR may replenish the Fund after it plugs an orphan well or responds to an emergency by pursuing recovery from the applicable parties as set forth in La. Rev. Stat. § 30:93. When the LDNR uses the Fund on orphan well restoration it can recover any costs in excess of $250,000 from all prior operators of record, starting with the most recent and moving backwards until all costs are recovered. *Id.* § 30:93(A)(1). For emergencies, however, the OSRL dictates that "recovery of costs shall be against the responsible party." *Id.* § 30:93(A)(4). The OSRL further defines "responsible party" as "the operator of record . . . who last operated the property . . . and that operator's partners and working interest owners . . . ." *Id.* § 30:82(11).

Litel began as a legacy lawsuit involving, in part, the G.A. Lyon Well #1. After the well started leaking in 2018, the LDNR issued a compliance order to Sandhill Production, Inc. (Sandhill) (the current operator of record), to stop the leak. Sandhill failed to stop the leak and abandoned the well in 2019. The LDNR subsequently declared an emergency and utilized the Fund to work on stopping the leak. To recover those expenditures, the LDNR intervened in the legacy suit in an attempt to recover costs from the well's former operators: Pioneer Natural Resources, Inc. (Pioneer) and Gary Production Company (Gary). Pioneer and Gary filed motions for partial summary judgment, pointing to the language of the OSRL that restricts cost recovery for emergency response to the responsible party: Sandhill and its working interest owners. The trial court granted their motions and dismissed the LDNR's cost recovery claims. *Litel*, 2022 WL 1023248, at *1–4.

On appeal, the LDNR argued that the cost recovery rules for orphan wells (i.e., those allowing recovery from prior operators) kicked in as soon as the well obtained the orphaned status, regardless of whether the Fund was spent on emergency work or plugging the well. Pioneer and Gary reiterated the language cited by the trial court that limits emergency recovery to the responsible party and added that the LDNR selects between emergency work and orphan work when it solicits bids for the job; in this case, the LDNR chose the informal bidding process allowed for emergencies rather than the formal bidding process mandated for orphan work.

The Louisiana Third Circuit affirmed the trial court's ruling, pointing once again to the "clear and unambiguous" language of the OSRL that recovery of costs for "*any* emergency . . . *shall* be against the responsible party." *Id.* at *7 (quoting La. Rev. Stat. § 30:93(A)(4)). The court further held that the OSRL created "a separate and distinct limitation as to recoupment of costs" for emergencies versus the ability to pursue recovery from prior operators for orphan work. *Id.* When the LDNR declared an emergency, utilized the informal bidding process, and spent Fund monies to pay for it, it limited itself to recovering only from Sandhill and its working interest owners. *Id.*

The Third Circuit's ruling draws a bright line between emergency work and orphan work, the procedures required for each, and the means of recovering costs based on which procedure is chosen. This case also highlights the importance of considering this choice carefully; the LDNR sought over $6.3 million in emergency response costs, the recovery of which is limited to only the last operator of record and its working interest owners. Finally, this ruling should allow prior operators to breathe a little easier, knowing they will not be held responsible for emergencies at wells they used to operate but now have no control over.

Editor's Note: Colleagues at the reporters' law firm represented defendant Gary Production Company.

Western District of Louisiana Changes Course on Proper Deductibility of Post-Production Costs from Unleased Mineral Owners

In *Self v. BPX Operating, Co.*, No. 5:19-cv-00927, 2022 WL 989345 (W.D. La. Mar. 31, 2022), *appeal docketed*, No. 22-30243 (5th Cir. Apr. 27, 2022), and *Johnson v. Chesapeake Louisiana, LP*, No. 5:16-cv-01543, 2022 WL 989341 (W.D. La. Mar. 31, 2022), the U.S. District Court for the Western District of Louisiana held that post-production costs were properly deductible from proceeds owed to unleased mineral owners in the unit, reversing its own decision in *Johnson* from three years earlier that ruled that post-production costs could not be deducted. *See Johnson v. Chesapeake La., LP*, No. 5:16-cv-01543, 2019 WL 1301985 (W.D. La. Mar. 21, 2019).

In the original *Johnson* decision, the district court faced the res nova issue of whether post-production costs were properly deductible from the proceeds of unleased mineral owners. The court looked to La. Rev. Stat. § 30:10(A)(3) as the statutory provision governing what an unleased owner is to be paid for production from a compulsory unit. This provision states that the unleased owner is entitled to his "pro rata share of the proceeds of the sale of production" and does not list any other costs that are recoverable against the unleased owners. The court interpreted the statute's silence as to post-production costs as a sign of legislative intent; namely, if the legislature wanted post-production costs to be deductible they would have stated as much in the statute.

On reconsideration of this ruling, the court adopted the defendants' arguments that section 30:10(A)(3) creates a quasi-contractual relationship under the doctrine of negotiorum gestio between the unit operator and unleased mineral owners. This doctrine applies where a manager handles the affairs of an owner, without the owner's authority but under a reasonable belief that the owner would approve. *See* La. Civ. Code arts. 2292–2297. Under such circumstances, the owner is bound to reimburse the manager for "all necessary and useful expenses." *Id.* art. 2297. Thus, because the unit operator is tasked with managing the sale of minerals produced in part from the lands of unleased mineral owners, and post-production costs are necessary to market those minerals, the unit operator is entitled to recover those costs from the unleased owners. *Johnson*, 2022 WL 989341, at *7.

Referencing its prior ruling, the court stated that silence in the Revised Statutes as to post-production costs is insufficient on its own to conclude that such costs must be non-deductible. *Id.* at *6. The court attributed this change of heart to the discussion in *J & L Family, LLC v. BHP Billiton Petroleum Properties (N.A.), LP*, 293 F. Supp. 3d 615, 621 (W.D. La. 2018), which involved an unleased mineral owner seeking attorney's fees despite the absence of an attorney's fees provision in La. Rev. Stat. § 30:10. Rather than interpret this silence as an express denial of the right to attorney's fees, the court in *J & L Family* looked to interpret the Revised Statutes alongside the Civil

Code's quasi-contractual provisions. The court followed suit in reversing its original decision in *Johnson*.

The Western District of Louisiana's rulings in *Self* and *Johnson* have been certified for appeal. Nonetheless, unit operators are likely breathing a sigh of relief after three years of uncertainty and two putative class actions following the original *Johnson* ruling.

Editor's Note: Colleagues at the reporters' law firm served as counsel of record on behalf of an amici group in *Johnson*, as counsel of record on behalf of the defendants in *Self* and *J & L Family*, and as counsel of record on behalf of various Louisiana operators in other lawsuits implicated by *Johnson* and *Self*.

U.S. Fifth Circuit Provides Further Guidance on the Notice Requirements of La. Rev. Stat. §§ 30:103.1 and 30:103.2

In *B.A. Kelly Land Co. v. Aethon Energy Operating, LLC*, 25 F.4th 369 (5th Cir. 2022), the U.S. Court of Appeals for the Fifth Circuit weighed in on the notice requirements of La. Rev. Stat. §§ 30:103.1 and 30:103.2, holding that a claim letter need not expressly cite to these statutes in order to put the operator on proper notice of the claim.

Under section 30:103.1, when a drilling unit contains lands upon which the unit operator has no valid oil, gas, or mineral lease, the operator must send reports to the owners of those lands with an itemized statement reflecting the costs of drilling, completing, and equipping the unit well. After production is established, the operator must send quarterly reports detailing the production of the unit well, prices received for that production, and quarterly operating expenses and other expenses. Under section 30:103.2, if the operator fails to comply with section 30:103.1 within 90 days of completion of the well and an additional 30 days after receipt of "written notice by certified mail from the owner or owners of unleased oil and gas interests calling attention to failure to comply with the provisions of [section] 30:103.1," the operator forfeits its right to demand contribution from an unleased owner.

This lawsuit involved a 160-acre tract of land in Bossier Parish, Louisiana, owned by plaintiff B.A. Kelly Land Company, LLC (Kelly). The Commissioner of Conservation included the Kelly tract in two drilling units operated by Aethon Energy Operating, LLC (Aethon). Kelly thereafter sent two letters to Aethon. The first letter comprised a four-item list of requested information that very closely tracked the four items listed in section 30:103.1(A)(2). The second letter closely tracked the language of section 30:103.2 and claimed that Aethon had failed to comply with requirements under Louisiana law to provide reports to an unleased owner in its unit. These letters closely tracked the language of sections 30:103.1 and 30:103.2 but did not expressly reference these statutes. The letters also failed to refer to the sought after information as "initial reports" or "quarterly reports" as they are referred to in the statutes. It is undisputed that Aethon failed to timely send the requested information to Kelly within the time frame provided by section 30:103.2.

In the ensuing lawsuit against Aethon in the Western District of Louisiana, Kelly filed a motion for partial summary judgment seeking to enforce the penalty under section 30:103.2. The trial court denied Kelly's motion for partial summary judgment, finding that Kelly's letters to Aethon were insufficient notice under the statutes because neither letter specifically referenced the statute numbers or used the terms "initial report" or "quarterly report." Furthermore, the second letter made no mention of the possibility of a lawsuit, penalty, or forfeiture. *B.A. Kelly*, 25 F.4th at 382–83.

The Fifth Circuit reversed this ruling on appeal, holding that the lower court erred in requiring an express reference to the statutes or to particular language therein. *Id.* at 383. Furthermore, the first letter was sufficient notice under section 30:103.1 because "it was (1) in writing; (2) sent by certified mail addressed to Aethon; and (3) contained the name and address of Kelly, the unleased owner." *Id.* at 379. The Fifth Circuit cast favor on the fact that Kelly's first letter tracked the language of section 30:103.1 and also clearly identified the relevant units and wells operated by Aethon. Similarly, the second letter closely tracked the language of section 30:103.2, which does not require notice of a possible lawsuit or penalty but only requires the unleased owner to "call[] attention to failure to comply with the provisions of [section] 30:103.1."

While the Fifth Circuit's opinion does not set the notice requirements of sections 30:103.1 and 30:103.2 in stone, it does serve as another guidepost to help Louisiana operators avoid potentially costly pitfalls with unleased landowners. *See also* Vol. XXXVIII, No. 3 (2021) of this *Newsletter*. The opinion should also serve to warn unit operators that they ignore communications from unleased landowners at their own peril, particularly when those communications have any bearing on the language of sections 30:103.1 and 30:103.2.

U.S. Fifth Circuit Rejects Disgorgement of Profits Claim for Oil and Gas Pipeline Trespass

In a recent decision by the U.S. Court of Appeals for the Fifth Circuit, a landowner was found not to be entitled to a pipeline company's profits because a portion of the pipeline was partially located outside of a servitude. *Mary v. QEP Energy Co.*, 24 F.4th 411 (5th Cir. 2022). In the events leading up to this lawsuit, the plaintiffs and QEP Energy Co. (QEP) entered into various agreements to explore for, extract, and transport oil and gas on the plaintiffs' property. One of these agreements permitted QEP to transport production from a well on neighboring land by pipeline across the plaintiffs' land. However, the plaintiffs claimed that two of QEP's oil and gas pipelines unlawfully extended onto their property beyond the servitude granted for the pipelines by 31 and 15 feet, respectively. As a result, the plaintiffs sought profits derived from those pipelines.

On appeal, the Fifth Circuit made some important distinctions. First, the gas produced from the wells was a product, not a fruit. *Id.* at 417–18. This distinction matters since the general rule in Louisiana is that the owner of a thing owns by accession the fruits of that thing. *Id.* at 418 (citing La. Civ. Code art. 483). Second, the gas that ran through the portion of the pipelines not on the servitude was not taken from the plaintiffs' land, it was taken from the plaintiffs' neighbor's land. *Id.* This distinction matters since, according to La. Civ. Code art. 488, a landowner may recover products taken from its land without its consent. *Mary*, 24 F.4th at 418. Therefore, even if the proceeds of the gas being transported were considered a "fruit," the court found the proceeds were not derived from any fruits that the plaintiffs owned. *Id.* Because QEP did not obtain or benefit from fruits derived from the plaintiffs' property, the plaintiffs were not entitled to QEP's profits. *Id.* at 420.

Next, the court rejected the plaintiffs' breach of contract claims since it could not find any basis in the Civil Code articles on contracts for a disgorgement of profits. Without any authority providing disgorgement as a remedy for breach of contract under Louisiana law, the Fifth Circuit concluded that the plaintiffs are not entitled to disgorgement under a breach of contract theory. *Id.* at 420–21.

Lastly, the court rejected the plaintiffs' trespass claims since it could not find any evidence of additional profits earned by QEP due to the trespass. Rather, the court concluded that the most the plaintiffs could possibly recover would be the additional profits QEP earned as a direct result of its encroachment, and the plaintiffs have no evidence of such additional profits. *Id.* at 421.

This case also provides a very clear analysis of the limits of disgorgement of profits in the context of oil and gas pipelines, putting special emphasis on the importance of where the oil and gas being transported originates. As long as the oil and gas being transported does not originate from the property of the party who sues for a pipeline existing outside a servitude, such a party cannot use disgorgement of profits as a method of recovery.

Editor's Note: This report was submitted for the previous issue of this *Newsletter* but was inadvertently omitted.

Louisiana Voluntary Self-Reporting Law for Minor Environmental Accidents Is Passed

In 2021, Louisiana joined 30 other states in adopting an environmental audit law when the Louisiana legislature enacted Act No. 481. This new law, which amends and reenacts La. Rev. Stat. §§ 30:2018(C) and 30:2030(A)(2) and enacts La. Rev. Stat. §§ 30:2030(A)(3) and 30:2044, aims "to require the secretary to promulgate regulations allowing for voluntary environmental self-audits; to provide for the confidentiality of information contained in a voluntary environmental self-audit; to provide for exceptions to confidentiality requirements; to provide for incentives to facilities conducting voluntary environmental self-audits; and to provide for related matters." Act No. 481, at Preamble.

Prior to this new law, there was no procedure through which a Louisiana industrial facility could opt to self-audit pollution events when they otherwise would not be required to report such occurrences. The only reporting requirements faced by these organizations came in the form of mandatory reporting requirements for pollution violations that met a set standard of severity. This new law urges plants to disclose pollution events that would not usually qualify for mandatory reporting in an "environmental audit." It aims to allow plants to report toxic spills that would otherwise go wholly unreported in order to provide the Louisiana Department of Environmental Quality (LDEQ) with information on minor accidents that it would not normally receive.

The incentives provided by this new law encouraging plants to participate in self-reporting their minor pollution incidents are twofold. First, it provides that self-audits made under its provisions will be held confidential and withheld from public disclosure for a period of time until a final decision is made by the LDEQ. La. Rev. Stat. § 30:2030(A)(2). Second, it incentivizes self-reporting with the promise of "reduction or elimination, or both, of civil penalties for violations disclosed to the [LDEQ] in a voluntary environmental self-audit." *Id.* § 30:2044(A)(3).

This new law could prove to be an effective tool for the LDEQ to increase the amount of data it has on hand in order to find best practices in making the oil and gas industry more efficient, effective, and environmentally conscious. However, some critics have raised concerns that this new law sets a bad precedent for laws to come by creating a policy to allow the state to withhold critical environmental information from the general public. Whether this new law is going to effectively promote better practices and more efficient actions from both the LDEQ and the oil and gas industry is still to be determined, but it may potentially be a fresh step toward a brighter future for both the oil and gas industry and the environment.

