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Wells Parker, Benjamin Machlis & Kayla Weiser-Burton, Reporters

Rosemont Copper Update

On May 12, 2022, the U.S. Court of Appeals for the Ninth Circuit issued a long-awaited decision regarding Rosemont Copper Company's (Rosemont) proposed mine in Arizona. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202 (9th Cir. 2022), *aff'g* 409 F. Supp. 3d 738 (D. Ariz. 2019). The Rosemont project has been the subject of numerous lawsuits. As it relates to mining activity on federal lands, litigation has focused on Rosemont's plan to deposit waste rock material on unpatented mining claims. The primary challenge has centered on the language of the General Mining Law of 1872, which provides that an unpatented mining claim must be valuable for a specific locatable mineral deposit. The plaintiffs argued, and the U.S. District for the District of Arizona agreed, that since Rosemont's plan included placing waste rock

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

Recent Federal and State Transmission Project Approvals Making Headway for Renewable Energy Resources to Interconnect into the Grid

The Colorado Public Utilities Commission (CoPUC) has approved construction of the 550-mile, 345-kilovolt (kV) double-circuit Colorado Power Pathway (CPP) transmission project. *See* CoPUC Proceeding No. 21A-0096E, Decision No. C22-0270 (mailed June 2, 2022). Under the decision, Public Service Company of Colorado's (PSCo) CPP will increase system capacity in eastern Colorado. Currently, the area hosts approximately 3 gigawatts (GW) of existing wind capacity with a much smaller amount of solar capacity. However, both solar and wind generation capacity are poised double in this decade as Colorado utilities strive to meet the state's carbon emission reduction targets. *See, e.g.*, Colo. Rev. Stat. § 25-7-102(g). The CPP joins a

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John H. Bernetich & Dale Ratliff, Reporters

Northern District of California and Federal Agencies Dismantle Trump-Era ESA Rules

In June 2021, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (collectively, Services) announced their intent to revise or rescind five Endangered Species Act (ESA) regulations that comprised the cornerstone of the Trump administration's ESA revisions:

(1) revised regulations under section 4 for listing, delisting, and reclassifying species;
(2) the rule repealing the blanket 4(d) rule;
(3) a rule governing section 7 interagency consultation;
(4) the regulatory definition of critical habitat; and
(5) the process for excluding lands from critical habitat.

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on unpatented mining claims, those claims were invalid and the U.S. Forest Service (Forest Service) erred in approving a mine plan of operations. *See* Vol. XXXVI, No. 3 (2019) of this *Newsletter*.

In a split decision, the Ninth Circuit affirmed the district court's ruling. In its decision, the court also vacated the final environmental impact statement and record of decision for the project. The Ninth Circuit agreed with the district court's holding that section 4 of the Multiple Use Mining Act of 1955, 30 U.S.C. § 612, granted no rights beyond those granted by the General Mining Law of 1872, and that the Forest Service had no basis for assuming that Rosemont's mining claims were valid under the General Mining Law. 33 F.4th at 1218. Of note, the Ninth Circuit reversed the district court's finding that no valuable minerals *existed* on Rosemont's claims; rather, the Ninth Circuit held that no valuable minerals had *been found* on the claims. *Id.* at 1222.

On July 27, 2022, Rosemont filed a petition for rehearing asking the Ninth Circuit to reconsider its decision affirming the district court's decision vacating the Forest Service's record of decision for the Rosemont Copper Mine's plan of operations. Rosemont's petition argues that the panel did not address the central question of the case: whether the Forest Service had correctly applied its locatable minerals regulations, as opposed to its special use regulations, in approving Rosemont's plan of operations.

Ambler Road Update

On May 17, 2022, the U.S. District Court for the District of Alaska granted the U.S. Department of the Interior's (DOI) request to remand the federal permits previously issued for the construction of the proposed Ambler Access Project, but ruled that the permits would not be terminated altogether. *N. Alaska Envtl. Ctr. v. Haaland*, No. 3:20-cv-00187, 2022 WL 1556028 (D. Alaska May 17, 2022), *reconsideration denied*, 2022 WL 2753568 (D. Alaska June 14, 2022). In February 2022 the DOI requested a voluntary remand of the joint record of decision authorizing a right-of-way across federal lands for the building of a road connecting the Ambler Mining District to the Dalton Highway, indicating that the remand was necessary due to deficiencies in the legal analysis of impacts to subsistence uses under section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120. In granting the remand, the court noted that it would retain jurisdiction over the remand, and that the DOI is required to file a status report within 60 days from the date of the order and every 60 days thereafter. See Vol. XXXVII, No. 3 (2020) of this *Newsletter* for additional details related to the Ambler Road project and litigation.

Interagency Working Group on Mining Regulations, Laws, and Permitting

The U.S. Department of the Interior (DOI) launched a new interagency working group (IWG) focused on developing recommendations to improve federal hardrock mining laws, regulations, and permitting processes. *See* Request for Information to Inform IWG on Mining Regulations, Laws, and Permitting, 87 Fed. Reg. 18,811 (Mar. 31, 2022). The group is chaired by the DOI, with other member agencies including the Department of Agriculture through the U.S. Forest Service; the U.S. Environmental Protection Agency; the U.S. Army Corps of Engineers; the U.S. Departments of Commerce, Energy, and State; the Council on Environmental Quality; and the National Economic Council. Stakeholder groups include Native American tribes, state and local governments, environmental justice groups, labor organizations, industry representatives, non-profit organizations, and scientists. The IWG's stated objectives are to host

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roundtable discussions and receive public input to assess the adequacy of existing laws, regulations, and permitting processes, to make a determination as to whether changes are necessary, and, if so, provide recommendations to the appropriate agencies or Congress on adopting those changes. Specific topics the IWG will consider include:

- Would alternatives to the existing claim system, such as leasing, or adjustments to the current system, such as incorporating mining into comprehensive federal lands use assessments and planning, lead to better outcomes for communities, [the] environment and a secure domestic supply of minerals? If so, how should such an alternative or adjusted system be structured?
- Are there international mining best practices or standards that the United States should consider adopting, or encouraging the U.S. mining industry to adopt? If so, which practices or standards and what improvements or benefits would they provide?
- If the U.S. were to place royalties on hardrock minerals produced from public domain lands, what factors should be considered and what structures would best protect the interests of the taxpayer while responsibly incentivizing production? In addition, if royalties were collected, how should those revenues be allocated?
- What changes to financial assurance requirements for mining should be considered?
- How might the U.S. best support reclamation of existing AML sites including the development of meaningful good Samaritan proposals as well as remining and reprocessing of mine tailings and waste, where feasible?
- What would a successful mine reclamation program include? Are there existing programs that the U.S. should adopt?
- How can Tribes and local communities be effectively engaged early in the process to ensure that they have meaningful input into the development of mine proposals?
- How could updates to the Mining Law of 1872, or other relevant statutes, help provide more certainty and timeliness in the permitting process?
- What improvements can be made to the mine permitting process without reducing opportunities for public input or limiting the comprehensiveness of environmental reviews?
- What types of incentives would be appropriate to encourage the development of critical minerals, and what is the proper definition of a "critical mineral mine"?
- Are there areas that should be off-limits from mining, and if so, how should those be identified?
- What science and data should be included in any decisions to permit and develop mines?