Editor's Note: This report was submitted for the previous issue of this *Newsletter* but was inadvertently omitted.

NEW MEXICO – MINING

Christina C. Sheehan, Reporter

New Mexico Water Quality Control Commission Concludes Latest Triennial Review Process

On March 9, 2022, and in accordance with section 303(c)(1) of the Clean Water Act and section 20.6.4.10 of the New Mexico Administrative Code, the New Mexico Water Quality Control Commission (WQCC) issued its statement of reasons and decision concerning proposed amendments to the state's surface water quality control standards. N.M. Code R. § 20.6.4. This concluded the latest triennial review proceeding that the New Mexico Environment Department (NMED) initiated in 2020. The WQCC's decision followed a five-day public hearing that included the presentation of technical testimony from many parties.

In its decision, the WQCC, the rulemaking authority under New Mexico's Water Quality Act, adopted amendments to the rule, many of which were proposed by NMED, one of the WQCC's constituent agencies administering the state's water quality protection programs. Most notably, the WQCC explicitly acknowledged climate change concerns and the promotion of water quality resiliency as objectives of New Mexico's surface water quality standards. The WQCC further adopted the following definition of climate change:

> "Climate change" refers to any significant change in the measures of climate lasting for an extended period of time, typically decades or longer, and includes major changes in temperature, precipitation, wind patterns or other weather-related effects.

Id. § 20.6.4.7.C(4). Taken together these amendments make the WQCC's surface water quality control regulations one of the first environmental protection regimes in the state to expressly recognize and define climate change, although the practical effect of doing so remains to be seen.

Over various objections offered by certain participants, the WQCC further added new definitions for "emerging contaminants" and "persistent toxic pollutants" to the regulations:

> "Emerging contaminants" refer to water contaminants that may cause significant ecological or human health effects at low concentrations. Emerging contaminants are generally chemical compounds recognized as having deleterious effects at environmental concentrations whose negative impacts have not been fully quantified and may not have regulatory numeric criteria.

Id. § 20.6.4.E(2).

> "Persistent toxic pollutants" means pollutants, generally organic, that are resistant to environmental degradation through chemical, biological and photolytic processes and can bioaccumulate in organisms, causing adverse impacts on human health and aquatic life.

Id. § 20.6.4.P(3).

Not all proposals from NMED were accepted by the WQCC, however. For example, the WQCC declined to adopt NMED's proposed redesignation of certain surface waters that for the most part would have increased the regulatory protections for the particular waters at issue.

The amendments to section 20.6.4 went into effect on April 23, 2022. A copy of the amended rule is located at https://www.srca.nm.gov/nmac/nmregister/xxxiii/20.6.4amend.html.

OHIO – MINING / OIL & GAS

J. Richard Emens, Sean Jacobs & Cody Smith, Reporters

Supreme Court of Ohio Provides Guidance as to an Unreasonable Search Under Ohio Dormant Mineral Act

In *Fonzi v. Brown*, 2022-Ohio-901, the Supreme Court of Ohio held that a surface owner has the burden of proof to show that they exercised a reasonably diligent search for the holder of an oil and gas interest prior to resorting to notice by publication under the Ohio Dormant Mineral Act (DMA), Ohio Rev. Code Ann. § 5301.56. A reasonably diligent search may include searching the public records outside of the county where the property is located.

In 1952, Elizabeth Henthorn Fonzi acquired land located in Monroe County, Ohio, via a deed that noted that she lived in Washington County, Pennsylvania. Shortly thereafter, Fonzi conveyed the surface of the property via a deed that also noted that she lived in Washington County. In 2012 and 2013, the surface owners of the property attempted to have the oil and gas interest reserved by Fonzi abandoned and vested in them pursuant to the DMA. The surface owners hired an attorney to search the public records of Monroe County, Ohio, seeking any information on the heirs of Fonzi. When the surface owners were unable to find any information, they published notice in a Monroe County newspaper of their intent to declare the oil and gas deemed abandoned. After the surface owners attempted the DMA procedure, the heirs of Fonzi filed lawsuits in Monroe County claiming that the surface owners failed to exercise reasonable diligence in attempting to locate them for service under the DMA. Thus, they claimed that the abandonment procedure under the DMA was ineffective and they owned the oil and gas under the property. *Id.* ¶¶ 2–5.

The DMA provides that prior to resorting to publication of notice, a surface owner must "[s]erve notice by certified mail . . . of the owner's intent to declare the mineral interest abandoned." *Id.* ¶ 14 (alteration in original) (quoting Ohio Rev. Code Ann. § 5301.56(E)(1)). If service by certified mail, however, "cannot be completed to any [mineral-interest] holder, the [surface] owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located." *Id.* (alterations in original) (quoting Ohio Rev. Code Ann. § 5301.56(E)(1)). A surface owner must exercise reasonable diligence in attempting to identify the holders of a mineral interest prior to resorting to notice by publication. *Id.* ¶ 21.

In *Fonzi*, the Supreme Court of Ohio found that the surface owners failed to exercise reasonable diligence in attempting to seek information on the heirs of Fonzi. It found it pertinent that the surface owners "did not attempt to search public records in Washington County, Pennsylvania, despite the fact that the last known residence of the mineral-rights holder was in that location." *Id.* ¶ 26. Thus, it held that the surface owners' use of the DMA procedure was ineffective, leaving the oil and gas vested in the heirs of Fonzi.

While the *Fonzi* decision states that the Supreme Court of Ohio is not adopting a bright-line rule, the decision suggests that in cases where a surface owner does not attempt to serve notice to a holder by certified mail, the surface owner must search for information in any out-of-county location that is referenced in the chain of title to the property prior to resorting to notice by publication. Furthermore, because "[c]ompliance with the reasonable-diligence standard is entirely in the hands of the surface owner," the surface owner has the burden of proof to show that their search was reasonably diligent. *Id.* ¶ 23.

OKLAHOMA – OIL & GAS

James C.T. Hardwick, Reporter

Claim for Damage to Vertical Well by Fracking of Horizontal Well Not Assignable; Assignee Has No Standing to Sue

The case of *Raw Crude Oil & Gas, LLC v. Ovintiv Mid-Continent Inc.*, No. 5:21-cv-00305, 2021 WL 6328011 (W.D. Okla. Oct. 04, 2021), involved whether the assignee of rights to an oil and gas well claimed to have been damaged by the fracking of the defendant's horizontal wells had standing to sue when the plaintiff was merely the assignee of the owner of the vertical well at the time of the horizontal well frack. Blue Dolphin Energy, LLC (Blue Dolphin), owned the Kayleen Well No. 1 well, a vertical well. In November 2020 Blue Dolphin sold its interest in the Kayleen Well and all associated oil and gas leases to Raw Crude Oil & Gas, LLC (Raw Crude). This assignment included all of Blue Dolphin's claims and causes of action in any way related to the Kayleen Well. Ovintiv Mid-Continent Inc. (Ovintiv) was the operator of six horizontal wells with bottom hole locations near the wellbore of the Kayleen Well. Between February 2016 and March 2019, Ovintiv drilled and completed the horizontal wells and as a part of the completion process those wells were fracked. In March 2021 Raw Crude filed this case in the District Court of Kingfisher County, Oklahoma, alleging that the fracking of Ovintiv's horizontal wells damaged the Kayleen Well and its ability to produce. In April 2021 Ovintiv removed the case to federal court. Ovintiv then filed a motion for summary judgment on the issue of Raw Crude's standing to sue.

Ovintiv contends Raw Crude does not have standing to sue because the assignment of these claims from Blue Dolphin to Raw Crude is prohibited under the Oklahoma statute dealing with capacity to sue and real party in interest. The court noted that Oklahoma provides that "[a] thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner." *Id.* at *1 (alteration in original) (quoting Okla. Stat. tit. 60, § 313). However, Oklahoma statutes also provide that "[t]he assignment of claims not arising out of contract is prohibited." *Id.* (alteration in original) (quoting Okla. Stat. tit. 12, § 2017(D)). Citing prior authority, the court noted that Oklahoma had held that "an action growing out of a tort, pure and simple . . . is not assignable." *Id.* (quoting *Kansas City, M. & O. Ry. Co. v. Shutt*, 104 P. 51, 53 (Okla. 1909)). Oklahoma has also held that "actions growing out of contracts, or arising out of violations of rights of property, where such violation partakes, not only of the nature of a tort, but also an implied contract" may be assigned. *Id.* (quoting *Shutt*, 104 P. at 53).

Turning to the plaintiff's claims, the court noted the allegation of Raw Crude that the injection of fluids into the earth as a part of the fracking process had damaged the Kayleen Well and its ability to produce. Further, Raw Crude alleged those fracks forced formation fluids and frack fluids into the wellbore of the Kayleen Well, that Ovintiv failed to use reasonable care, and the damage to its well was foreseeable to Ovintiv. The court noted that the petition contained no allegations regarding any contract or implied contract between Ovintiv and Blue Dolphin. Raw

Crude responded that Ovintiv and Raw Crude owned certain leasehold interests in the same oil and gas leases. However, the court concluded that this ownership was unrelated to the actual tort alleged. Raw Crude further argued that the provisions of Okla. Stat. tit. 41, § 15, gave standing. That section provides that "alienees of lessors and lessees of land shall have the same legal remedies in relation to such lands as their principal." The court held that this statute was inapplicable because it applied to lessors and lessees of land and not claims that arise from damage to the Kayleen Well. *Raw Crude*, 2021 WL 6328011, at *2. The court concluded that this action was a tort, pure and simple, and was not an action growing out of contract. Thus, Raw Crude was not the real party in interest. However, the case was not dismissed. Pursuant to Fed. R. Civ. P. 17(a)(3), Blue Dolphin was given 30 days from the date of the order to move to be substituted as the plaintiff in the case. If Blue Dolphin did not do so within that time, the court would dismiss the case.

Authority of Municipalities to Regulate Oil and Gas Operations Is Narrowly Limited in Scope

Magnum Energy, Inc. v. Board of Adjustment for the City of Norman, 2022 OK 26, was a dispute involving section 13-1502.1(a)(4) of the Norman Municipal Code requiring oil and gas operators to maintain an umbrella insurance policy with at least $2 million in coverage. Magnum Energy, Inc. (Magnum), had operated the Patty No. 1 Well in Norman, Oklahoma, since September 1989. On January 2, 2018, Magnum filed an application for a variance with the Board of Adjustment for the City of Norman (Board) requesting a waiver of the umbrella insurance requirement. The Board denied the application for variance. Magnum appealed the Board's order to the District Court of Cleveland County, Oklahoma. In its appeal, Magnum claimed that Norman Municipal Code § 13-1502.1(a)(4) conflicted with 52 Okla. Stat. tit. 52, § 137.1, which places a limit on the authority of municipalities to regulate oil and gas operations. Magnum filed a motion for summary judgment to have section 13-1502.1(a)(4) declared void and unenforceable on the grounds that it conflicted with state law. On March 19, 2019, the district court granted Magnum's motion for summary judgment finding that the Municipal Code section conflicts with section 137.1 and enjoining enforcement against Magnum. The Board appealed and the appeal was assigned to the Oklahoma Court of Civil Appeals. On June 24, 2020, the court of civil appeals issued an unpublished opinion reversing the district court's order, determining that the Municipal Code section at issue was enacted pursuant to the city's general police power and that the ordinance was not precluded under section 137.1 and therefore was enforceable. Magnum filed its petition for certiorari to the Oklahoma Supreme Court, which petition was granted.

On appeal, Magnum contended that the 2015 enactment of section 137.1 curtailed the authority of municipalities to regulate oil and gas operations under the scope of their general police power and that the Municipal Code section at issue here was precluded. The statute limited a municipality's authority to regulate gas production to three parameters. First, municipalities and the like may enact reasonable ordinances, rules, and regulations concerning road use, traffic, noise, and odors incidental to oil and gas operations within their boundaries provided those ordinances were not inconsistent with any regulation established by the Oklahoma Corporation Commission (OCC) under title 52. Second, the municipality had the ability to establish reasonable setback and fencing requirements for oil and gas well site locations reasonably necessary to protect the health, safety, and welfare of its citizens but may not effectively prohibit or ban oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines, or pipeline infrastructure. Third, a municipality may enact reasonable ordinances concerning development of areas within its boundaries delineated as a 100-year floodplain but only to the minimum extent necessary to maintain National Flood Insurance Program eligibility. *Magnum Energy*, 2022 OK 26, ¶ 9.

The Board argued that section 137.1 does not compromise the full scope of municipal authority to regulate oil and gas production. Specifically, the Board contended that "municipalities maintain a general police power to provide for the safety and wellbeing of their inhabitants, and pursuant to that authority, municipalities may impose regulations on oil and gas production that go beyond the categories enumerated in [section] 137.1." *Id.* ¶ 12. In support, the Board cited a number of earlier decisions recognizing such municipal police power that the supreme court said upheld a municipal ordinance as a legitimate exercise of that police power, most recently in *Gant v. Oklahoma City*, 6 P.2d 1065 (Okla. 1931). However, the court said the Board's position failed to account for the effect of the statutory changes since the *Gant* decision. *Magnum Energy*, 2022 OK 26, ¶ 16. Thus, until 2015 municipalities clearly had broad authority to regulate oil and gas production, including the authority to prohibit oil and gas production altogether, and municipalities' police power to impose other regulations was explicitly recognized. *Id.* ¶ 17. However, in 2015 the prior controlling section, Okla. Stat. tit. 52, § 137, was repealed and section 137.1 was adopted, which, the supreme court said, "drastically curtailed the jurisdiction of municipalities to regulate oil and gas production." *Id.* Notably, said the court, the legislature "omitted any reference to municipal police power, instead reserving specific and limited areas of regulation for municipal control." *Id.* Further, the legislature "explicitly precluded municipalities from prohibiting oil and gas production and made all other regulations of oil and gas production subject to the exclusive jurisdiction of the [OCC]." *Id.*

The supreme court concluded that the umbrella insurance requirement of the Norman Municipal Code did not fall within any of the categories reserved for municipal regulations under section 137.1. *Id.* ¶ 20. It did not qualify as an ordinance concerning road use, traffic, noise, and odors incident to oil and gas operations nor did it constitute a setback or fencing requirement for oil and gas well sites. *Id.* Further, it did not concern the development of areas delineated within a 100-year floodplain. *Id.* The court noted that under Okla. Stat. tit. 17, § 52(B), incorporated cities and towns (together with the OCC) have exclusive jurisdiction over permit fees for drilling an oil and gas well. *Magnum Energy*, 2022 OK 26, ¶ 20. However, the umbrella insurance requirement could not be fairly characterized as a permit fee. *Id.*

The court's final conclusion was that section 13-1502.1(a)(4) of the Norman Municipal Code is irreconcilable with state law, that with the enactment of section 137.1 the legislature sought to change the concurrent jurisdiction of municipalities and the OCC, and that municipalities no longer possessed a broad police power to regulate all oil and gas operations. *Id.* ¶¶ 20–21. Accordingly the court of civil appeals opinion was vacated and the judgment of the trial court was affirmed.

PENNSYLVANIA – MINING

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

Pennsylvania Joins RGGI

After a lengthy rulemaking process, the Pennsylvania Department of Environmental Protection's (PADEP) CO_2 Budget Trading Program rule was published in the *Pennsylvania Bulletin*. *See* 52 Pa. Bull. 2471 (Apr. 23, 2022). As previously reported in Vol. XXXVI, No. 4 (2019) of this *Newsletter*, on October 3, 2019, Governor Tom Wolf signed Executive Order No. 2019-07, "Commonwealth Leadership in Addressing Climate Change Through Electric Sector Emissions Reductions," directing PADEP to initiate a rulemaking to join the Regional Greenhouse Gas Initiative (RGGI). 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. The CO_2 Budget Trading Program links Pennsylvania's program to RGGI.

Following approval of the rule by the Environmental Quality Board (EQB) in July 2021 and approval by the Pennsylvania Independent Regulatory Review Commission in September 2021, the final form rulemaking was submitted to the Pennsylvania House and Senate Environmental Resources and Energy standing committees. Both houses of the legislature passed Senate Concurrent Regulatory Review Resolution 1 (S.C.R.R.R.1), which disapproved of the rulemaking, and Governor Wolf vetoed the resolution on January 10, 2022. *See* Vol. 39, No. 1 (2022) of this *Newsletter*. The Governor's veto sent the resolution back to the legislature, where each chamber had 30 calendar days or 10 legislative days, whichever was longer, to attempt a veto override. The legislature needs a veto-proof two-thirds majority to override a veto and block a regulation. On April 4, 2022, the Pennsylvania Senate failed by one vote to reach the two-thirds majority vote needed to override Governor Wolf's veto of S.C.R.R.R.1.

However, while S.C.R.R.R.1 was pending in the legislature, on November 29, 2021, the EQB submitted the CO_2 Budget Trading Program rule to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. The Legislative Reference Bureau informed the EQB that it was not authorized to publish the rule because S.C.R.R.R.1 was still pending before the House of Representatives. On February 3, 2022, Patrick McDonnell, Secretary of PADEP and Chairperson of the EQB, filed suit in commonwealth court seeking to compel the Legislative Reference Bureau to publish the EQB's final-form rulemaking for the CO_2 Budget Trading Program. *See McDonnell v. Pa. Legislative Reference Bureau*, No. 41 MD 2022 (Pa. Commw. Ct. filed Feb. 3, 2022). On February 25, 2022, Senator Yaw's office also announced that Pennsylvania Senate leaders petitioned to intervene in the lawsuit.

On April 5, 2022, the commonwealth court issued a stay preventing the Legislative Reference Bureau from publishing the EQB's final-form rulemaking for the CO_2 Budget Trading Program, pending further order of the court. Because no hearing was held on the stay, it was dissolved by operation of Pa. R. Civ. P. 1531(d) after five days.

The Legislative Reference Bureau subsequently published the rule on April 23, 2022. Two days later a group of stakeholders filed a petition for review of the rule and an application for preliminary injunction in the commonwealth court. *See Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022). The court held a hearing on the preliminary injunction on May 10 and 11, 2022, and a ruling is expected early this summer.

If the commonwealth court does not grant the application for preliminary injunction, compliance obligations under the rule will begin July 1, 2022. Regulated sources must hold allowances equal to their CO_2 emissions over a three-year compliance period. Each allowance is equal to one short ton of CO_2. Regulated sources may purchase state-issued allowances at quarterly auctions or through secondary markets and can use allowances issued by any RGGI state to comply. Affected units would need to start monitoring emissions on July 1, 2022, to be able to purchase allowances for CO_2 emitted on or after that date. RGGI operates on a three-year compliance schedule whereby only partial compliance is required within the first two years, and then full compliance is required after the end of the third year. The current RGGI three-year compliance period began in 2021, so 2021 and 2022 are interim compliance years and 2023 is a full compliance year. Regulated sources must acquire 50% of the necessary CO_2 allowances by March 1, 2023, and acquire 100% of their allowances by March 1, 2024. The allowance price was $13.50 at the last RGGI auction on March 11, 2022. The partial year emissions cap for Pennsylvania would be 40.7 million tons of CO_2 for the remainder of 2022. The total annual emissions cap will gradually decline to 58 million in 2030.

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

Pennsylvania Eligible for Over $26 Million in Federal Funding to Help Reclaim Abandoned Mine Lands

On March 4, 2022, Pennsylvania Governor Tom Wolf announced that the commonwealth is eligible for almost $26.5 million in Abandoned Mine Reclamation Fund program annual grants. *See* Press Release, Gov. Tom Wolf, "Gov. Wolf Announces $26.5 Million Federal Funding to Help Reclaim Abandoned Mine Lands" (Mar. 4, 2022). This is in addition to the almost $250 million authorized for annual distribution to Pennsylvania over 15 years from the federal Abandoned Mine Land (AML) Trust Fund. *See* Press Release, Gov. Tom Wolf, "Gov. Wolf Announces $244.9 Million Bipartisan Infrastructure Law Investment to Cleanup Pennsylvania's Abandoned Mine Lands" (Feb. 7, 2022). The AML program was established pursuant to title IV of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, and the $250 million annual distribution for Pennsylvania stems from President Joe Biden's November 2021 bipartisan Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

In Governor Wolf's March 4 announcement, he noted that AML funding supports jobs in coal communities and could lead to the reduction of methane emissions throughout the commonwealth. Pennsylvania expects to receive almost $4 billion over the next 15 years to address contamination and pollution caused by coal mining and the estimated 5,000 abandoned mines throughout the commonwealth. In 2019, the Pennsylvania Department of Environmental Protection (PADEP) reported that the commonwealth had over 287,000 acres of land in need of reclamation, with the estimated cost of reclamation expected to exceed $5 billion. *See* Fact Sheet, PADEP, "Pennsylvania's Surface Mining Control and Reclamation Act Funded Abandoned Mine Lands Program: Past, Present, and Future" (Mar. 2019). A year-by-year summary of the AML grants awarded to Pennsylvania is available on PADEP's website at https://www.

dep.pa.gov/Business/Land/Mining/AbandonedMineReclamation/AMLProgramInformation/Pages/AMLFunding.aspx.

PADEP Announces Bond Rate Guidelines for Coal and Noncoal Mining Operations

On February 19, 2022, the Pennsylvania Department of Environmental Protection (PADEP) announced the bond rate guidelines for the calculation of land reclamation bonds for coal and noncoal mining operations in Pennsylvania. The coal bond rates were effective April 1, 2022, and the noncoal bond rates were effective February 19, 2022.

PADEP will use the coal bond rate guidelines to calculate land reclamation bonds for coal mining operations including surface mines, coal refuse disposal sites, coal refuse reprocessing sites, coal processing facilities, and the surface facilities of underground mining operations. These guidelines do not apply to bonds ensuring replacement of water supplies under section 3.1(c) of the Surface Mining Conservation and Reclamation Act, 52 Pa. Stat. § 1396.3a(c), or to bonds ensuring compliance with the requirements of the Bituminous Mine Subsidence and Land Conservation Act, *id.* §§ 1406.1—.21.

PADEP will use the noncoal bond rate guidelines to calculate land reclamation bonds for noncoal mining operations including surface mines and facilities and the surface facilities of underground mining operations. Activities including special revegetation plans, wetland mitigation, and stream channel restoration will be estimated on a case-by-case basis. Pursuant to 25 Pa. Code § 86.149 (coal) and 25 Pa. Code § 77.202 (noncoal), the bond schedule must reflect the requirement that the bond equal the estimated cost to PADEP "if it had to complete the reclamation, restoration and abatement work" required under the applicable acts, regulations, and permits. Both the coal and noncoal bond rate schedules and announcements are available on PADEP's website at https://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Bonding/Pages/BondRates.aspx.

PADEP Publishes and Requests Comments on Draft Environmental Justice Policy

On March 12, 2022, the Pennsylvania Department of Environmental Protection (PADEP) published a revised draft of its Environmental Justice Policy (Draft EJ Policy) for public comment. *See* 52 Pa. Bull. 1537 (Mar. 12, 2022); PADEP, Draft EJ Policy (Mar. 12, 2022). Publication of the Draft EJ Policy comes approximately four years after PADEP published a revised version of its then-current EJ Policy focused on enhancing public participation during permit reviews in identified environmental justice (EJ) areas. PADEP withdrew that revision after public comments indicated that the proposed revisions were beyond the scope of PADEP's stated focus. *See* 50 Pa. Bull. 5920 (Oct. 24, 2020). With the withdrawal, PADEP indicated that it intended to develop and integrate a broader EJ policy into its policies and practices. *Id.* The Draft EJ Policy incorporates, refines, and expands on the withdrawn 2018 revisions, relying on many of the developments that have occurred in the intervening years, and proposes to make significant changes to the current EJ Policy. *See* PADEP, Environmental Justice Public Participation Policy (Apr. 24, 2004). Below are some of the most significant changes.

<u>Incorporation of Executive Order and Expansion of OEJ's Role</u>

The Draft EJ Policy incorporates Governor Tom Wolf's October 28, 2021, executive order on EJ by citing it as an authority and addressing the requirements of the order. *See* Executive Order 2021-07, "Environmental Justice" (Oct. 28, 2021); Draft EJ Policy at i; *see also* Vol. XXXVIII, No. 4 (2021) of this *Newsletter* (Pennsylvania—Oil & Gas report). The executive order aligns the commonwealth with federal EJ initiatives and directs PADEP and executive agencies to address EJ across all programs. The executive order also formally established the Office of Environmental Justice (OEJ) and the Draft EJ Policy expands upon and clarifies the roles and responsibilities of the OEJ. Draft EJ Policy at 4–6. OEJ's responsibilities include carrying out the Draft EJ Policy requirements and leading an interagency council on EJ for the commonwealth. *Id.* at 4.

<u>Trigger and Opt-in Permits Are More Inclusive</u>

The Draft EJ Policy expands the applicability of the policy to more permits, including "trigger permits," defined as permits that "may lead to significant public concern due to potential impacts on human health and the environment." *Id.* at 3. Trigger permits listed in the policy will automatically fall under the Draft EJ Policy if the project is in an "EJ Area." *Id.* at 3, 6, 19–20. Trigger permits listed include surface and underground mining permits, coal refuse disposal, and large coal preparation facilities. *Id.* at 19. Unconventional oil and gas permits are also listed in the Draft EJ Policy as trigger permits and unconventional oil and gas permit holders must adhere to unique public participation requirements, including generating annual reports on active and anticipated drilling operations in EJ Areas. *Id.* at 15–16, 20.

Permits not listed as trigger permits or permits outside an EJ Area may still be considered "opt-in permits," defined as "[a] permit that otherwise does not qualify as a public participation trigger permit, but [PADEP] believes warrants special consideration and enhanced public participation based on identified community concerns, present or anticipated environmental impacts, or reasonably anticipated significant adverse cumulative impacts." *Id.* at 2. PADEP maintains broad discretion to apply the Draft EJ Policy to opt-in permits, which may include a permit for a listed opt-in facility type (appendix A of the Draft EJ Policy); a permit that "warrants special consideration," a phrase undefined in the Draft EJ Policy; or any permit that warrants special consideration based on its "reasonably anticipated significant adverse cumulative impacts," also undefined in the Draft EJ Policy. *Id.* at 2; *see also id.* at 20.

The Draft EJ Policy moves the definition of an "EJ Area" outside of the policy to a supplemental document, which has not yet been drafted or circulated. *Id.* at 1–2. According to PADEP, this supplemental document should allow for more frequent updates to data and methods used to determine "the geographic location where [PADEP's] EJ Policy applies." *Id.* at 1. Further, the Draft EJ Policy requires use of the new and frequently updated EJ Areas Viewer mapping tool, which includes environmental, demographic, and health data for use in all decisions regarding EJ in the commonwealth. *Id.* at 2, 5, 7. Because the EJ Areas Viewer will be frequently updated and the definition of an EJ Area will live in a supplemental document, it may prove difficult for permit applicants to predict when the Draft EJ Policy, if finalized, will apply to a project.

<u>Enforcement and Grant Priority, Harmony with Climate Change Initiatives, and Future Updates</u>

The Draft EJ Policy requires PADEP to prioritize inspections and compliance in EJ Areas or areas where environmental and public health conditions warrant increased attention. *Id.* at 16. PADEP must also develop grant guidance to prioritize EJ projects and create tracking/reporting systems for EJ projects. *Id.* at 17–18. The Draft EJ Policy also prompts PADEP to harmonize EJ initiatives with climate change initiatives. *Id.* at 17. If finalized as drafted, PADEP's Secretary must review the EJ Policy at least every four years to determine whether revisions—via public comment and engagement processes—are necessary. *Id.* at 18.

PADEP accepted written comments on the Draft EJ Policy through May 11, 2022, and has suggested that the supplemental document defining "EJ Area" will be issued for public review sometime later this year. For more information on the Draft EJ Policy and how to submit comments, visit PADEP's website at https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/Policy-Revision.aspx.

PENNSYLVANIA – OIL & GAS

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

After Commonwealth Court Denies Challenge to Municipality's Unconventional Drilling and Operations Ordinance, Citizen Group Petitions Pennsylvania Supreme Court for Review

On February 23, 2022, the Murrysville Watch Committee (MWC) petitioned the Supreme Court of Pennsylvania to allow an appeal of its unsuccessful challenge of the Municipality of Murrysville's Oil and Gas Ordinance (Ordinance), which authorized oil and gas wells as a conditional use in Murrysville's Oil and Gas Recovery Overlay District (Overlay District), including parts of the rural residential zoning district. As adopted, the Ordinance's geographic and other limitations (e.g., required setbacks from well pads) restricted unconventional oil and gas development to only 5% of Murrysville's land mass. MWC originally filed a validity challenge to the Ordinance in October 2018 before the Murrysville Zoning Hearing Board (Board), claiming, among other things, violations of due process, equal protection, and the Environmental Rights Amendment (ERA) to the Pennsylvania Constitution, Pa. Const. art. I, § 27. Broadly, MWC contended that unconventional oil and gas drilling is an industrial activity incompatible with residential zoning districts. The Board held multiple hearings, denied MWC's challenge, and issued 167 findings of fact related to its decision. Without presenting any additional evidence, MWC appealed the Board's decision to the Westmoreland County Court of Common Pleas, which affirmed the Board's decision, noting that the record showed that MWC provided no evidence to differentiate the Ordinance from other, similar ordinances upheld on appeal, the precedential application of which foreclosed MWC's challenges. MWC subsequently appealed that decision to the Commonwealth Court of Pennsylvania.