Id. at 18,812.

The IWG invited comments from the interested public and recently extended the comment deadline through August 30, 2022. *See* 87 Fed. Reg. 42,492 (July 17, 2022).

Securing the Domestic Supply of Critical Minerals

On March 31, 2022, President Biden invoked the Defense Production Act to increase the domestic supply of critical minerals, including lithium, cobalt, graphite, and manganese. *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 memorandum stated that these minerals are "essential" to meeting the needs of the clean energy economy and to national security. *Id.* § 1. President Biden directed the Secretary of Defense to bolster the domestic critical mineral supply by supporting feasibility studies for new projects, encouraging waste reclamation at existing facilities, and maintaining sustainable and responsible production of such minerals. *Id.* § 2. The Defense Production Act grants authority to the president to "create, maintain, expedite, expand, protect, or restore" manufacturing capabilities for industrial resources, technologies, and materials needed to meet national security requirements. 50 U.S.C. § 4531(a)(1).

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growing number of large-scale transmission projects (discussed below) which numerous studies have concluded are necessary to integrate large amounts of renewable energy onto the grid.

The CPP decision was subject to a wide-ranging settlement agreement including CoPUC staff, independent power producer (IPP) interests, environmental nongovernmental organizations (NGOs), and labor interests. The settlement agreement was faced with a countervailing proposal from a coalition of ratepayer groups including the Colorado Office of the Utility Consumer Advocate. The settling parties provided a proposed framework where the outermost areas of the transmission project closest to the renewable rich zones of eastern Colorado would be in service prior to the end of 2025 in order to capture remaining tax incentives for wind and solar energy that are currently set to expire at the end of 2025. Conversely, the ratepayer coalition proposed to tie cost recovery for the project to the outcome of CoPUC's pending resource plan interconnecting to the project.

The CPP contains six segments, to be constructed in sequence. The segments form looped service that connects to Colorado's Eastern Plain substation hubs, with three new substations planned. The last segment is a radial line into the southeastern corner of the state. CoPUC ruled that the May Valley-Longhorn Extension will be contingent on cost savings shown in the bid evaluation process under CoPUC's pending resource plan. *See* Decision No. C22-0270, Ordering Paragraph at 65. CoPUC estimates that the CPP will be able to connect

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.

more than 3,000 megawatts (MW) of wind and solar resources by 2030 on its own. *Id.* ¶ 15.

One significant area of CoPUC's decision that diverged from the settlement proposal is the performance incentive mechanism (PIM). CoPUC had included a PIM in the settlement agreement, but CoPUC changed its parameters in its decision. The purpose of implementing a PIM is "to motivate timely completion of the Pathway Project and discourage imprudent cost overruns." *Id.* ¶ 1. There are three PIMs in the decision, slightly modified after the rehearing process. *See* CoPUC Proceeding No. 21A-0096E, Decision No. C22-0430 (mailed July 22, 2022). Two of the PIMs are for construction. One is based on construction costs over which the utility has "full control" and one over which the utility has "limited control," for example environmental regulations or supply chain pressures. Decision No. C22-0270, ¶ 88. Each PIM is symmetrical, allowing the utility to capture a portion of construction savings, or receive a penalty on their ROE. *Id.* ¶ 84.

The third PIM is related to construction timing of the project segments. The PIM is designed to incentivize the company to bring the project online by September 2025 in order to allow sufficient time for IPP projects to connect to the project before the expiration of the federal tax credits on January 1, 2026. Decision No. C22-0430, ¶¶ 10–11. The PIM authorizes a $50,000 penalty each day after the project is 15 days late, up to $20 million, for delivery of the project, and allows a $25,000 per day bonus each day the project is brought online more than 15 days early. *Id.* ¶ 32. CoPUC also will provide a report on using carbon core conductors on the line to potentially reduce the number of poles required. *Id.* ¶ 12.

In July 2022, the Bureau of Land Management (BLM) approved the 550 kV Ten West Link transmission line project, a 125-mile transmission line that will span parts of eastern California and western Arizona. *See* Press Release, U.S. Dep't of the Interior, "Biden-Harris Administration Approves Clean Energy Transmission Project in Arizona and California with Potential to Lower Costs for Consumers" (July 14, 2022). This regional project is expected to handle 3,200 MW of electricity in a solar-rich area of the country.

Previously, the California Public Utilities Commission granted the project a certificate of public convenience and necessity in November 2021. BLM's notice to proceed gives the go-ahead to developer Delaney Colorado River Transmission, LLC, to start construction of the project, which will connect Southern California Edison Blythe's California substation and Arizona Public Service Company's Tonopah, Arizona, substation. Construction of the project is also expected to begin this summer. *See* BLM National NEPA Register, Ten West Link 500-kilovolt Transmission Line Project and Potential Amendment to the Yuma Field Office Resource Management Plan, https://eplanning.blm.gov/eplanning-ui/project/59013/510.

The CPP and Ten West Link join a growing list of transmission projects across the country that are advancing in the southwestern United States, including the Gateway South project by PacifiCorp and the 550-mile SunZia project in Arizona and New Mexico, recently purchased by Pattern Energy Group LP.

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In 2019, immediately following promulgation of the final ESA rules, a coalition of environmental nongovernmental organizations filed suit in the U.S. District Court for the Northern District of California challenging FWS's (1) revised section 4 listing regulations, (2) repeal of the blanket 4(d) rule, and (3) revisions to the rules for section 7 consultation. *See* Complaint ¶ 4, *Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206 (N.D. Cal. Aug. 21, 2019). The Biden administration moved to have the rules voluntarily remanded to the Services in December 2021 to address the "substantial concerns" it identified with the 2019 rules. Mot. for Voluntary Remand at 20, *Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206 (N.D. Cal. Dec. 10, 2021). But the Services requested that the rules be left in place because (1) the Services were likely to remedy the procedural flaws with rules during its intended reconsideration of the rules, (2) vacatur would lead to disruptive consequences, and (3) the plaintiffs could not identify a concrete interest harmed by continued implementation of the 2019 rules. *Id.* at 28–30.

On July 5, 2022, the court finally ruled on the Services' motion for remand. *See Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206 (N.D. Cal. July 5, 2022). The court granted the motion but vacated the underlying regulations. The court found vacatur to be appropriate because the Services had identified substantive and procedural concerns with the regulations, and because the agency itself had made clear that it did not intend to retain the 2019 rules. *Id.* slip op. at 8–10. The court's order puts the pre-2019 regulations back into effect. The Services have not announced any plans to review and propose revisions to those rules in the absence of the 2019 ESA rules.

In October 2021, the Services published two proposed rules to rescind the new critical habitat regulations. *See* Vol. XXXVIII, No. 4 (2021) of this *Newsletter*. The Services finalized these rules on June 24, 2022 (critical habitat regulation) and July 21, 2022 (exclusion rule). *See* 87 Fed. Reg. 37,757 (June 24, 2022) (to be codified at 50 C.F.R. pt. 424); 87 Fed. Reg. 43,433 (July 21, 2022) (to be codified at 50 C.F.R. pt. 17).

As previously reported, the case to wholly rescind the Trump-era critical habitat rules, and the impacts of that rescission, are not straightforward. *See* Vol. XXXVII, No. 4 (2020); Vol. XXXVIII, No. 4 (2021) of this *Newsletter*.

By rescinding the definition of critical habitat, the Services addressed the identified concern that the rule potentially precluded the Services from designating unoccupied habitat that is necessary for a species' survival, but that requires modification or restoration in order to support the species in the future. But rescission of the rule now requires the Services to conduct case-by-case determinations for designating unoccupied critical habitat, subject to the Supreme Court's undefined mandate in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* that they must first determine what qualifies as habitat in making these determinations. 139 S. Ct. 361, 368 (2018).

Rescission of the exclusion rule has potential unintended consequences for the proponents of ESA § 10 conservation plans. 16 U.S.C. § 1539. The ability of FWS to designate lands subject to a habitat conservation plan (HCP) under section 10 as critical habitat has historically been in tension with the certainty intended to be provided to participants in these agreements. The exclusion rule explicitly included specific criteria for FWS to consider when "analyzing the benefits of including or excluding particular areas covered by conservation plans, agreements, or partnerships that have been authorized by a permit under section 10 of the Act." 50 C.F.R. § 17.90(d)(3) (2021). And the preamble to the final rule confirmed FWS's position that it "anticipate[d] consistently excluding areas covered by plans, agreements, or partnerships as long as the conditions in paragraphs (d)(3)(i)-(iii) are met." 85 Fed. Reg. 82,376,

82,382–83 (Dec. 18, 2020). This kind of certainty—and partnership from the agency—can go a long way to incentivize the development of HCPs. Rescission of the 2020 rule reverts the Services to following a non-binding policy published during the Obama administration. *See* 81 Fed. Reg. 7226 (Feb. 11, 2016).

The court's July 5 order and the concurrent rule rescissions published by the Services effectively dismantle the core of the Trump-era ESA revisions. It is unclear whether the current administration has any intent to engage in any further ESA reform.

Biden Administration Issues Guidance to Obtain Funding Under the Bipartisan Infrastructure Law to Reclaim Abandoned Coal Mine Lands

On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL), also known as the Infrastructure Investment and Jobs Act. Pub. L. No. 117-58, 135 Stat. 429. The BIL appropriated approximately $11 billion for deposit into the Abandoned Mine Reclamation Fund, and authorized the Office of Surface Mining Reclamation and Enforcement (OSMRE) to disburse about $725 million annually over 15 years to eligible states and tribes to reclaim abandoned mine lands. *Id.* § 40701. Eligibility for funds will be determined based on the total tonnage of coal historically produced in each state or on Indian lands before enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). *Id.*

Under guidance issued by OSMRE, states and tribes may use BIL abandoned mine reclamation funds to address (1) "[h]azards resulting from legacy coal mining that pose a threat to public health, safety, and the environment within their jurisdictions (including, but not limited to, dangerous highwalls, waste piles, subsidence, open portals, features that may be routes for the release of harmful gases, acid mine drainage, etc.)"; (2) water supply restoration projects; and (3) emergencies resulting from legacy coal mining. OSMRE, "Guidance on the Bipartisan Infrastructure Law Abandoned Mine Land Grant Implementation," at 1 (July 19, 2022).

Until enactment of the BIL, the Abandoned Mine Reclamation Fund was funded by fees on the production of coal, as required by title IV of SMCRA. The BIL fills an important restoration need by providing funds to reclaim sites abandoned or unreclaimed as of August 3, 1977, the date that SMCRA was enacted. Under the BIL, states and tribes will have more flexibility to use funds than is allowed under traditional grants under the Abandoned Mine Reclamation Fund. States and tribes should consult OSMRE's guidance regarding requirements to apply for and receive abandoned mine restoration grants under the BIL.

ENVIRONMENTAL

Randy Dann, Kate Sanford & Michael Golz, Reporters

Federal and State Governments Turn Up the Heat on PFAS Regulation

Per- and poly-fluoroalkyl substances, more commonly known as PFAS, are a group of over a thousand synthetic compounds. These compounds have gained significant attention at the state and federal level in recent years because they are ubiquitous in the environment and may cause human health impacts. Since they were first developed in the 1950s, PFAS have been used in a variety of industries and numerous goods, such as outdoor gear, non-stick cookware, plastics, carpeting, and fire-fighting foam.

The popularity of PFAS compounds was tied to their robust resistance to heat, oil, and water. However, the molecule chains that make up PFAS—which are fused carbon and fluorine atoms—are strongly resistant to degradation in the environment over time. Because they do not easily degrade, they can accumulate in water, soil, and the human body.

Concerns over the accumulation of PFAS compounds in the environment and the associated health effects have prompted governments at all levels to begin regulating and restricting industries' use of PFAS compounds. This report provides an overview of some of the most recent federal and state developments regarding regulation of PFAS compounds.

Federal Regulation of PFAS Is Accelerating

President Joe Biden's Environmental Protection Agency (EPA) has set an ambitious agenda to regulate PFAS under numerous regulatory authorities, including the Safe Drinking Water Act, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"). In October 2021, EPA published its PFAS Strategic Roadmap, detailing the Agency's plans for upcoming rulemakings and other regulatory actions. *See* EPA, "PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024," EPA-100-K-21-002 (Oct. 2021).

Notably, EPA has proposed to designate two of the most common PFAS, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), as "hazardous substances" under CERCLA. *See id.* at 17. The Agency submitted its proposed rule to the White House Office of Management and Budget (OMB) on January 10, 2022. More than seven months later, OMB finally concluded its review on August 12, 2022. At the time of this report, EPA has not yet published its proposed rule. Industry groups, including the U.S. Chamber of Commerce, have weighed in on the CERCLA designation, expressing their concern about the high regulatory cost burden the designation would impose on private-party cleanups. *See* Letter from U.S. Chamber of Commerce, to OMB (June 8, 2022). Other stakeholders support the designation and the newly found avenue it would provide for recovering PFAS cleanup costs under CERCLA's cost-recovery provisions. *See* 42 U.S.C. §§ 9607(a), 9613(f).

If EPA moves forward with the CERCLA designation, this would be the first time in CERCLA's history that EPA designated a compound as a CERCLA hazardous substance that was not otherwise designated in another statute, such as the Clean Water Act or Clean Air Act. The designation would undoubtedly expand the number of sites on the Superfund National Priorities List (NPL) and reopen any number of previously "remedy complete" NPL sites.