On January 24, 2022, the commonwealth court affirmed the trial court's and Board's decisions. *Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.*, No. 579 C.D. 2020 (Pa. Commw. Ct. Jan. 24, 2022). In doing so, the court relied on its prior decisions *Frederick v. Allegheny Township Zoning Hearing Board*, 196 A.3d 677 (Pa. Commw. Ct. 2018), and *Protect PT v. Penn Township Zoning Hearing Board*, 220 A.3d 1174 (Pa. Commw. Ct. 2019). In *Frederick*, the appellees claimed that an Allegheny Township, Westmoreland County, zoning ordinance that allowed oil and gas wells as a use by right in all zoning districts, subject to additional limitations, violated the ERA. The local zoning board and trial court both rejected these challenges and the commonwealth court affirmed, defining the appropriate standard for determining an ERA violation as whether (1) the values in the first clause of the ERA are implicated and (2) the governmental action unreasonably impairs those values. *Murrysville*, slip op. at 23–24; *see* Vol. XXXV, No. 4 (2018) of this *Newsletter*. Likewise, in *Protect PT*, the commonwealth court affirmed the validity of the Penn Township, Westmoreland County, zoning ordinance, which also faced claims of ERA violations. That ordinance created an overlay district authorizing natural gas operations by special exception, subject to certain limitations. The court rejected the challengers' arguments of actual risk to the environment or health of township residents and found that the ordinance did not violate the ERA or due process. *Murrysville*, slip op. at 27–28.

Applying its analysis of these cases, the commonwealth court also found that the appellants failed to provide any evidence that unconventional oil and gas development, as contemplated under the Ordinance, was incompatible in the authorized residential zoning districts. On the contrary, the court concluded that the municipality had appropriately balanced protecting property owners in the Overlay District with economic development considerations and rejected the appellants' claims that the Ordinance violated citizens' due process rights. *Id.* at 21. For similar reasons, the court found that MWC had not shown that the Ordinance "unreasonably impaired" citizens' rights under the ERA. *Id.* at 28. Finally, the court rejected the appellants' claim that the Overlay District violated citizens' equal protection rights under article III, section 32 of the Pennsylvania Constitution because it treated rural residential districts unequally. *Id.* at 35. The court reasoned that by their nature, overlay districts are subject to available land and population density, which municipalities can account for in their development. *Id.* The court also rejected MWC's remaining claims, as further detailed in the opinion.

On February 23, 2022, MWC filed its petition to the Supreme Court of Pennsylvania to allow it to appeal the commonwealth court's decision. At the time of this report, the respondents had filed their answers to MWC's petition. *See Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.*, No. 56 WAL 2022 (Pa. filed Feb. 23, 2022).

Editor's Note: The reporters' law firm represents Olympus Energy LLC, an intervenor in the litigation with a pending unconventional gas well in Murrysville.

Pennsylvania Drafting Updates to Conventional Oil and Gas Regulations

The Pennsylvania Department of Environmental Protection (PADEP) is proceeding with two updates amending 25 Pa. Code ch. 78 (conventional oil and gas well regulations). *See* DEP Regulatory Update (Apr. 23, 2022). The final chapter 78 rulemaking approved by the Environmental Quality Board (EQB) and Independent Regulatory Review Commission (IRRC) in 2016 was used as the basis for the proposed updates. *See* Meeting Minutes, Oil & Gas Technical Advisory Board (TAB) (Sept. 17, 2020).

The first draft update, "Environmental Protection Performance Standards for Conventional Oil and Gas Operators" (#7-539), proposes updates to well reporting requirements and protection and replacement of public or private water supply regulations to reflect Act 13 of 2012, bonding requirements to reflect Act 57 of 1997, and updates to assessment and inactive status designation regulations to reflect current PADEP practice. Other surface and non-surface activity updates address permit issuance, underground injection well permitting, impoundments and borrow pits, erosion and sedimentation and site restoration requirements, and mechanical integrity testing and reporting. *See* TAB Meeting (Jan. 14, 2022); Proposed Chapter 78 Annex A Rulemaking (Aug. 19, 2021). This update was most recently presented to the Pennsylvania Grade Crude Development Advisory Council (CDAC) on December 16, 2021, and TAB on May 5, 2021.

The second update, "Waste Management and Related Issues at Conventional Oil and Gas Well Sites" (#7-540), addresses proper handling, storage, processing, and disposal of drill cuttings and waste water generated by conventional oil and gas operations. Area of review requirements pertaining to preparedness, prevention, and contingency plans, along with reporting and remediation of spills and releases at conventional oil and gas well sites, would be significantly updated by this proposed update. This update was last presented to CDAC on August 19, 2021, and to TAB on September 9, 2021. Of note, the practice of spreading brine for dust suppression and deicing roadways, on which PADEP's Office of Oil and Gas Management imposed a moratorium in 2018 (but is authorized under PADEP's Waste Management Program in certain situations), is not addressed in this update. *See* Proposed Chapter 78 Annex A Rulemaking (Aug. 19, 2021); Meeting Minutes, TAB (Sept. 9, 2021). PADEP, however, is currently reviewing a Penn State study on the environmental impact of spreading brine on roadways and advised TAB that the report will be released no later than August 2022, and indicated to TAB that the findings of the Penn State study will likely have a broad impact on the practice of brine spreading on roadways. TAB Meeting (Apr. 25, 2022). PADEP's review of the study coincides with the Pennsylvania Office of the Attorney General's apparent investigation of alleged illegal disposal, under the residual waste regulations, of brine produced from conventional oil and gas operations on roadways. *See* Meeting Comments, CDAC (Apr. 21, 2022).

PADEP advised TAB on April 25, 2022, that it will present the first draft update to the EQB for consideration and public comment during the second quarter of 2022. PADEP anticipates presenting the second update to EQB for consideration and public comment the following quarter. *See* 52 Pa. Bull. 1930 (Mar. 26, 2022).

Pennsylvania Allocated $104 Million for Orphaned and Abandoned Well Cleanup

On January 31, 2022, Pennsylvania Governor Tom Wolf announced Pennsylvania was allocated a total of $104 million in Phase I funding to support the cleanup of orphaned and abandoned oil and natural gas wells throughout the state. *See* Press Release, Gov. Tom Wolf, "Gov. Wolf Announces $104 Million from President Biden's Bipartisan Infrastructure Law to Support Orphaned, Abandoned Well Cleanup in PA" (Jan. 31, 2022). The $104 million allocation is based on Pennsylvania's notice of intent (NOI) to the U.S. Department of the Interior (DOI) indicating the commonwealth's interest in applying for federal grant money for plugging orphaned wells and remediating orphaned well sites. *See* Press Release, DOI, "Biden Administration Announces $1.15 Billion for States to Create Jobs Cleaning Up Orphaned Oil and Gas Wells" (Jan. 31, 2022). The grants are part of $1.15 billion the federal government has allocated to states under the DOI with specific goals of reducing methane emissions and other pollution, and creating jobs. *See* Fact Sheet, White House, "Biden Administration Tackles Super-Polluting Methane Emissions" (Jan. 31, 2022); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021). In the future, formula grants will allow the commonwealth to access more than $330 million in additional funding for the same purposes. *See* News Release, Senator Bob Casey, "Pennsylvania to Receive $104 Million to Clean Up Orphaned Oil and Gas Wells" (Jan. 31, 2022).

The Pennsylvania Oil and Gas Act defines an "abandoned well" as a well that (1) has not been used to produce, extract, or inject any gas, petroleum, or other liquid within the preceding 12 months; (2) for which the equipment necessary for production, extraction, or injection has been removed; or (3) is considered dry and not equipped for production within 60 days after drilling, re-drilling, or deepening. 58 Pa. Cons. Stat. Ann. § 3203. An "orphan well" is a well "abandoned prior to April 18, 1985, that has not been affected or operated by the present owner or operator and from which the present owner, operator or lessee has received no economic benefit other than as a landowner or recipient of a royalty interest from the well." *Id.* The Pennsylvania Department of Environmental Protection (PADEP) estimates there are between 100,000 and 560,000 wells unaccounted for in state records, a significant number of which may still pose a threat to human health and the environment. *See* Fact Sheet, PADEP, "Abandoned and Orphan Oil and Gas Wells and the Well Plugging Program" (rev. Apr. 2021).

The funding is allocated in two parts. Phase I, with an initial grant of $25 million, will be used by PADEP to plug and remediate high-priority wells that pose a threat to health and the environment, and document how many orphaned and abandoned wells exist throughout the commonwealth that need to be plugged. *See* Meeting, Oil and Gas Technical Advisory Board (TAB) (Jan. 14, 2022). At the April 25, 2022, TAB meeting, PADEP stated that it is developing plugging projects for the most efficient expenditure of funds. For example, PADEP said that it intends to include lower priority orphaned wells in the vicinity of high-priority wells, targeting 8 to 10 wells per contract. Per PADEP, doing so will allow for remediating the largest number of orphaned wells possible in the fewest number of trips. Meeting, TAB (Apr. 25, 2022). The second allocation of Phase I funding to the commonwealth, totaling $79 million, was awarded in accordance with Phase I formula grant eligibility requirements based on job loss in the oil and gas industry during the COVID-19 pandemic, the number of documented orphaned wells, and the estimated cost to plug and remediate orphaned wells. *See* DOI Press Release, *supra*.

On April 12, 2022, DOI issued guidance to states outlining, among other things, the grant application process, uses for initial grant funding, and recommended best practices for establishing, conducting, and reporting plugging, remediating, and reclaiming activities. *See* Fact Sheet, DOI, "Bipartisan Infrastructure Law Sec. 40601 Orphaned Well Program—FY 2022 State Initial Grant Guidance" (Apr. 2022). At the January 14, 2022, and April 25, 2022, TAB meetings, PADEP explained that the commonwealth must submit an application for the previously awarded initial grant funding no later than May 13, 2022. The application must include certification that (1) there are orphaned wells in the commonwealth, (2) the commonwealth is a member of the Interstate Oil and Gas Compact Commission, and (3) 90% of the funds will be allotted to plugging contracts or grants within 90 days of receiving federal funding. *See also id.* at 9. DOI will disperse funds within 30 days of submission of certification. Any funds that remain "unobligated," i.e., any funding that, on the date one year from the date of receipt, is not subject to a definite commitment for an immediate or future payment for goods or services ordered or received, must be returned to DOI. *Id.* at 5–6.

PADEP Withdraws Final Rulemaking for Control of VOC Emissions from Existing Oil and Natural Gas Resources

On March 15, 2022, the Environmental Quality Board approved final regulations establishing reasonably available control technology (RACT) requirements for volatile organic compounds (VOCs) and other pollutants from existing oil and natural gas production facilities, compressor stations, processing plants, and transmission stations. The regulation will be submitted to the U.S. Environmental Protection Agency (EPA) for approval as part of the commonwealth's state implementation plan under the Clean Air Act. As reported in more detail in Vol. 39, No. 1 (2022) and Vol. XXXVII, No. 3 (2020) of this *Newsletter*, under the new regulation, oil and natural gas operators with facilities that exceed VOC emission thresholds would be required to do more frequent leak detection and repair monitoring on certain equipment at their facilities.

The rulemaking had advanced to the Pennsylvania House and Senate Environmental Resources and Energy Committees and the Independent Regulatory Review Commission (IRRC) for consideration. After the House Environmental Resources and Energy Committee issued a disapproval letter for the rulemaking on April 26, 2022, however, the Pennsylvania Department of Environmental Protection (PADEP) withdrew the rule from consideration by the IRRC to reevaluate the rulemaking. The Committee's disapproval letter alleges 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. PADEP has stated that it needs to finalize the rule by June 16, 2022, to avoid sanctions by the EPA under the Clean Air Act. Documents related to the rule can be found on PADEP's website at https://www.dep.pa.gov/PublicParticipation/EnvironmentalQuality/Pages/2022-Meetings.aspx.

TEXAS – OIL & GAS

William B. Burford, Reporter

Oil and Gas Lease's Offset Well Clause Held Ambiguous

The Texas Supreme Court in *Rosetta Resources Operating, LP v. Martin*, No. 20-0898, 2022 WL 1434662 (Tex. May 6, 2022), *rev'g* No. 13-19-00431-CV, 2020 WL 5887566 (Tex. App.—Corpus Christi-Edinburg Oct. 1, 2020), construed a provision of an amendment to an oil and gas lease under which the Martins were lessors and Rosetta Resources Operating, LP (Rosetta), lessee covering land in Live Oak County, Texas. The lease provision in question, "Addendum 18," provided as follows:

> [I]n the event a well is drilled on or in a unit containing part of this acreage or is drilled on acreage adjoining this Lease, the Lessor [sic], or its agent(s) shall protect the Lessee's [sic] undrilled acreage from drainage and in the opinions of reasonable and prudent operations [sic], drainage is occurring on the un-drilled acreage, even though the draining well is located over three hundred-thirty (330) feet from the un-drilled acreage, the Lessee shall spud an offset well on said un-drilled acreage or on a unit containing said acreage within twelve (12) months from the date drainage began or release the acreage which is un-drilled or is not a part of a unit which is held by production.

Id. at *1 (alterations omitted). (The parties agreed that the terms "lessor" and "lessee" were switched due to a scrivener's error, and they did not disagree that the term "operations" should have been "operators.")

In 2008 Rosetta and another company, Newfield Exploration Co. (Newfield), formed a pooled unit that included the northern portion of the Martin lease and other land, and Newfield drilled the "Martin Well" on the portion of the Martin acreage within the unit. In 2009 Newfield drilled another well, the "Simmons Well," on land not within or adjoining the Martin lease or the pooled unit but alleged to be draining the unpooled and undrilled southern portion of the Martin lease. In 2014 the Martins sued Rosetta for breach of Addendum 18 by failing to protect against drainage from the Simmons Well. The trial court granted Rosetta's motion for summary judgment, but the court of appeals reversed, agreeing with the Martins that the offset obligation, although triggered by the Martin Well but not the Simmons Well, obligated Rosetta to protect against drainage from the Simmons Well. *See* Vol. XXXVII, No. 4 (2020) of this *Newsletter*.

Most of Addendum 18 was unambiguous, the court observed. Three types of wells would trigger the lessee's offset obligation: (1) a well drilled on the lease, (2) a well drilled in a unit containing leased acreage, or (3) a well on acreage adjoining the lease. The Martin Well was a triggering well because it was drilled on land covered by the lease and in a pooled unit containing lease acreage, but the Simmons Well, on land neither within the lease acreage nor pooled with it nor on adjoining land, was not. It was also clear that the lessee's obligation to drill an offset well or release undrilled acreage would apply only if a reasonably prudent operator would conclude that drainage was occurring (a lower threshold than the "substantial drainage" that must occur before a lessee's implied covenant to protect against drainage would apply, the court pointed out). But was Addendum 18 intended to obligate the lessee when there was drainage only from a well other than the triggering well? On that question, the court concluded, the wording was ambiguous.

The Martins argued that the unmodified use of the word "drainage" in Addendum 18 was not limited to drainage from the well that triggered the offset obligation according to the express language, and the court found that interpretation reasonable. Rosetta's contrary interpretation, though, was also reasonable, in the court's analysis. It would be reasonable to conclude that Addendum 18's conditional clause, requiring a well at a specific location before any offset obligation would arise, informed the scope of the main clause, it explained. There being more than one reasonable interpretation of the contractual language, the court held, Addendum 18 was ambiguous, and the factual issue of its meaning precluded summary judgment.