EPA is also moving forward with information gathering under the Safe Drinking Water Act to support future regulation of PFAS. On December 27, 2021, EPA announced its final revisions to the Unregulated Contaminant Monitoring Rule (UCMR 5), adding 29 PFAS to the list of substances for which certain public water systems must monitor. *See* 86 Fed. Reg. 73,131 (Dec. 27, 2021) (to be codified at 40 C.F.R. pt. 141). Several prominent emerging contaminants, including 1,4-dioxane, first appeared on the UCMR before EPA subsequently ramped up regulation. *See* 77 Fed. Reg. 26,072, 26,074 (May 2, 2012) (to be codified at 40 C.F.R. pts. 141, 142). EPA's listing of numerous PFAS in UCMR 5 is likely to support the Agency's broad regulation of PFAS.

On June 21, 2022, EPA released interim updated drinking water health advisory limits (HALs) for PFOA and PFOS. *See* Lifetime Drinking Water Health Advisories for Four Perfluoroal-

kyl Substances, 87 Fed. Reg. 36,848 (June 21, 2022). The previous advisories for each of the compounds—set in 2016—were 70 parts per trillion (ppt). Now, the level is set at .004 ppt for PFOA and 0.02 ppt for PFOS (below the laboratory detection limit). The purpose of these HALs is to provide scientific information and guidance to states to use in setting their own maximum contaminant limits (MCLs). Although not binding, the dramatically reduced HALs will drive increased public scrutiny of PFAS and likely cause some states to ratchet down their own surface water and groundwater standards.

According to its PFAS Strategic Roadmap, EPA plans to promulgate binding MCLs for PFOA and PFOS in fall 2023. *See* PFAS Strategic Roadmap at 12–13. The MCLs would likely require many public water system operators, as well as wastewater treatment plants, to implement new and expensive treatment technologies to achieve new stringent standards. Promulgation of MCLs may not immediately concern stakeholders outside these sectors. However, broad drinking water regulation promises increased scrutiny of PFAS sources impacting these systems, whether that be manufacturing facilities or airports and oil and gas operations that have traditionally relied on PFAS-containing fire-fighting foams.

Despite EPA's progress toward drinking water standards and a CERCLA designation, other regulatory initiatives have languished. In October 2021, EPA accepted a petition by New Mexico Governor Lujan Grisham to list several PFAS, including PFOA and PFOS, as RCRA hazardous constituents. *See* Letter from EPA, to N.M. Governor Lujan Grisham (Oct. 26, 2021). Such a rule would trigger EPA's cleanup authority under the RCRA Corrective Action Program and could have far-reaching consequences, particularly for wastewater utilities that dispose of sludge and biosolids containing PFAS.

EPA's recent actions and announcements can only be described as a rapid acceleration of federal interest in PFAS regulation. Nevertheless, public scrutiny continues to outpace agency action. Congress has attempted to move the ball forward, but to no avail. In July 2021, the PFAS Action Act of 2021 passed the House. H.R. 2467, 117th Cong. (2021). The bill would require EPA to list PFOS and PFOA as CERCLA hazardous substances within one year and promulgate a national primary drinking water regulation for both substances within two years, among other major actions. The bill was referred to the Senate Committee on Environment and Public Works in July 2021, and no additional action has yet been taken.

States Are Starting to Fill the Gap

Despite intense public scrutiny, states are not far ahead of the federal government in regulating PFAS in drinking water. At the time of this report, only a handful of eastern states have promulgated MCLs for certain PFAS, including Massachusetts, Michigan, New Hampshire, New Jersey, New York, and Vermont. For example, New York has set an MCL of 10 ppt for both PFOA and PFOS. *See* 10 NYCRR § 5-1.52.

No state west of the Mississippi has set binding drinking water standards; however, several states, including California, Washington, and Alaska, have promulgated "notification" rules requiring public water systems to notify customers if PFAS concentrations exceed a certain level. For example, California requires notification if the concentration of PFOS exceeds 6.5 ppt or the concentration of PFOA exceeds 5.1 ppt. *See* Cal. Health & Safety Code § 116378; Cal. State Water Res. Control Bd., "Drinking Water Notification Levels and Response Levels: An Overview," at 2–3 (Feb. 10, 2022). These requirements can be onerous for public water systems given that PFAS sampling requires very detailed protocols to avoid sample contamination from clothing and other sources.

It appears that some states will simply wait for federal direction (or mandate) on PFAS standards, highlighting the prominent role of EPA in pushing the envelope on emerging-contaminant regulation. And even for states that have already opted to act, EPA's revised HALs, which are now much lower than any existing state standard, will no doubt catalyze further rulemakings to ratchet down state standards.

State regulation is not limited to drinking water standards, and some states are enacting PFAS legislation targeted at mitigating risks at the source. For example, on June 3, 2022, Colorado Governor Jared Polis signed HB 22-1345, prohibiting the sale or distribution of consumer and industrial products, including fire-fighting foam, that contain intentionally added PFAS compounds. H.B. 22-1345, 2022 Colo. Legis. Serv. ch. 338. And on June 8, 2022, Governor Polis signed HB 22-1348, implementing disclosure requirements for any compound that may be used in oil and gas production in Colorado, including PFAS compounds, to encourage less-toxic alternatives and enable the public to evaluate the environmental and public health impacts of these compounds. H.B. 22-1348, 2022 Colo. Legis. Serv. ch. 478. The new laws may ultimately have limited utility given that manufacturers have been phasing out PFAS for some time and some stakeholders doubt PFAS are used at all in downhole oil and gas operations. The laws nevertheless reflect public pressure to regulate these substances. According to a survey by Safer States, the list of proposed legislation in other states to curb the use of PFAS grows by the day. *See* Safer States, "PFAS," https://www.saferstates.com/toxic-chemicals/pfas/.

Moving Forward

PFAS regulations are proliferating across the United States, with states setting varied public health standards and experimenting with legislation to phase out PFAS or mitigate exposure risks. Recent EPA actions to push forward with regulation under the Safe Drinking Water Act will only further accelerate public attention and state action. Amidst the flurry of activity, businesses should carefully evaluate any new restrictions or disclosure requirements associated with these quickly evolving statutes and regulations. Businesses that emit or discharge PFAS compounds into the environment, or whose other wastes contain PFAS compounds, are likely to see stringent and costly control requirements in the near future and should plan accordingly. Even for businesses that are not forced to implement control strategies, the impending listing of PFOS and PFOA as hazardous substances promises to drag businesses from numerous sectors into complex and expensive cost-shifting litigation under CERCLA.

Editor's Note: The reporters' law firm represents clients involved in litigation and agency matters related to PFAS.

ARKANSAS – OIL & GAS

Thomas A. Daily, Reporter

Two Recent Decisions of the Arkansas Court of Appeals Permit Evidence of Other Instruments in the Parties' Title Chain in Deeds Conveying Mineral Interests

Numerous Arkansas appellate decisions involving deed interpretation recite the "four corners" rule with language similar or identical to the following:

> The construction of a deed is a matter of law, which we review de novo. When interpreting a deed we give primary consideration to the intent of the grantor. We

> examine the deed from its four corners for the purpose of ascertaining that intent from the language employed. Further, we gather the intention of the parties, not from some particular clause, but from the whole context of the agreement. We will resort to the rules of construction only when the language of the deed is ambiguous, uncertain, or doubtful.

Thus, the four corners rule requires the court to first determine whether the deed in question is ambiguous. Outside evidence of the parties' intent is only admissible after ambiguity is found.

Two recent decisions of the Arkansas Court of Appeals that involved somewhat similar facts recited the above four corners language, but then slightly expanded the inquiry from the four corners of the deed itself to include consideration of prior and contemporaneous instruments in the parties' title chain.

Phifer v. Ouellette, 641 S.W.3d 48 (Ark. Ct. App. 2022), involved a series of conveyances, the last of which was a deed from appellees Wilburn and Ruth Cowin, now deceased, to the appellant, Larry Phifer. The question presented was whether that deed conveyed a one-half or one-fourth mineral interest. Its answer depended upon the interpretation of a prior instrument in the parties' title chain. That prior instrument excepted "one-half of all oil, gas and other minerals . . . previously conveyed." *Id.* at 53. The "previous conveyance" thus referred conveyed a one-half mineral interest to the other appellees, Richard and Margot Cowin, immediately prior to the Pfifer deed. The question was whether the exception in the Pfifer deed of "one-half . . . previously conveyed" excepted the full one-half or only one-half of that one-half. The court acknowledged such language "could be considered ambiguous" because the court could not have known what was previously conveyed from only the four corners of the Pfifer deed. *Id.* It thus permitted evidence of the entire title chain, including the mineral deed to Richard and Margot, and concluded that a full one-half mineral interest had been excepted.

Mehaffy v. Clark, 643 S.W.3d 55, *superseded on reh'g*, 646 S.W.3d 651 (Ark. Ct. App. 2022), involved two quitclaim deeds that had been executed on the same day to different grantees. The deeds were otherwise identical. Each quitclaimed to its respective grantee one-half of the grantor's interest. However, at the time, the common grantor owned only a three-fourths mineral interest. The two deeds were not recorded until two and one-half years later, also on the same day. Marley Jo Clark, the grantee of the deed that was recorded first, claimed a full one-half mineral interest out of the grantor's three-fourths interest based upon the earlier recording time, rather than a three-eighths interest (one-half of the common grantor's three-fourths interest). The appeals court referenced the "four corners" deed interpretation rule quoted above, but did not conclude whether the deed to Clark was ambiguous. Instead it merely held that, in the context of the other near-identical contemporaneous deed, the common grantor had intended to convey one-half of the grantor's interest to each grantee.

CALIFORNIA – OIL & GAS

Tracy K. Hunckler & Megan A. Sammut, Reporters

Kern County SREIR Challenge Granted in Part, Denied in Part

Vol. XXXVIII, No. 4 (2021) of this *Newsletter* provided an update on Kern County's ongoing battle over its oil and gas permitting ordinance, Kern County Code of Ordinances § 19.98.010. At that time, the Kern County Superior Court had issued a ruling providing that that the 2021 revision to the ordinance adopted by the County Board of Supervisors pursuant to a supplemental recirculated environmental impact report (SREIR) "must be set aside as inoperable until a judicial determination is made that the ordinance satisfies the CEQA requirements of the Second Peremptory Writ of Mandate." Ruling on Petitioners' Joint Motion to Enforce Second Peremptory Writ of Mandate at 2, *Vaquero Energy v. Cty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. Oct. 4, 2021). Therein, the court set the matter for trial to determine whether the 2021 ordinance complied with the requirements of the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21000–21189.57, such that the court could discharge its previous writ. Essentially, the County was required to show that the SREIR underlying the 2021 ordinance corrected the deficiencies previously identified by the court.

A one-day trial took place on May 26, 2022, and the court issued a ruling granting in part and denying in part the consolidated petitions for writ of mandate. Ruling on Petitions for (Third) Writ of Mandate, *Vaquero Energy v. Cty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. June 7, 2022).

With respect to mitigation for impacts on agricultural land, the court first found that the California Court of Appeals, when ruling on the County's 2015 environmental impact report (EIR), did not preclude the use of agricultural conservation easements, but did find them to be ineffective mitigation because they do not offset the annual loss of agricultural land. Second, the court found that the County's asserted mitigation measure was partially effective because it requires the removal of "legacy equipment" that exists on the same parcel before a new drilling permit is issued. But the County had not justified its removal of the 1:1 ratio requirement for removal of legacy equipment, which ratio was previously included in the 2015 EIR and approved by the court of appeals as resulting in "full compensation for the loss of agricultural land." *Id.* at 12.

Because of this unjustified removal of the 1:1 ratio, the court further found that "the County's rejection of requiring an applicant to remove legacy equipment on property at a location other than where the permit is requested is not supported by substantial evidence." *Id.* at 13. On the other hand, the rejection of a mitigation fee bank and removal of soil contaminants was supported by the evidence and the court therefore deferred to the County's determinations with regard to those measures. *Id.* at 13–14.

The court also found the multi-well health risk assessment to be legally adequate, upheld the County's methodology for assessing and mitigating noise impacts, found no CEQA violation in terms of the County's analysis of impacts to the Temblor Legless Lizard, and confirmed that the County's failure to translate CEQA notices or documents to Spanish had already been ruled permissible by the court of appeals and re-adjudication was thus barred by res judicata. *Id.* at 17, 20, 29, 32.

With respect to PM2.5 emissions, however, the court found the County's SREIR continues to "treat[] PM2.5 as a subset of PM10 and, as a result, PM2.5 is not subject to any particular requirement." *Id.* at 22 (quoting the court of appeals). While the mitigation measure specifically lists PM2.5 as a pollutant for which an applicant must pay fees to offset its effects, that mitigation measure is achieved (as it was previously) via an agreement with the air pollution control district, which agreement was not amended pursuant to the writ. The court therefore found that the County's failure to amend the implementing agreement to distinguish between PM2.5 and PM10 is a prejudicial error that remains to be corrected.

In terms of the SREIR's analysis and mitigation of water supply impacts, the court ruled that the petitioners' argument that the SREIR should require the use of treated oilfield water in lieu of domestic quality water in connection with steam enhanced oil recovery operations was addressed in the 2015 EIR and not raised in the 2015 litigation. It is thus barred by res judicata. *Id.* at 27. The court additionally ruled that neither CEQA nor case law requires a lead agency like the County to set up a fee program for operators to pay mitigation costs to a groundwater sustainability agency where that agency has the exclusive authority to pursue such a fee. The County's failure to do so was therefore not a violation. *Id.* at 28.