Because Addendum 18 was, the court said, "an outlier among express covenants to protect against drainage," *id.* at *4, "'suffer[ing] from both a lack of accuracy and a lack of clarity,' including typographical and grammatical errors," *id.* (quoting *Martin v. Rosetta Res. Operating, LP*, No. 13-19-00431-CV, 2020 WL 5887566, at *3 (Tex. App.—Corpus Christi-Edinburg Oct. 1, 2020)), it cautioned that its construction "may not provide useful guidance for determining how [such covenants] typically function," *id.* Some may welcome this decision, though, as a signal of the court's increased willingness to find ambiguity where it truly exists.

Lessee's Liability for Oilfield Accident Held Precluded by Statute

Chapter 95 of the Texas Civil Practice and Remedies Code limits a real property owner's liability for a negligence claim asserted by a contractor or subcontractor or its employees "that arises from the condition or use of an improvement to real property" on which the contractor or subcontractor is working. Tex. Civ. Prac. & Rem. Code § 95.002(2). On the basis of that statute, the court in *Energen Resources Corp. v. Wallace*, 642 S.W.3d 502 (Tex. 2022), *rev'g* 603 S.W.3d 499 (Tex. App.—El Paso 2020), affirmed summary judgment for Energen Resources Corp. (Energen), the lessee under an oil and gas lease in Reeves County, Texas, against Elite Drillers Corp. (Elite Drillers), a subcontractor, and its president and employee Bryce Wallace, for property damage and injuries they suffered while working on the lease.

Energen contracted with Dubose Drilling, Inc. (Dubose), to drill a water well on the lease to facilitate the drilling of an oil well by another contractor. Dubose in turn subcontracted the work to Elite Drillers. The oil well experienced a "gas kick" during its drilling, which caused pressurized gas to migrate to the water well on which Elite Drillers and Wallace were working, roughly 500 feet away. Gas flowing from the water well caught fire and exploded, injuring Wallace and damaging Elite Drillers' equipment. They and their insurers sued Energen, alleging its negligence caused the injury and damage.

The court rejected the plaintiffs' argument that the oil well and the water well were two separate improvements located on Energen's lease and that there was a fact issue whether their injuries actually resulted from negligent activity at the oil well on which they did no work so that chapter 95 did not apply. What matters, the court explained, "is whether there was negligence regarding the 'condition or use' of the improvement on which [the] plaintiffs were working," and that negligence need not be the *only* cause of the injury for chapter 95 to preclude recovery. *Id.* at 513. The plaintiffs' own pleadings alleged damages caused by negligence arising from a dangerous condition of the improvement on which they were working—the water well. *Id.* at 512. "[N]egligence away from the water well that contribute[d] to [the] plaintiffs' damages [did] not negate the conclusion . . . that negligence at the water well on which they worked also caused those same damages." *Id.* at 513. "Chapter 95 applies," the court declared, "where negligence affecting the condition of an improvement on which [the plaintiff was] working was a cause of [the] damages," *id.* at 512, but it need not be the only cause, *id.* at 513.

Former Operator Held Not Potentially Liable for Injury Caused by Burst Pipeline It Installed

Earmon Lovern, injured when a gas pipeline at the Donnell 2H wellsite ruptured, sued Eagleridge Operating, LLC (Eagleridge), the contract operator, as well as USG Properties Barnett II, LLC (USG), the oil and gas leasehold owner, asserting claims for negligence and gross negligence with respect to the construction, installation, and maintenance of the pipeline, among other things. Eagleridge moved to designate Aruba Petroleum, Inc. (Aruba), which had been a minority working interest owner in the property and the operator at the time the gas line was installed, as a potentially responsible third-party defendant. Aruba was no longer an owner or operator, having conveyed its interest to USG. In *In re Eagleridge Operating, LLC*, 642 S.W.3d 518 (Tex. 2022), the Texas Supreme Court rejected Eagleridge's mandamus petition against the trial court's denial of the motion.

In *Occidental Chemical Corp. v. Jenkins*, 478 S.W.3d 640 (Tex. 2016), the court had held that where a property owner constructs improvements and later conveys the property to another, the former premises owner has no duty, and thus no responsibility, with respect to the condition of the property after the conveyance even though it may have created an allegedly defective improvement. Instead, any such duty passes to the new owner. Eagleridge sought to distinguish *Occidental* on the basis that Aruba had not only been an owner of the property but also, as operator, an independent contractor for other working interest owners who paid for its services as such, including its installation of the gas line. "[A]n independent contractor or third party who creates a dangerous property condition while making improvements 'on behalf of' property owners," it pointed out, "may remain responsible under ordinary negligence principles for injuries the condition causes even after the contractor has completed the work and no longer has control over the condition or the premises." *In re Eagleridge*, 642 S.W.3d at 526. The question for the court, as it put it, was whether Aruba, even though it had the right as an owner to construct improvements, could become an independent contractor with respect to its cotenant majority working interest owner (ESG) because it had been compensated under some agreement to take responsibility for operating the wellsite. *Id.* at 527.

Occidental precludes such a dual-role analysis, the court held. *Id.* at 528. *Occidental*'s holding that "a property owner, when making improvements on its own property, acts solely in its capacity as an owner and not as an independent contractor," it said, "is not altered by evidence that ESG paid Aruba to operate the wellsite." *Id.* "Aruba's responsibility to any person injured [by] the gas line must arise from premises liability, and when USG acquired Aruba's ownership interest, it 'assumed responsibility' for the property condition its co-owner purportedly created." *Id.* at 529. "Aruba's receipt of compensation for its efforts as operator of record neither transform[ed] it from an owner into an independent contractor or third party nor materially distinguishe[d] the facts of this case from [those of] *Occidental*." *Id.*

Independent Executor's Mineral Deed Held Ineffective Absent Affirmative Showing of Authority

The question before the court in *Texas Petroleum Land Management, LLC v. McMillan*, 641 S.W.3d 831 (Tex. App.—Eastland 2022, no pet. h.), was whether Republic National Bank & Trust Company (Republic), appointed independent executor of the estate of A.M. McMillan after his death on August 6, 1932, had authority in that capacity to convey a portion of McMillan's mineral interest in a 200-acre tract of land in Howard County, Texas. The court held that it did not.

McMillan's will appointed Republic as independent executor with the express authority to make payments out of the assets of the estate to settle outstanding debts. He also devised the residue of his estate, including his mineral interest in the tract in question, to Republic as trustee, with general authority to sell trust property, but only with the consent of his wife Minnie. On December 27, 1933, Republic, in its capacity as independent executor, executed a mineral deed to Albert George Hinn, conveying an undivided 16 2/3-acre mineral interest in the land "for the purpose of partitioning certain oil and mineral properties owned jointly by said A.M. McMillan and [Hinn], legal title to which was vested in said A.M. McMillan." *Id.* at 838 (alteration in original) (alteration omitted). Many years later the successors to the interest of Hinn, the grantee, sued McMillan's family to enforce their claimed right to receive royalty attributable to the mineral interest purportedly conveyed in the 1933 deed, and the defendants counterclaimed to quiet title in themselves. The trial court granted summary judgment to the McMillans, and the court of appeals affirmed.

The court first addressed the Hinn claimants' argument that the 1933 deed's recital of its purpose established that the property had been held in trust for Hinn so that no authority for sale or transfer by the executor need be shown. Using bare recitals in the "after-the-fact" conveyance in an attempt to prove a preexisting agreement, the court believed, was a circular argument that a cotenancy between McMillan and Hinn had in fact existed and could not support that conclusion. *Id.* at 842.

Nor were the Hinn successors assisted by the fact that McMillan's wife Minnie, decades after the deed to Hinn, had executed a document in which she had purported to ratify all prior acts of the executor and trustee. Her consent or lack thereof was immaterial, according to the court, since Republic had executed the Hinn deed as executor and not as trustee. *Id.* at 843. McMillan's will had not conferred the same broad powers to Republic in its capacity as executor as it had given it, subject to Minnie's approval, in acting as trustee. *Id.* That Republic had expressly stated in the 1933 deed that it was acting in its capacity as independent executor precluded the court, it reasoned, from finding that it was exercising the broad powers it possessed as trustee. *Id.* Moreover, because the will did not expressly grant Republic, acting as independent executor, authority to sell real property of the estate to pay debts, the owners of the Hinn interest were not entitled to a presumption of the existence of debts so as to permit a sale by the independent executor. *Id.* at 847–48. In the absence of any proof of such debts, the Hinn claimants were unable to show that Republic had the power to sell estate real property. *Id.* at 848.

Correction Deed Acknowledging Omitted Mineral Reservation, Executed by Husband After Wife's Death, Validly Corrected Deed in Which Both Husband and Wife Were Grantees

In *Endeavor Energy Resources, LP v. Trudy Jane Anderson Testamentary Trust*, No. 11-20-00263-CV, 2022 WL 969542 (Tex. App.—Eastland Mar. 31, 2022, no pet. h.), reversed the trial court's summary judgment that a 2007 correction deed was ineffective.

In 2003 E.D. and Arah Evelyn Holcomb sold land in Martin County, Texas, to Charles Thomas (Tom) Anderson and his wife, Trudy Anderson. Although the parties' preliminary sale contract provided that all of the sellers' mineral interests would be reserved, their warranty deed executed on closing failed to accomplish the mineral reservation. After realizing that the 2003 deed did not comport with the parties' intention that the minerals would be excluded, the Holcombs and Tom executed a correction warranty deed in 2007, stating that it was their intention to "clarify and replace" the 2003 deed because it contained a mutual mistake and providing that the 2003 deed conveyed the "surface only" and reserved to the Holcombs all oil, gas, and other minerals. *Id.* at *2. Trudy did not join in the 2007 correction deed, however. She had died in 2006, appointing Tom as executor of her estate and trustee of a testamentary trust that included her interest in the land, to be held by him for his life, with distribution on his death to the Andersons' children or, if deceased, their descendants. The correction deed recited Trudy's having died, but its signature line did not reflect Tom's execution in any particular capacity such as executor or trustee. *Id.*

In 2019 Tom sued the Holcombs and their oil and gas lessee, Endeavor Energy Resources, LP (Endeavor), claiming that his execution of the 2007 correction deed had no legal effect. The court of appeals agreed with the Holcombs and Endeavor that the correction deed was binding on Tom and the Anderson trust.

The court's analysis focused on whether the 2007 correction deed substantially complied with Tex. Prop. Code § 5.029, a statute that sets out circumstances under which correction instruments may be recognized as valid. A correction instrument is effective under the statute, the court pointed out, if it is "executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, if applicable, a party's heirs, successors, or assigns . . . ." *Endeavor*, 2022 WL 969542, at *5 (emphasis omitted) (quoting Tex. Prop. Code § 5.029(b)(1)). Correction instruments recorded before the statute's effective date of September 1, 2011, as the 2007 correction deed at issue here was, are validated under Tex. Prop. Code § 5.031 if they "substantially comply" with section 5.029. *Endeavor*, 2022 WL 969542, at *5.

In Trudy's will she granted Tom, as trustee, broad power to "manage and handle" all of the property held in her trust, restricted only in that he could not make a "sale or conveyance" of real estate without the joinder of the Andersons' two sons. *Id.* at *7. Tom argued that he had no authority as trustee to execute the 2007 correction deed so that it could not possibly have been effective. The court disagreed. The execution of the correction deed did not constitute a sale or conveyance of trust property, which would have required the Andersons' two sons to join. *Id.* It conveyed nothing, explained the court, but merely clarified the scope of the conveyances and mineral reservations contained in the parties' 2003 deed. *Id.* And Tom's interest as trustee was more than simply a life estate: he was not bound by the constraints against alienation placed upon life tenants. *Id.* at *6. Tom's power to manage trust property, in the court's view, included the power to execute the correction deed. *Id.* at *7.

The court further disagreed with Tom that his execution of the correction deed had been only in his individual capacity and not as trustee under Trudy's will or as executor of her estate. The correction deed, said the court, "clearly show[ed] that the parties intended that it represent and bind both Tom and Trudy's interests," and that it could not conceive of a contrary interpretation. *Id.* at *9. It unambiguously recited that Tom and Trudy were the original grantees, that Trudy had passed away, and that the parties intended the correction deed to clarify and replace the original 2003 deed to show the true intent for the Holcombs to have reserved the minerals. *Id.* "Further, the correction deed's signature block show[ed] that Tom [had executed] on behalf of the plural 'Grantees.'" *Id.* That and the correction deed's recitations, according to the court, showed that he executed in every possible capacity: as executor, trustee, and individually. *Id.*

Because Tom was Trudy's sole successor when the correction deed was executed and recorded, because he had executed it in every possible capacity, and because the correction deed was not a conveyance and thus within Tom's authority as trustee, the correction deed substantially complied with the requirements of section 5.029 and was, therefore, a valid and enforceable instrument. *Id.*

Editor's Note: The reporter represents Endeavor in this case.

Subcontractor's Mineral Lien Held Invalid Where Owner Owed Nothing Under Original Contract with Turnkey Drilling Contractor

Pearl Resources Operating Co., LLC (Pearl), owned a working interest in the Garnet State oil and gas lease in Pecos County, Texas, and contracted with PDS Drilling LLC (PDS) for the drilling of the Garnet State #4 Well on the lease. The contract was a "turnkey" contract calling for payment of a specified dollar amount for the completion of the well, with 30% of the amount paid when the well was ready to be spud and the remaining 70% payable only after PDS had delivered a successful well. After the well suffered a "wild well" incident that resulted in the eruption of fresh water from the well and a nearby water well, PDS engaged Cannon Oil & Gas, LLC (Cannon), to haul away accumulated water. PDS failed to pay Cannon the $57,000 invoiced for the water hauling and, lacking funds to continue, abandoned the well. Cannon transferred its unpaid invoices to Transcon Capital, LLC (Transcon), which, after notice to Pearl, filed an affidavit claiming a mineral lien for the work under Tex. Prop. Code § 56.003. Reversing the trial court's summary judgment ordering foreclosure, the court in *Pearl Resources Operating Co. v. Transcon Capital, LLC*, 641 S.W.3d 851 (Tex. App.—El Paso 2022, no pet. h.), declared the lien invalid.

Although chapter 56 of the Texas Property Code generally affords a "mineral subcontractor" such as Cannon a lien on an oil and gas lease for which the subcontractor has provided services, the owner of the lease is not liable in an amount greater than that agreed to be paid in its contract, Tex. Prop. Code § 56.006, nor for more than the amount the owner owed the original contractor at the time notice of the claim is received, *id.* § 56.043. Thus, the court pointed out, a mineral lien "is dependent upon the state of the account between the owner and its contractor . . . when the owner receives notice of the claim," not upon the state of the account between the contractor and a subcontractor. *Pearl Res.*, 641 S.W.3d at 857. "As a result, when the owner has already paid its contractor all that is owed under a contract by the time the subcontractor serves the owner with notice of its claim, the subcontractor is not entitled to [the statutory lien]." *Id.* at 857–58. In this case Pearl owed no further payment to PDS unless and until a successful well was completed. Because Pearl owed nothing to PDS, the court concluded, Transcon had no valid lien. *Id.* at 860.

Texas Court Held Without Jurisdiction to Consider Injury Claim Against Nonresident Business

Jesus Moreno, a Texas resident, was injured while working on a drilling rig operating on a lease owned by Devon Energy Production Company, L.P., in New Mexico. He sued that entity and its parent, Devon Energy Corporation (collectively, Devon Entities) in Harris County, Texas. In *Devon Energy Corp. v. Moreno*, No. 01-21-00084-CV, 2022 WL 547641 (Tex. App.—Houston [1st Dist.] Feb. 24, 2022, no pet. h.) (mem. op.), the court reversed the trial court's denial of the Devon Entities' special appearance challenging the personal jurisdiction of the Texas court over them.