On impacts to disadvantaged communities, however, the court found the SREIR falls short of CEQA compliance.

> While the County is correct that there is no requirement in CEQA to perform an analysis on impacts to low-income or disadvantaged communities, once the County committed to the analysis and imposed a mitigation fee to fund improvements to drinking water wells or systems that serve DACs, it had an obligation to make sure its analysis and findings complied with the requirements of CEQA.

Id. More specifically, the SREIR failed to define the baseline water supply conditions in those communities and did not "disclose anything about the nature or magnitude of impacts to disadvantaged communities." *Id.*

Finally, because the court found that certain feasible mitigation measures had not been implemented in the SREIR, the County's statement of overriding considerations (SOC) is also invalid. As provided by the court of appeals with respect to the 2015 EIR, "the defects in the EIR's discussion of mitigation measures must be remedied and a revised EIR considered by the Board before it adopts any [SOC]." *Id.* at 37 (quoting *King & Gardiner Farms, LLC v. Cty. of Kern*, 259 Cal. Rptr. 3d 109, 154 (Ct. App. 2020)).

The court scheduled a case management conference—initially for July 14, 2022, and then rescheduled for September 28, 2022—to discuss remedies and relief. In the meantime, the County Board of Supervisors has issued a notice of public hearing to take place on August 23, 2022, to address amendments to mitigation measures included in the final SREIR. *See* Notice of Public Hearing, Kern Cty. Bd. of Supervisors (July 18, 2022).

According to the notice, the County is endeavoring to fix the four errors identified by the court in its June 7 ruling concerning (1) removal of legacy equipment, (2) mitigation of PM2.5 emissions, (3) the disadvantaged community drinking water grant fund, and (4) the SOC. More specifically, the County is undertaking to (1) revise the relevant mitigation measure to require the removal of legacy equipment on certain lands, (2) execute an amended implementing agreement to clarify PM2.5, (3) delete the disadvantaged community drinking water grant fund, and (4) adopt a voluntary disadvantaged community drinking water grant fund. Once the County has a valid SREIR, it can legally adopt its proposed ordinance and become the lead agency for CEQA matters—a role currently fulfilled by the California Department of Conservation's Geologic Energy Management Division, under which agency permitting has slowed and approvals have decreased dramatically.

Demurrers Overruled in Suits Against Governor Newsom over WST Ban

In the three pending actions against Governor Newsom in Kern County Superior Court involving the state's well stimulation treatment (WST) ban, the parties recently filed a joint stipulation regarding case management, proposing to (1) transfer the Aera Energy LLC (Aera) petition to the judge assigned to the Chevron U.S.A. Inc. (Chevron) and Western States Petroleum Association (WSPA) petitions; (2) relate all three actions; (3) bifurcate the causes of action in the Aera and Chevron petitions to address certain of those causes of action along with all of the WSPA causes of action in phase 1, while leaving the state and federal constitutional claims of the Aera and Chevron petitions to a second phase, and staying all action on those claims until conclusion of phase 1; and (4) file combined responsive pleadings to the Chevron and Aera petitions by June 6, 2022, to be heard together with the demurrer then pending against the amended WSPA petition. *See* Joint Stipulation and Order Regarding Case Management, *Chevron U.S.A. Inc. v. Newsom*, No. BCV-22-100636 (Cal. Super. Ct. June 3, 2022). The court approved the stipulation on June 3, 2022, and pursuant thereto held a hearing on all demurrers on June 6.

The demurrer to WSPA's amended complaint was as to the amended fifth cause of action only, as the court had previously overruled the State's demurrer as to all other causes of action pleaded in the original complaint. Demurrer to First Amended Complaint for Declaratory Relief and Petition for Writ of Mandate, *WSPA v. Newsom*, No. BCV-21-102380 (Cal. Super. Ct. Apr. 26, 2022). For more information on the State's demurrer to WSPA's initial complaint, see Vol. 39, No. 2 (2022) of this *Newsletter*. The joint demurrer to the Aera and Chevron petitions was as to claims 1 through 6—all claims within "phase 1" of the bifurcated claims, per the parties' stipulation. *See* Demurrer, *Chevron U.S.A. Inc. v. Newsom*, No. BCV-22-100636 (Cal. Super. Ct. June 6, 2022). For more information on Chevron and Aera's respective petitions, see Vol. 39, No. 2 (2022) of this *Newsletter*. While the State did not file a separate special motion to strike (an anti-SLAPP motion), the demurrer to the Aera and Chevron petitions does include the argument that the petitioners do not state a cognizable claim against the Governor because "the only allegations directed specifically at the Governor concern his First Amendment-protected speech on matters of public policy." Demurrer at 33; *see also id.* at 35–36 (arguing that a writ cannot issue to prohibit the governor from engaging in political speech), 36–37 (arguing declaratory relief would violate the First Amendment). The court overruled both demurrers in their entirety and ordered the State to file a responsive pleading no later than August 15, 2022. *See* Demurrer Hearing Minutes, *Chevron U.S.A. Inc. v. Newsom; WSPA v. Newsom* (Cal. Super. Ct. July 7, 2022). The court directed counsel for the plaintiffs to submit a proposed order, but nothing is on file or adopted by the court yet. *Id.*

Trial Took Place in Lawsuit on Established Oil Fields

As for Aera Energy LLC's (Aera) other lawsuit in Kern County—against the California Department of Conservation's Geologic Energy Management Division (CalGEM) and State Oil and Gas Supervisor Uduak-Joe Ntuk—the matter should soon come to an end. *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). As previously reported in Vol. 39, No. 2 (2022) of this *Newsletter*, the case has been identified as related to the lawsuits discussed above, but unlike Aera's petition challenging the State's well stimulation treatment (WST) ban, this petition from Aera "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.

After denying Aera's motion for preliminary injunction in February 2022, *see* Order Denying Petitioner's Motion for Preliminary Injunction, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. Mar. 21, 2022), the court set a trial on the matter for June 28, 2022. The parties fully briefed the matter and a one-day court trial was held on June 28. *See* Court Trial Minutes, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. June 28, 2022). The matter was submitted for decision at the conclusion of trial, and remains submitted at this time pending a ruling from the court. The court's ruling will determine whether CalGEM is required to issue determinations on Aera's pending new well NOIs.

MJOP Granted in Favor of Ventura County; Amended Complaint Filed

In January 2021, Peak Oil Holdings LLC (Peak) filed a lawsuit against the County of Ventura in the U.S. District Court for the Central District of California alleging a violation of the takings clause of the Fifth Amendment and a violation of the procedural and substantive due process clause of the U.S. Constitution. *See* Complaint, *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. Jan. 27, 2021). Peak's claims stem from the County's ultimate refusal to issue clearance for Peak to exercise certain vested rights it asserts it has under an oil and gas lease, and the related nullification of a 2012 zoning clearance. Peak asserts that the County's actions have deprived it of all or substantially all economically beneficial use of its property without compensation in violation of the takings clause of the Constitution, and that the deprivation of development of its property rights is arbitrary, capricious, and pretextual in violation of the due process clause of the Constitution.