Although the Texas long-arm statute broadly "allows a court to exercise personal jurisdiction over a nonresident defendant who 'does business' in Texas," *id.* at *2 (quoting Tex. Civ. Prac. & Rem. Code § 17.042), "[t]he United States Constitution allows a state court to assert [such] jurisdiction . . . only if the defendant has some minimum, purposeful contacts with the state and if the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice," *id.* "A nonresident has sufficient contacts with a state to confer personal jurisdiction if it has purposefully availed itself of the privileges and benefits of conducting business in the state." *Id.*

"A defendant's contacts with a forum state," the court continued, "can give rise to either specific or general jurisdiction." *Id.* at *3. "To constitute the minimum contacts required for a Texas court to exercise specific jurisdiction over a nonresident defendant: (1) the defendant's contacts with Texas must be purposeful . . . , and (2) the cause of action must 'arise from or relate to' those contacts" (i.e., there must be a substantial connection between the defendant's contacts and the operative facts of the litigation). *Id.* (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579 (Tex. 2007)). General jurisdiction over a nonresident defendant, conversely, "involves a court's ability to exercise jurisdiction . . . based on any claim, including [those] unrelated to the defendant's contacts with the state." *Id.* (quoting *M & F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Co.*, 512 S.W.3d 878, 885 (Tex. 2017)). The general jurisdiction inquiry is more demanding than a specific jurisdiction inquiry, "with a 'substantially higher threshold,'" the court observed. *Id.* (quoting *PHC-Minden, LP v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007)). Even when a defendant's contacts with the state are continuous and systematic, they are insufficient to confer general jurisdiction unless they render a defendant "essentially at home in the forum State." *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). The Devon Entities' contacts with Texas, the court held, were insufficient to confer either specific or general jurisdiction.

Concerning specific jurisdiction, the suit, in the court's analysis, simply did not arise out of or relate to any of the Devon Entities' Texas contacts. *Id.* at *8. It rejected Moreno's argument that his injuries related to an activity conducted in the forum state in that they occurred during the same activities in New Mexico that the Devon Entities perform in Texas—extracting mineral resources for profit. "There must be," the court explained, "an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place' in the forum." *Id.* at *7 (alterations in original) (quoting *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1031 (2021)). Even if the Devon Entities had the necessary minimum contacts with Texas, their alleged liability for Moreno's injuries did not arise from or relate to those contacts. Thus, the Texas trial court lacked specific jurisdiction over them. *Id.* at *8.

Turning to whether the Texas court might have general jurisdiction over the Devon Entities, the court first observed that, according to testimony, neither was organized nor headquartered in Texas, so that Texas was not "one of the paradigmatic forums in which [they] may be fairly regarded as being 'at home.'" *Id.* (quoting *Daimler AG*, 571 U.S. at 127). General jurisdiction could only be premised, therefore, on a showing that the Devon Entities' contacts with Texas were so continuous and systematic as to render them essentially at home there. *Id.* Moreno had presented evidence that one or the other of the Devon Entities owned producing oil and gas properties in Texas, including a number of profitable wells in two counties in the Eagle Ford shale in South Texas that were featured prominently on its website, that it regularly had employees performing work on its behalf in Texas, and that it was currently involved in other litigation in Texas. *Id.* at *9. That evidence, to the court, was plainly insufficient. The presence of property in Texas does not alone support in personam jurisdiction, the court noted, and the Devon Entities did not operate their Texas properties, which accounted for only 15% of their company-wide oil production and 7% of their oil reserves during a recent annual period. *Id.* at *10–11. And although Devon personnel were present in Texas, at least from time to time, acting on the Devon Entities' behalf, there was no evidence of a continuous presence such as the maintenance of a permanent office for soliciting Texas business. *Id.* at *11. Finally, the defense of unrelated Texas litigation, which could be subject to jurisdictional factors not present in this case, simply did not establish that the Devon Entities had the kind of contacts with Texas necessary to establish general jurisdiction in this case. *Id.* at *12. In sum, the court concluded, Moreno's evidence could not support a finding that the Devon Entities' contacts with Texas were so continuous and systematic as to render them essentially at home. *Id.* at *13.

Lessee's Commitment to Drill New "Wells" Held Met by Vertical Wells—No Implied Limitation to Horizontal Wells

The court in *TotalEnergies E&P USA, Inc. v. Dallas/Fort Worth International Airport Board*, No. 02-20-00054-CV, 2022 WL 872476 (Tex. App.—Fort Worth Mar. 24, 2022, pet. filed) (mem. op.), construed an amendment to a 2006 oil and gas lease on land owned by the Dallas/Fort Worth International Airport Board and the cities of Dallas and Fort Worth (collectively, DFW). The amendment allowed the lessees to maintain the lease in effect, deferring partial termination, by the drilling of "fourteen new wells" during a two-year period. *Id.* at *1. Other provisions of the original lease defined the amount of acreage that would remain under lease upon its partial termination, specifying different amounts depending on whether the well was a horizontal well or a vertical well.

In 2015 the lessees determined, after a dramatic drop in gas prices, that although there was no economic justification to drill any wells at all, they would drill vertical wells, less costly than horizontal wells, to fulfill the drilling commitment. DFW sued the lessees and was granted summary judgment that the drilling commitment required the drilling of horizontal wells and could not be satisfied by vertical wells. Citing the plain language of the lease, the court of appeals reversed.

The lease's provisions separately defining horizontal and vertical wells, the court observed, showed that the term "well" was a generic, nonspecific term that could be modified by the terms "horizontal" or "vertical" when necessary to specify one or the other. *Id.* at *3. Only the term "well" was used in the drilling commitment; at no point did the lease amendment indicate that only horizontal wells could satisfy the commitment or that vertical wells were excluded. *Id.* at *4. Although the court recognized that vertical wells had never before been drilled on the leasehold and that the parties likely contemplated horizontal wells, it could not go beyond the plain language of the lease, it said, to construe it according to DFW's interpretation. *Id.* The court further rejected DFW's argument that the implied covenant to reasonably develop the leasehold required horizontal wells. *Id.* That covenant could not supersede the express provisions of the lease governing development, which did not limit the drilling commitment to horizontal wells. *Id.*

Ex-Spouse Held Entitled to Community One-Half of Mineral Interest Left Out of Divorce Decree

In 1997, during William G. Johnson's marriage to Martha Lawler Dunham, he acquired an undivided 1/3 mineral interest in a half-section of land in Howard County, Texas. When he and Dunham divorced in 1999, the divorce decree did not explicitly mention or describe the mineral interest, although it awarded various other oil and gas properties to William as his separate property. It also awarded each spouse his or her "sole proprietorship," including "contractual rights" and rights arising out of or in connection with the operation of their businesses. William died in 2010, leaving his then wife, Paquita Johnson, and son, Timothy Johnson, as his only heirs. In *Johnson v. Dunham*, No. 11-20-00123-CV, 2022 WL 969516 (Tex. App.—Eastland Mar. 31, 2022, no pet. h.) (mem. op.), the court affirmed the trial court's summary judgment awarding Dunham an undivided 50% interest in the half-section.

The court first noted that under Texas law, all property either spouse acquires during marriage is community property, owned one-half by each, unless it was acquired by gift, devise, or descent or as a recovery for personal injuries. *Id.* at *3 (citing Tex. Fam. Code §§ 3.001, .002). There being no allegation that William had acquired the mineral interest in question by gift, devise, or descent, his heirs were required, to defeat summary judgment, to provide some evidence that the spouses' divorce decree had awarded the property to William. They had not done so, the court concluded. *Id.* at *4.

The subject property, the Johnsons contended, was subsumed within William's sole proprietorship awarded to him because the decree referenced "contractual rights." *Id.* at *6. However, the decree neither mentioned nor described the property in question, although it did specifically refer to other real properties belonging to William. An oil and gas lease executed by William several years after the divorce referring to the property as William's separate property was not probative of anything except perhaps William's subjective belief, the court observed. *Id.* And affidavits by a business associate of William's and of his son, asserting that William's sole proprietorship consisted of oil and gas properties and that the property in question was part of William's sole proprietorship, represented no more than unsupported opinions and conclusions. *Id.* at *8. Because the Johnsons provided no evidence to rebut the presumption that the mineral interest was community property of William and Dunham's marriage, the court held, the trial court's judgment was correct. *Id.* at *7.

Mineral Interests Conveyed by Mother to Children Held Community Property

Lilly Parker, the owner of an undivided one-half interest in the minerals in a 120-acre tract on the boundary between Midland and Glasscock Counties, Texas, executed a mineral deed in June 1971 conveying an undivided 1/12 mineral interest in the land to each of her six children, including W.T. Aaron and Chester Little. The deeds recited that the grantor, for a sum of "cash in hand paid and other good and valuable consideration," "grant[s], bargain[s], sell[s], convey[s], transfer[s], assign[s], and deliver[s]" the interest to each grantee, and made "this sale" subject to the rights of any oil and gas lessee. W.T. Aaron and Chester Little died intestate and without descendants in 2000 and 1998, respectively, each survived by a wife to whom he was married at the time of his 1971 deed. In 2017 Glen Aaron II, the son of another of Parker's six children, filed suit against Pioneer Natural Resources USA, Inc. (Pioneer), the operator of a producing oil and gas lease on the land, contending he was entitled to royalty inherited from his uncles W.T. Aaron and Chester Little. Pioneer filed a petition in interpleader joining heirs of W.T. Aaron's and Chester Little's surviving wives. In *Aaron v. Fisher*, No. 11-20-00080-CV, 2022 WL 1251580 (Tex. App.—Eastland Apr. 28, 2022, no pet. h.), the court of appeals affirmed summary judgments for the wives' heirs and against Aaron.

On appeal Aaron argued that Parker's 1971 deeds had been gifts, so that the grantees' interests were separate property that descended in part to W.T.'s and Chester's brothers and sisters, including Aaron's father through whom Aaron claimed. The court disagreed, concluding that the deeds were unambiguous and demonstrated by their wording that the conveyances were sales, not gifts. *Id.* at *5. The mineral interests conveyed therefore became community property of the grantees and their respective wives. *Id.* As a result, the interests passed to the surviving wives and then to the wives' heirs on their deaths to the exclusion of the Aaron family. *Id.*

Statute of Limitations Bars Contamination Claims

In *Mustafa v. Americo Energy Resources, LLC*, No. 14-20-00202-CV, 2022 WL 1088584 (Tex. App.—Houston [14th Dist.] Apr. 12, 2022, no pet. h.), the court affirmed the trial court's summary judgment for Americo Energy Resources, LLC (Americo), the operator of an oil and gas lease from which the Bash 1 and Bash A6 wells had produced, against landowners Ali Mustafa and Ali Reza Lahijani, dismissing the landowners' suit for negligence in Americo's alleged failure to prevent leaks and pollution because it was filed after the expiration of the two-year statute of limitations.

The landowners argued that the running of the statute of limitations was tolled by the discovery rule and that the October 2017 filing of their suit had been timely. They claimed that although the wells had not produced since 1998 and 2008, respectively, and all oil stored on their land had been removed by early 2015, they did not discover, and had no reason to discover, any problems with the property until 2016, within the limitation period, when one of them visited the property with a prospective business partner and saw white areas around the abandoned wells on the property. The presence of equipment, debris, and soil discoloration did not prove as a matter of law, according to the landowners, the date they should have been aware of injury to their land or the inapplicability of the discovery rule.

The court acknowledged that the discovery rule may "defer[] accrual of a cause of action until the plaintiff knew—or, exercising reasonable diligence, should have known—of the facts giving rise to the cause of action." *Id.* at *3. "However, the discovery rule is limited to those rare 'circumstances where the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable.'" *Id.* (quoting *Cosgrove v. Cade*, 468 S.W.3d 32, 36 (Tex. 2015)). "An injury is not inherently undiscoverable when it could be discovered through the exercise of reasonable diligence." *Id.* Affidavit testimony of representatives of Americo established that no contamination could have occurred after February 2015, more than two years before the suit was filed, and that contamination was discoverable on that date because of visible discoloration of the ground. *Id.* at *4. Nothing kept the plaintiffs from investigating potential contamination sooner, the court noted, and the presence of stained soil and white residue visible at the time of the landowner's 2016 visit suggested that the plaintiffs would have discovered facts leading them to investigate their injury if they had exercised due diligence in visiting the property. *Id.* at *5. For six years before then, the plaintiffs had never visited the property so that their "use of diligence did not rise to the level of even passive visual observation," the court noted. *Id.* Therefore, it declared, the type of injury they alleged—soil and groundwater contamination stemming from oil and gas operations—was not inherently undiscoverable. *Id.*

Agreement's Choice of Texas Law for Oilfield Indemnity Rejected

Cannon Oil & Gas Well Services, Inc. v. KLX Energy Services, LLC, 20 F.4th 184 (5th Cir. 2021), *aff'g* No. 4:20-cv-01164, 2021 WL 823996 (S.D. Tex. Feb. 1, 2021), involved a master equipment rental agreement between Cannon Oil and Gas Well Services, Inc. (Cannon), an oil and gas exploration company based in Wyoming, and KLX Energy Services, LLC (KLX), a Texas-based provider of rental equipment and services, governing all equipment and services provided by KLX to Cannon. The agreement included an indemnity provision under which each party would be solely responsible for injuries to its own employees, regardless of fault, and it provided that Texas law would govern the agreement.

After a KLX employee from its Wyoming office was injured while working on a Cannon oil well in southern Wyoming, he sued Cannon in Wyoming state court. Cannon then filed a federal declaratory judgment action in Texas to enforce KLX's indemnity obligation. The district court granted summary judgment to KLX on the basis that Wyoming law prohibits indemnity against liability for oilfield injuries resulting from the indemnified party's own negligence, and the court of appeals affirmed.

Because the master agreement's indemnity provision would be enforceable under Texas law (presumably meeting the mutual-insurance requirements of Texas's own oilfield anti-indemnity legislation), the question for the court was whether the agreement's choice of Texas law should be enforced. Applying Texas law as a federal court sitting in diversity, the court held that Wyoming law, not Texas law, must govern so that Cannon's agreement to indemnify KLX was unenforceable.

Although Texas generally recognizes that parties may agree to choose the law that will govern their agreements, the court observed, it limits that contractual autonomy when the chosen jurisdiction bears no relation to the parties or their agreement or when the choice would thwart or offend the public policy of the state whose law would otherwise apply. *Id.* at 188–89. Texas courts, according to the court, look to *Restatement (Second) of Conflict of Laws* § 187(2)(b) "to determine whether to enforce a contractual choice of law." *Id.* at 189. "Under that section," it said, "three things must be true for Wyoming law to override the parties' choice of Texas law." *Id.* "First, Wyoming must have a 'more significant relationship' with the parties and transaction than Texas does . . . . Second, Wyoming must have a 'materially greater interest' than Texas in applying its law . . . . Third, applying Texas law must be contrary to a fundamental policy of Wyoming." *Id.* (quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990)).