In February 2022, the County filed a motion for judgment on the pleadings, which—after being fully briefed by the parties—the court took under submission without oral argument. On May 27, 2022, the court issued a written order granting the motion with leave to amend. Order Granting County of Ventura's Motion for Judgment on the Pleadings, *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. May 27, 2022). Therein, the court found Peak had not sufficiently alleged a property interest, the existence of which is "the threshold question of any takings analysis." *Id.* at 5–6. Although Peak asserted a vested right to drill and extract oil, the court found that right existed under a zoning clearance it was issued in 2012 that the County had later nullified because of Peak's own violations. Peak therefore does not have a vested right in a permit that it violated. *Id.* at 8. Peak additionally asserts that its mineral lease is a recognized property interest, but—according to the court—it "fail[ed] to allege any facts as to what the County 'took' or how with respect to the oil and gas lease." *Id.* at 8–9. Peak's takings claim was therefore dismissed, but the court granted it leave to amend.

With respect to Peak's due process claim, the court reiterated that a plaintiff must demonstrate deprivation of a protected property interest, which Peak had failed to do. *Id.* at 9. Moreover, the court found Peak had failed to allege that it was denied a meaningful opportunity to be heard, citing to Peak's administrative appeal before the Planning Commission. To the extent Peak asserts that the administrative determination was biased or pretextual, it nonetheless failed to "rebut the presumption of honesty and integrity of the tribunal such that Peak's Fourteenth Amendment procedural due process rights were infringed." *Id.* at 10. Peak further failed to state a substantive due process claim because its factual allegations do not establish that the County's nullification of the zoning clearance was arbitrary or an abuse of power. Peak's due process claim was also dismissed with leave to amend.

Finally, the court ruled that Peak's claims are barred by the doctrine of res judicata to the extent they are predicated on the County's nullification of the 2012 zoning clearance. *Id.* at 15. The County's proceedings with regard to the zoning determination meet the requirements for preclusive effect because the hearing qualifies as a judicial proceeding, the determinations made therein were within the scope of the zoning clearance determination, and the parties were given the opportunity to litigate the same issues that are now before the court. As a result, any amended complaint would necessarily have to rely on a property right not premised on the zoning clearance.

On July 21, 2022, Peak filed its amended complaint attempting to cure the deficiencies the court identified with its initial complaint. *See* First Amended Complaint, *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. July 21, 2022). The amended complaint asserts the same two causes of action, but—among other amendments and modifications—places more focus on two conditional use permits the County issued in 1952 and 1955 for oil drilling on the subject property, attempts to identify issues not addressed by way of the administrative appeal process, alleges that the County was not an impartial tribunal, and includes additional assertions regarding the County's motivations for ceasing Peak's operations, as well as additional allegations supporting the irreparable harm Peak has suffered. The County's deadline to file a responsive pleading is August 22, 2022, and trial is set for September 26, 2023.

Ventura County Proposes Another Set of Zoning Amendments to Impact Oil and Gas Operations

As previously reported in Vol. XXXVII, No. 3 (2020) and Vol. XXXVII, No. 4 (2020) of this *Newsletter*, on November 10, 2020, the Ventura County Board of Supervisors (Board) adopted amendments to the county's zoning ordinances regulating oil and gas activities under county permits issued prior to the 1960s. Those zoning amendments were met with various lawsuits and also faced a referendum vote by the public in the June 2022 election. The referendum was successful and the zoning amendments were struck down by the will of the voters.

Now—and stemming from the same November 10, 2020, Board meeting—the County has proposed another set of amendments to the zoning ordinances that will impact oil and gas operations. At the November 10, 2020, meeting, the Board directed the Ventura County Resource Management Agency to prepare amendments effecting three new requirements: (1) limit discretionary permits for oil and gas operations to 15 years, (2) increase the amount of the performance surety and insurance requirements for oil and gas operations, and (3) incorporate measures related to permanently plugging and restoring wells that have been idle for 15 years or more. Twenty months after the Board's directive was given and on the heels of the voters overturning the prior zoning amendments, the Planning Commission held a public hearing on July 28, 2022, on draft amendments to the zoning ordinances to implement these directives. The draft amendments will (1) limit new conditional use permits and modifications to 15-year terms with the option of one 15-year renewal; (2) introduce surety bond requirements for surface restoration and expand insurance requirements; and (3) include additional surety for long-term idle wells, and fund Planning Division staff to identify wells that should be plugged and abandoned to support County requests to the California Department of Conservation's Geologic Energy Management

Division to prioritize closing those wells. The Planning Commission's agenda and a video of the hearing are available at https://ventura.primegov.com/Portal/Meeting?meetingId=2960&templateName=HTML%20Agenda. There was little advance notice of the hearing and no advance request by staff for input from industry or stakeholders as to the effects of the new proposed amendments. Numerous operators submitted written and oral comments to the Planning Commission, including that the new amendments would render operations financially infeasible such that operators would be forced to shut down operations altogether in the county, leading to takings and other claims/litigation against the County. Despite those impacts, the Planning Commission voted 3 to 2 to recommend approval to the Board with a suggestion that the Board consider the financial impact to the county of the new amendments. *Id.*

Subsequent to that vote, however, the Planning Commission issued a notice that it would be holding another hearing on the new amendments because a subset of public comments was not included in the Planning Commission staff packets. The new hearing is currently scheduled for August 18, 2022.

Legislation to Prohibit Carbon Capture and Sequestration Projects for Enhanced Oil Recovery Operations Passes Senate

In Vol. 39, No. 2 (2022) of this *Newsletter*, we reported on Senate Bill 1314 (SB 1314), which, as amended March 16, 2022, would add section 3132 to the Public Resources Code to prohibit the use of carbon capture technologies and carbon capture and sequestration projects to facilitate enhanced oil recovery operations in the state. On May 25, 2022, the bill passed in the Senate and was sent to the Assembly. After being referred to the Assembly Committee on Natural Resources, the bill was rereferred to the Assembly Appropriations Committee where it was placed in the suspense file on August 3, 2022.