Concerning the first question, whether Wyoming had a more significant relationship to the parties and their transaction than Texas, section 188 of the *Restatement* requires analysis, in disputes involving contracts like indemnity agreements, of various contacts with each state, including (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the contract's subject matter; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.* at 190. These contacts favored Wyoming, the court was convinced. The contract had been negotiated beginning in Wyoming and had been executed by Cannon in Wyoming (and by KLX in West Virginia). *Id.* KLX's equipment rentals and services, the contract's subject matter, were largely in Wyoming, and the lawsuit for which Cannon sought indemnity was filed there. *Id.* The only debatable section 188 contact, in the court's view, was the principal place of the parties' business, and on that score Cannon's Wyoming domicile negated KLX's Texas presence. *Id.* at 190–91. The section 188 contacts overwhelmingly favored Wyoming, the court concluded. *Id.* at 191.

Wyoming's interest in the indemnity matter at issue, the court continued, easily was materially greater than that of Texas. *Id.* at 193. "Wyoming bans oilfield indemnity provisions so that oil and gas companies 'internalize the costs of their own operations' and become 'more mindful of employee safety,'" *id.* (quoting *Lexington Ins. Co. v. Precision Drilling Co.*, 830 F.3d 1219, 1220 (10th Cir. 2016)), based on the state's deep experience with drilling and mining, the court remarked, and "[e]nforcing the indemnity provision would discourage what Wyoming hopes to encourage," *id.* at 194. Texas's interest in the parties' dispute, enforcing the contract of one of its businesses, was more attenuated given that the contract was not negotiated, drafted, or performed within its borders. *Id.*

The final question, whether Wyoming's anti-indemnity policy is "fundamental," posed a challenge for the court because neither the Texas Supreme Court nor the *Restatement* has articulated a clear standard for that determination. *Id.* But Texas courts, it noted, have found policies to be fundamental when the applicable state has codified them in a statute and, as Wyoming's statute does, declared them the state's public policy. *Id.* Wyoming law thus applied, the court concluded, and that law did not allow Cannon's claim for indemnification. *Id.*

Insurance Contract Held to Limit Contractor's Indemnity Obligation Under Texas Oilfield Anti-Indemnity Act

The court in *Cimarex Energy Co. v. CP Well Testing, LLC*, 26 F.4th 683 (5th Cir. 2022), *aff'g* 489 F. Supp. 3d 635 (W.D. Tex. 2020), construed the mutual indemnity provision of a master service agreement (MSA) between Cimarex Energy Co. (Cimarex), an oil and gas operator, and CP Well Testing, LLC (CP Well), a contractor. The indemnity clause required each party to indemnify the other against liability for injuries to personnel in its own "group," evidently including the indemnifying party's subcontractors and their employees. To support the indemnity obligations, each was required to maintain specified insurance coverage for the benefit of the other, CP Well in the minimum amount of $1 million in commercial general liability insurance and $2 million in excess liability insurance, or total of $3 million, and Cimarex in the amount of $1 million in general liability insurance and $25 million in excess liability insurance. CP Well obtained a $1 million general liability insurance policy and a $10 million excess liability policy, $8 million more than the MSA required.

The employee of a CP Well subcontractor was injured while working on a Cimarex oil well in Oklahoma. He sued Cimarex and CP Well in Oklahoma state court for his injuries, and Cimarex and its insurers settled the suit for $4.5 million. When Cimarex sought indemnity from CP Well, CP Well paid Cimarex $3 million but refused to indemnify it for the remaining $1.5 million. Cimarex brought the underlying action in this case seeking a declaration that CP Well was obligated to indemnify it up to the full $11 million amount of its insurance coverage. The district court granted summary judgment to CP Well, and Cimarex appealed.

The court of appeals affirmed, agreeing with CP Well that the terms of its excess liability policy had to be taken into account. That policy stated that the most the insurer would pay

> on behalf of any person or organization to whom [CP Well] [is] obligated by written Insured Contract to provide insurance such as is afforded by this policy is the lesser of the Limits of Insurance shown in . . . the Declarations or the minimum Limits of Insurance [CP Well] agreed to procure in such written Insured Contract.

Id. at 689 (alterations in original). It defined an "Insured Contract" as any business contract under which the insured, CP Well, assumed the tort liability of another party to a third party. *Id.* The effect, the court held, was to cap coverage for Cimarex as indemnitee at $3 million, the minimum the MSA required. *Id.* at 690.

The court rejected Cimarex's reliance on the Texas Oilfield Anti-Indemnity Act (TOAIA), Tex. Civ. Prac. & Rem. Code §§ 127.001–.007, which generally prohibits agreements that indemnify a party against liability for oilfield injuries caused by its own negligence but allows them where they are mutual and agreed to be supported by insurance, "to the extent of the coverage and dollar limits of insurance . . . each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee." *Cimarex*, 26 F.4th at 688 (quoting Tex. Civ. Prac. & Rem. Code § 127.005(b)). According to Cimarex, courts must "look only to the 'lower amount of insurance' that both CP Well and Cimarex maintained and enforce the indemnity obligation up to that amount," without regard to the terms of the indemnifying party's insurance policy. *Id.* at 687 (quoting *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 351 (Tex. 2000)). That was incorrect, according to the court, because, in TOAIA's terminology, the $8 million of CP Well's coverage that was in excess of the minimum required was not obtained "for the benefit of" Cimarex. *Id.* at 690.

WEST VIRGINIA – OIL & GAS

Andrew S. Graham, Reporter

Lessors Barred from Recovering Bonus Payments Where Lessee Failed to Execute or Acknowledge Leases

In *Benson v. High Road Operating, LLC*, No. 5:20-cv-00229, 2022 WL 264548 (N.D. W. Va. Jan. 27, 2022), the U.S. District Court for the Northern District of West Virginia granted summary judgment in favor of High Road Operating, LLC (formerly known as American Petroleum Partners Operating, LLC) (HRO) in a dispute with a group of landowners in Ohio County, West Virginia, over HRO's decision to surrender the oil and gas leases granted to it by the landowners and HRO's refusal to tender bonus payments to the landowners because the court determined that the bonus payments were subject to a condition precedent, specifically the execution and acknowledgment of the leases by HRO, that was never satisfied.

In April and May 2018, the landowners executed the following instruments: (1) a paid-up oil and gas lease, (2) an addendum to the lease, (3) an order of payment – oil & gas lease bonus, and (4) a memorandum of lease. While the landowners signed and acknowledged the leases, HRO did not execute any of them; however, the landowners and HRO did execute and acknowledge the memoranda of lease, each of which recited that the landowners and HRO had entered into a lease. In May and June 2018, HRO recorded the memoranda in the Ohio County Clerk's office.

The order of payment required HRO to tender a bonus payment to the landowners equal to $6,500 per net mineral acre; however, this payment was "[o]n and subject to approval of the fully executed and notarized Oil and Gas Lease . . . by the management of [HRO] . . . and upon and subject to further approval of [the landowners'] title and rights thereunder by [HRO]." *Id.* at *1 (first alteration in original). The order of payment called for the bonus payment to be made within 90 business days from the date of the order of payment and provided that, if the title examination revealed that the landowners owned less than 100% of the oil and gas, then the bonus payment could either be proportionately reduced or HRO could, at its sole option, void the lease. *Id.* The landowners executed the order of payment, but HRO did not because there was no line on the order of payment for HRO's execution. *Id.* HRO never tendered any bonus payments to the landowners. *Id.* at *2.

Between October 5, 2018, and April 18, 2019, HRO sent each landowner a surrender of oil and gas lease, executed by HRO, under which HRO "release[d], relinquish[ed], surrender[ed] . . . any and all right, title, and interest whatsoever presently owned." *Id.* (alterations in original). The landowners leased their mineral interest to another company for a $4,500 per-acre bonus payment and then filed suit against HRO in 2020, stating causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and slander of title. The landowners and HRO both filed motions for summary judgment and the district court granted summary judgment in favor of HRO.

The district court, applying West Virginia law, held that a breach of contract claim has four elements: "[1] the existence of a valid, enforceable contract; [2] that the plaintiff has performed under the contract; [3] that the defendant has breached or violated its duties or obligations under the contract; and [4] that the plaintiff has been injured as a result." *Id.* at *3 (alterations in original) (quoting *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 714 (S.D. W. Va. 2009)). According to the court, the second and fourth elements were undisputed, and the court's decision would hinge on the first and third elements. *Id.* The landowners argued that they had formed valid, enforceable contracts with HRO and that HRO had breached those contracts by failing to pay the bonus, while HRO argued that there was no such contract, that even if there was, conditions precedent to its performance had not been satisfied, and that any obligation owed by HRO to the landowners had been discharged by these conditions precedent. *Id.*

The district court held that there was a valid and enforceable contract between the landowners and HRO. Under West Virginia law, a valid and enforceable contract requires (1) competent parties, (2) legal subject matter, (3) valuable consideration, and (4) mutual assent. *Id.* at *4. HRO disputed that the parties had mutually assented to form a contract, but the court found, by construing the lease, the memorandum of lease, and the order of payment together, that HRO had manifested an intent to be bound and that the terms of the lease and the order of payment were certain enough to create a power of acceptance on the part of the landowners. *Id.* at *5. The court also rejected HRO's argument that the lease and the order of payment represented only preliminary negotiations between the parties, relying on a six-factor test adopted by the West Virginia Supreme Court of Appeals in *Blair v. Dickinson*, 54 S.E.2d 828 (W. Va. 1949):

> (1) whether the contract is of the type usually in writing; (2) whether the contract needs to be a formal writing for its full expression; (3) whether it has many or few details; (4) whether the value of the contract is large; (5) "whether it is a common or unusual contract"; and (6) "whether the negotiations themselves indicate a written draft is contemplated as a final conclusion of the negotiations."

Benson, 2022 WL 264548, at *6 (quoting *Blair*, 54 S.E.2d at 844).

But having determined that valid and enforceable contracts existed between the landowners and HRO, the court nonetheless held that HRO did not breach its contractual duty because the conditions precedent to HRO's obligation to tender the bonus payments had not been satisfied. Specifically, the court pointed to the language in the order of payment that conditioned the bonus payment "[o]n and subject to approval of the fully executed and notarized Oil and Gas Lease . . . by the management of [HRO]." *Id.* at *7 (first alteration in original). While the court did not try to define "management approval," it nevertheless held that HRO was not obligated to tender the bonus payments because the lease was never "fully executed and notarized," as HRO never executed or acknowledged the leases. *Id.*

Editor's Note: The reporter's law firm represented High Road Operating, LLC, in this case.

State Court Trespass Claim Not Barred by Earlier Settlement of Federal Court Class Action Royalty Claims

In *Kay Co. v. Equitable Production Co.*, 27 F.4th 252 (4th Cir. 2022), *aff'g* 535 F. Supp. 3d 537 (S.D. W. Va. 2021), the U.S. Court of Appeals for the Fourth Circuit affirmed a decision by the U.S. District Court for the Southern District of West Virginia in which the district court refused to enforce the final judgment and final order in a class action settlement between oil and gas companies and a class of royalty owners so as to enjoin a mineral trespass filed in the Circuit Court of Wetzel County, West Virginia, by some of the members of the royalty owner class (collectively, Huey Plaintiffs).

In 2006, a class action lawsuit was filed against EQT Production Company and Equitable Resources, Inc. (collectively, EQT) in the district court, seeking damages for (1) improper deduction of post-production expenses from royalty payments; (2) breach of lease agreements; (3) breach of fiduciary duty; (4) fraud; (5) violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-6-101 to -110; (6) violation of the West Virginia flat-rate royalty statute, *id.* § 22-6-8; and (7) punitive damages. In 2010, the district court approved a settlement of this class action, which included a provision releasing EQT "from future claims by Class Members from any and all royalty claims through the settlement date of December 8, 2008." *Kay*, 27 F.4th at 256 (emphasis omitted). The settlement agreement defined "royalty claims" as

> [t]hose claims asserted by the Plaintiff Class Representatives in this Action, individually and as representatives of the Class, including claims for improper royalty payments, improper deductions, improper measurement, improper accounting for natural gas liquids, improper sales prices, breach of lease agreements, breach of fiduciary duty, fraud, violation of the West Virginia Consumer Credit and Protection Act (W. Va. Code § 46A-6-101, et seq.), violation of the flat rate royalty statute (W. Va. Code § 22-6-8), and punitive damages, all based upon the failure to pay proper royalty.

Id. (emphasis omitted). The release was also limited to a compensation period running from February 1, 2000, to December 8, 2008. *Id.* at 256–57.

Class members had to submit a claim form to obtain settlement funds. One such form, which applied to those class members subject to flat-rate leases, provided that claimants "cannot seek forfeiture of their Flat Rate Leases after entry of Final Order and Judgment in this civil action." *Id.* at 257. The Huey Plaintiffs submitted a flat-rate lease claim form and received funds from the settlement of the class action. As part of the settlement of the class action, the district court also ordered that the class members were barred from asserting royalty claims against EQT, that all such claims were released through December 8, 2008, and that the settlement agreement provided the sole and exclusive remedy to the class members for royalty claims. *Id.*

In 2017, the Huey Plaintiffs filed a civil action against EQT in the Circuit Court of Wetzel County, alleging, among other things, mineral trespass on the grounds that an oil and gas lease granted in 1900, the Hoge Lease, which granted EQT the right to produce the oil and gas owned by the Huey Plaintiffs, had expired, but that EQT continued to produce oil and gas after the expiration. The Hoge Lease provided for a primary term of five years and a secondary term that would continue "as long after the commencement of operations as said premises are operated for the production of oil or gas." *Id.* The Huey Plaintiffs alleged in the Wetzel County case that (1) from 1935 to 2014, the Hoge Lease was being held by production from a single oil well; (2) that well did not produce in 1987, 2004, or 2005, so the Hoge Lease had terminated by its own terms for lack of production; and (3) EQT had drilled additional wells on the Hoge Lease in 2013 and 2014. *Id.*

In 2020, EQT filed a motion in the Southern District of West Virginia to enforce the settlement agreement against the Huey

Plaintiffs because the Huey Plaintiffs' Wetzel County trespass claim was actually a royalty claim that had been satisfied by the settlement agreement and because the Huey Plaintiffs had represented that the Hoge Lease was a valid lease when they submitted their class action claim form, which would mean that the Wetzel County trespass claim was in violation of the settlement agreement. The district court denied the motion. It found that the Wetzel County trespass claim did not fall within the definition of a "royalty claim" for purposes of the settlement agreement because the trespass claim "ha[d] nothing to do with whether EQT paid proper royalties." *Id.* at 258 (quoting *Kay Co. v. Equitable Prod. Co.*, 535 F. Supp. 3d 537 (S.D. W. Va. 2021)). The district court also declined to enjoin the Wetzel County case because it did not find an exception to the Anti-Injunction Act that applied and, even if one did, the district court would not use its discretion to enjoin the case because EQT had other remedies and an injunction would be an extraordinary remedy. *Id.*

EQT appealed and asked the Fourth Circuit to reverse the district court's decision for three reasons: (1) the district court failed to find that the Huey Plaintiffs were bound by the settlement agreement, (2) the district court erred when it found that the Wetzel County case was not a royalty claim barred by the settlement agreement, and (3) the district court abused its discretion in not issuing an injunction against the Wetzel County case and it erred in finding that two exceptions to the Anti-Injunction Act did not apply. *Id.* at 258–59.

The Fourth Circuit rejected the first argument because the district court had addressed whether the Huey Plaintiffs had violated the settlement agreement, so the district court must have assumed that they were bound by the agreement. *Id.* at 259. The Fourth Circuit rejected the second argument, focusing, as the district court had, on the definition of "royalty claims" set forth in the settlement agreement, especially the provision that such claims were "based upon the failure to pay proper royalty." *Id.* (emphasis omitted). The Fourth Circuit distinguished the Wetzel County case from the class action because the trespass claim is not based on royalty payments, but rather on alleged damage to the Huey Plaintiffs' property. *Id.* The Fourth Circuit also noted that, even if the Wetzel County case were a royalty claim, the settlement agreement would not bar it because the release in the settlement agreement only applied to royalty claims prior to December 8, 2008, and the Huey Plaintiffs' trespass claim in the Wetzel County case was related to an alleged trespass in 2013 and 2014, which occurred after the period covered by the settlement agreement. *Id.* at 259–60. Finally, the Fourth Circuit disagreed with EQT's contention that its motion fell within either the "in aid of jurisdiction" or "relitigation" exceptions to the Anti-Injunction Act. *Id.* at 260–62. While federal law authorizes federal courts to enjoin state court proceedings that interfere with federal judgments, such injunctions cannot be granted unless (1) expressly authorized by an Act of Congress, (2) necessary in aid of the federal court's jurisdiction, or (3) necessary to protect or effectuate the federal court's judgments, and even then, the federal court's decision to grant such an injunction is discretionary on the part of the federal court. *Id.* at 260. Here, the Fourth Circuit agreed with the district court that the Wetzel County case did not "seriously impair the district court's flexibility and authority to decide" the class action, *id.* at 261 (quoting *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970)), nor did it represent a relitigation of the class action because the trespass claim had not been squarely presented for the district court's determination, *id.* The Fourth Circuit also held that, had one of the two exceptions to the Anti-Injunction Act applied, the district court did not abuse its discretion by refusing to issue the injunction sought by EQT. *Id.* at 262.

Royalty Owner's Fraud Claim Can Proceed Even Though She Did Not Read Remittance Statements

In *Glover v. EQT Corp.*, No. 5:19-cv-00223, 2022 WL 740762 (N.D. W. Va. Feb. 23, 2022), the U.S. District Court for the Northern District of West Virginia denied a motion for partial summary judgment against an oil and gas royalty owner's claim for fraudulent misrepresentation on the grounds that the royalty owner had testified that she had not read the remittance statements submitted with the royalty payments. The fraudulent misrepresentation claim is part of a purported class action by a group of oil and gas royalty owners who allege that their lessees have improperly calculated royalty payments for natural gas liquids (NGLs), having

> intentionally and deliberately misrepresented certain information relating to the calculation and payment of NGL royalties on the remittance statements in order to be able to conceal their failure to pay the royalties required under the leases and that the plaintiffs relied upon the truth of these statements and the amount of the checks to their detriment.

Id. at *1. Based upon testimony by one of the purported class representatives that she did not read the remittance statements, the defendants moved for partial summary judgment on her fraud claim because she could not have relied upon statements that she did not read. *Id.*

In reaching its decision to deny the defendants' motion, the district court noted that discovery in the case has not yet concluded and that the court would assume the truth of the plaintiffs' claims and focus only on the question of whether failure to read the remittance statements is fatal to the fraud claim. *Id.* The district court decided to excuse the plaintiff's failure to read the remittance statements because "[a] review of the statement or check stub would not provide her with any information that would inform her that the statements concealed improper activity on the part of [the lessee]." *Id.* at *2. Relying upon two decisions made under consumer protection laws, one by the U.S. Court of Appeals for the Fourth Circuit in *Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021), *vacated on other grounds sub nom. Rocket Mortgage, LLC v. Alig*, 142 S. Ct. 748 (2022), and one by the West Virginia Supreme Court of Appeals in *White v. Wyeth*, 705 S.E.2d 828 (W. Va. 2010), the district court held that the logic and rationale of these cases, namely that "[w]here concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss," absolved the plaintiff from proving reliance on the remittance statements that she had not read. *Glover*, 2022 WL 740762, at *3 (alteration in original) (quoting *Alig*, 990 F.3d at 802).

WYOMING – OIL & GAS

Amy Mowry, Reporter

Wyoming Legislature Passes Legislation Related to Mineral Production Tax Delinquency and Carbon Sequestration Liabilities; Bill to Establish Title Ownership of "Fossils" Fails

The Wyoming legislature passed two noteworthy oil and gas-related acts during its 2022 Budget Session.

House Enrolled Act No. 40, 2022 Wyoming Laws ch. 79 (House Bill No. 89), amends Wyo. Stat. Ann. § 30-5-104(d) to add an additional penalty for failure to make timely payment for severance taxes or ad valorem taxes on mineral production. The Act creates a new paragraph (x) authorizing the Wyoming Oil and Gas Conservation Commission, after notice and hearing, to order wells shut in and sealed and to prohibit drilling upon written notice from the Wyoming Department of Revenue that an owner or operator is more than 120 days delinquent on the payment of taxes related to mineral production. Upon written notice from the Department that the delinquent taxes have been paid, the Commission is required to remove any regulatory penalty or prohibition on drilling. References to the new statutory penalty are added to Wyo. Stat. Ann. §§ 39-13-113 and 39-14-208. The Act was signed into law on March 15, 2022, and goes into effect on July 1, 2022.

Senate Enrolled Act No. 53, 2022 Wyoming Laws ch. 101 (Senate File No. 47), amends the current statutory process by which carbon dioxide may be injected into underground spaces. As reported in Vol. 39, No. 1 (2022) of this *Newsletter*, the Act creates Wyo. Stat. Ann. § 35-11-318, which establishes that the person applying for or holding a permit or certificate for geologic sequestration of carbon dioxide under Wyo. Stat. Ann. § 35-11-313, or "injector," shall "have title" to any carbon dioxide the injector injects into and stores underground or within a unit area, and "hold title" for any injected or stored carbon dioxide until the Wyoming Department of Environmental Quality (DEQ) issues a certificate of project completion as specified in newly created Wyo. Stat. Ann. § 35-11-319. While the injector holds title, the injector remains liable for any damage caused by released or escaped injected and stored carbon dioxide. The certificate of completion under section 35-11-319 is to be issued only after 20 years have passed since carbon dioxide injections end. Additionally, certain public notice requirements and safety assurances must be satisfied prior to issuance of the certificate of project completion. Once the certificate issues, title to the stored or injected carbon dioxide shall be transferred to the state, along with primary responsibility and liability for the stored or injected carbon dioxide. The DEQ is authorized to use funds in the geologic sequestration special revenue account under renumbered Wyo. Stat. Ann. § 35-11-320 for remediation of mechanical problems with injection wells, plugging and abandonment of monitoring wells, and future claims associated with injected carbon dioxide for which the state has assumed primary responsibility. The rulemaking provisions and the reporting requirement of the Act are effective immediately, while the substantive provisions take effect on July 1, 2023.

Senate File No. 4, "Fossils distinguished from minerals," referenced in the prior report, sought to establish that fossils and non-fossilized animal remains as provided by Wyo. Stat. Ann. § 34-1-157 are not minerals and are exempt from the provisions of title 30 relating to ownership of the mineral estate. The bill failed its introduction by a vote of 19 to 11 and is now inactive.

CANADA –OIL & GAS

David Macaulay, Luke Morrison, Sharon Singh, Matthew Cunningham, Evan Hall & Dayo Ogunyemi, Reporters

Exploring Small Modular Reactors as a Potential Key Component of Canada's Low-Carbon Future

Energy innovation and transformation is a growing focus of all levels of government and industry as society tackles climate issues. Interest in the development and deployment of small modular reactors (SMRs) continues to gain traction due to their size, design, and potential to help reduce greenhouse gas emissions. SMRs are nuclear fission reactors that can produce significant amounts of low-carbon electricity, despite being considerably smaller in scope and footprint than conventional nuclear reactors. Canada is exploring the opportunities of SMRs for Canadian companies and communities, and the challenges to SMR development, both federal and provincial, as it seeks to meet its targets of reducing emissions by 40% to 45% below 2005 levels by 2030 and net-zero by 2050.

<u>Canadian SMR Development</u>

Federal SMR Action Plan

In December 2020, the Canadian federal government launched the SMR Action Plan for the development, demonstration, and deployment of SMRs for multiple applications domestically and abroad. The plan builds on the SMR Roadmap, released in 2018, and includes input from a wide array of stakeholders including governments, Indigenous communities, utilities, industry, and academia. The SMR Action Plan outlines a variety of principles and goals, including:

- promoting cross-jurisdictional cooperation on SMRs to enable first units to achieve operation by the late 2020s;
- unifying Canada's public and private sectors to seize export opportunities, influence international standards, and secure investments;
- leveraging Canada's extensive capabilities in academia, research, engineering, and manufacturing in the deployment and export of SMRs; and
- seeking out opportunities to integrate SMRs with other clean energy sources, storage technologies, and applications to accelerate Canada's low-carbon future.

Four-Province SMR Strategic Plan Released

Under the Strategic Plan for the Deployment of Small Modular Reactors (SMR Strategic Plan) released on March 28, 2022, the Canadian provinces of Alberta, Ontario, Saskatchewan, and New Brunswick have agreed to collaborate on the advancement of SMRs as a clean energy option to address climate change, regional energy demands, and potential economic development. The SMR Strategic Plan identifies five key priority areas for SMR development and deployment: (1) technological readiness, (2) regulatory framework, (3) federal government commitments, (4) Indigenous and public engagement, and (5) nuclear waste management. The four provinces will assess these areas as they decide whether or not to move forward with SMR projects.

One of the underlying themes of the SMR Strategic Plan is positioning Canada as a world leader in nuclear innovation and SMR technology. Early adoption of SMRs could allow Canada to seize a significant share of the SMR market internationally, creating jobs and economic benefits while contributing to emissions reduction targets on a global scale. Currently, three project streams have been proposed:

- on-grid SMR deployments in Ontario and Saskatchewan, including a grid-scale SMR project of 300 megawatts to be constructed in Ontario by 2028 and up to four subsequent units in Saskatchewan beginning deployment in 2034;
- on-grid SMR deployment in New Brunswick including proposed developments in the province which will be fully operational by 2029 and the early 2030s; and

- a new class of micro-SMRs designed primarily to replace diesel use in industrial, remote communities, mines, and other commercial applications, which are currently in development and targeting mid-2020s for demonstration unit deployment in Canada.

The SMR Strategic Plan follows on work commenced by Ontario, Saskatchewan, and New Brunswick under an SMR memorandum of understanding signed in December 2019, which Alberta subsequently signed onto in April 2021.

<u>SMR Opportunities for Canadian Companies and Communities</u>

Though the technology is globally applicable, SMRs offer numerous benefits and opportunities in the Canadian context.

Electricity generation. Unlike conventional nuclear reactors, SMRs are small in both physical size and installation footprint, while still being able to produce sufficient power to support on-grid industrial applications, especially in provinces phasing out coal or in remote communities with limited grid capacity. SMRs are typically factory-built, are portable or modular, scale easily, and can be transported as a unit by truck, rail, or ship to any site for assembly.

Heat. SMRs can be used to create heat for a wide variety of applications. The heat generated from SMRs can be used for industrial purposes, district heating for commercial and residential needs, greenhouses, water desalination, and as process heat for bitumen extraction and steam supply, among other uses.

Support for hybrid energy systems and decarbonization. SMRs can play a critical role in supporting Canadian emissions reduction goals through safe and reliable zero-emission energy production. SMRs can also be used in combination with other energy sources like fossil fuel energy and renewables to leverage resources, generate increased returns, and enable greater penetration for intermittent renewable energy sources. The federal government's Hydrogen Strategy for Canada, released in December 2020, identified synergies between hydrogen and nuclear energy development, and multiple proponents are looking at ways to integrate SMRs into hydrogen production. This energy may in turn be utilized by the electricity and transportation sectors for energy storage or as a fuel source for long haul transportation.

Economic partnerships for and with Indigenous communities. The federal SMR Action Plan and the four-province SMR Strategic Plan both recognize the need for meaningful Indigenous engagement in SMR development and hope to establish mutually beneficial partnerships with Indigenous communities. The SMR Strategic Plan notes that SMR project proposals in Alberta, Ontario, Saskatchewan, and New Brunswick will need to consider opportunities for Indigenous communities to participate in their development. This includes areas such as equity investment, employment, skills development, and supplier arrangements and builds on growing Indigenous involvement in related sectors in Canada.

<u>Challenges for SMR Development</u>

Despite government and industry support, opportunities, and comparative advantages, the development and implementation of SMRs continues to face challenges and obstacles.

Regulatory uncertainty and the need for policy reform. While the International Energy Agency's Canada 2022 Energy Policy Review welcomes SMR developments in Canada, it highlights the need for both federal government support for ongoing SMR projects under discussion at the provincial level and policy reform at both the federal and provincial levels to allow for licensing and construction of demonstration projects. Such support and policy readiness is recognized as a key challenge in both the provincial SMR Strategic Plan and the federal SMR Action Plan. Fortunately, the Canadian Nuclear Safety Commission (CNSC), Canada's nuclear energy regulator, has significant institutional expertise regarding the policy and regulatory framework for reactor facilities. As a result, there should be a pathway to ensure that the current licensing requirements can be appropriately tailored using a risk-informed approach to facilitate an efficient and effective regulatory process for SMR development.

Waste management. While the regulatory framework for radioactive waste in Canada is well established under CNSC licensing, SMR proponents and governments recognize the need to engage in dialogue to provide information regarding fuel waste from new or emerging reactor technologies and to consult with multiple stakeholder groups to demonstrate how a proposed SMR project will meet waste storage and handling requirements and international standards.

Capital costs. While several analyses have shown that SMR capital costs per unit of power are comparatively lower than costs for large nuclear reactors or other sources of electricity such as diesel, proposed SMR projects face cost certainty issues in relation to matters such as fuel source scarcity and reliability, logistics and transportation costs (for fuel, spent fuel, and for the SMRs themselves), and limitations regarding spent fuel storage.

<u>Conclusion</u>

SMRs present exciting potential for both energy generation and emissions reductions due to their size, portability, scalability, and versatility. Their potential energy output is sufficient to handle industrial applications, they are capable of being deployed in a wide range of both on- and off-grid circumstances, and they can be incorporated into and utilized in hybrid energy systems. Canada has launched initiatives at the federal and provincial levels to explore and advance SMR development and has the potential to capture a significant share of the SMR market as an early adopter of the technology. However, more research and development needs to occur to determine whether SMRs are appropriate and cost-effective for deployment in Canada and whether further collaboration between the federal and provincial governments and industry will be required to resolve regulatory uncertainty and reform existing policy. If these obstacles can be overcome, SMRs have the potential to create economic growth and jobs in Canada and play an important role in Canada reaching its emissions reductions goals.

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