Governor Newsom Comments on CARB's 2022 Scoping Plan

Also on the topic of carbon sequestration, Governor Newsom sent a letter to the California Air Resources Board (CARB) Chair, Liane Randolph, on July 22, 2022, commenting on CARB's draft 2022 scoping plan, which "calls for emissions cuts in every sector of the economy while prioritizing community health and equitable economic growth." Letter from Gov'r Newsom, to Liane Randolph, Chair, CARB (July 22, 2022). While commending CARB's efforts, the Governor calls for "even bolder action than outlined in the draft plan" and demands that the final scoping plan "lay out a clear path to achieve both our 2030 climate goal and statewide carbon neutrality no later than 2045." The letter sets out six "goals and actions" and asks that CARB include them in the final scoping plan. Those six goals and actions involve (1) deploying offshore wind, (2) building clean and healthy homes, (3) moving away from fossil fuels, (4) drastically reducing methane, (5) advancing carbon removal, and (6) increasing our ambition. The Governor specifically notes that he looks forward to working with the legislature to finalize the proposed $54 million climate budget and to "develop policy to support sequestering carbon in natural and working lands, but [states that] industrial carbon capture must be included in any complete legislative strategy with careful consideration to its application in the oil and gas industry." Beginning July 28 and ending August 9, 2022, CARB is hosting in-person and virtual "listening sessions" whereby the public can hear an overview of the draft plan and provide feedback to CARB staff and board members. *See* CARB, "Draft 2022 Scoping Plan Community Listening Sessions," https://ww2.arb.ca.gov/draft-2022-scoping-plan-community-listening-sessions

COLORADO – MINING

Jill H. Van Noord, Reporter

New Hardrock Mining Regulations Addressing Perpetual Water Treatment and Temporary Cessation Adopted

The Colorado Mined Land Reclamation Board (MLRB) recently adopted amendments to the Hard Rock, Metal, and Designated Mining Operations regulations, which took effect July 15, 2022. The primary purpose of the amendments is to implement House Bill 19-1113 (HB 19-1113), *see* Vol. XXXVI, No. 3 (2019) of this *Newsletter*, and modify the regulations related to temporary cessation.

To implement HB 19-1113, the amendments eliminated the provisions that allowed for self-bonding and added provisions prohibiting perpetual water treatment as a final reclamation plan. *See* Colo. Code Regs. § 407-1:3.1.6(1)(i). While the MLRB and the Division of Reclamation, Mining and Safety had a policy of not approving permit applications that included perpetual water treatment, this policy is now codified along with a requirement to demonstrate an end date for any water quality treatment. *Id.* § 407-1:3.1.6(1)(f). One exception is that the MLRB may approve a new permit that cannot make a demonstration of an end date to treatment if the activities are "limited to reclamation of already-mined ore or other waste materials, including mine drainage runoff, as part of a clean up." *Id.* § 407-1:3.1.6(1)(h).

The amendments also clarify the administrative process and requirements for temporary cessation—or cessation of production—under the regulations. Colorado's Mined Land Reclamation Act provides: "In no case shall temporary cessation of production be continued for more than ten years without terminating the operation and fully complying with the reclamation requirements of this article." Colo. Rev. Stat. § 34-32-103(6)(a)(III). Essentially, the law provides a specific window of 10 years where an operator may cease production and if production is not restarted, reclamation must then be completed. Therefore, whether the temporary cessation clock is ticking revolves around whether production is occurring. To clarify this, the regulatory amendments include several changes related to what can or cannot qualify as temporary cessation, including adding a definition of "production," revising the definition of "mining operation" to include activities associated with production, and revising the list of indicators for and against temporary cessation. *See* Colo. Code Regs. § 407-1:1.

These clarifications come after the 2019 court of appeals' decision in *Information Network for Responsible Mining v. Colorado Mined Land Reclamation Board*, 2019 COA 114, 451 P.3d 1245, that addressed the MLRB's application of the temporary cessation regulations, finding that the period of temporary cessation had run at the subject mine.

COLORADO – OIL & GAS

Scott Turner & Kate Mailliard, Reporters

Broomfield City Council Amends Oil and Gas Financial Assurance Regulations

In May 2022 the Broomfield City Council unanimously passed Proposed Ordinance No. 2161, which will amend sections of the Broomfield Municipal Code regarding oil and gas financial assurances. Broomfield City Council, Proposed Ordinance No. 2161, Amending Certain Sections to the Broomfield Municipal Code Regarding Oil and Gas Financial Assurances - Second and Final Reading (May 10, 2022); *see* Sydney McDon-

ald, "Broomfield City Council Passes Amendments to Oil and Gas Financial Assurances," *Daily Camera* (May 10, 2022). The amendment is a response to the Colorado Oil and Gas Conservation Commission finishing its financial assurances rulemaking earlier this year. *See* Vol. 39, No. 2 (2022) of this *Newsletter*. The amendment will increase financial assurances on wells of a certain economic threshold and provide a definition for "low-producing wells." The ordinance will take effect May 1, 2023.

Fracking Chemicals Bill Signed into Law

In June 2022 Governor Jared Polis signed House Bill 22-1348 (HB 22-1348), 2022 Colo. Legis. Serv. ch. 478, into law, which will require manufacturers and users of hydraulic fracking chemicals to disclose to the Colorado Oil and Gas Conservation Commission (COGCC) each chemical in their products. HB 22-1348 adds Colo. Rev. Stat. § 34-60-132 to the Oil and Gas Conservation Act. The statute became effective on June 8, 2022. On and after July 31, 2023, a "discloser" that sells, distributes, or uses a chemical product in downhole operations in Colorado must disclose information about the product to the COGCC, including the name of the product, details about the chemicals used in the product, and the intended purpose for the chemicals. Colo. Rev. Stat. § 34-60-132(2). Trade secrets are protected from public disclosure under the statute. *Id.* The statute defines a "discloser" as an operator or service provider that uses chemical products in the course of downhole operations, or any direct vendor that provides chemical products to an operator or service provider for use at the well site. *Id.* § 34-60-132(1).

Orphan Well Fund Created

Senate Bill 22-198 (SB 22-198), 2022 Colo. Legis. Serv. ch. 331, which creates a fund for cleaning up oil and gas well sites in Colorado, was signed into law by Governor Jared Polis in June 2022. SB 22-198 adds Colo. Rev. Stat. § 34-60-133 to the Oil and Gas Conservation Act. The statute became effective on July 1, 2022. On or before August 1, 2022, April 30, 2023, and April 30 of each year thereafter, operators must pay a mitigation fee for each well that has been spud but is not yet plugged and abandoned. Colo. Rev. Stat. § 34-60-133(5). Fees due August 1, 2022, include, for operators with production equal to or less than a threshold to be determined by the rules of the Colorado Oil and Gas Conservation Commission (COGCC), $125 for each well, and for operators with production that exceeds the threshold, $225 for each well. *Id.* The fees will be used to fund the plugging, reclaiming, and remediating of orphaned wells in Colorado. *Id.* § 34-60-133(1).

On August 1, 2022, the COGCC's Orphan Well Mitigation Fee Enterprise Rules became effective. *See* Press Release, COGCC, "Colorado Oil & Gas Conservation Commission Votes Unanimously to Adopt Orphan Well Mitigation Fee Enterprise Rules" (June 30, 2022). The rules establish the Orphan Well Mitigation Fee Enterprise Fund, which is the fund operators will pay their fees to. The rules also provide the threshold that determines the level of fees due. The final rules are available on the COGCC website at https://cogcc.state.co.us/owe.html#/owe.

Two New COGCC Commissioners Appointed

In June 2022, Governor Jared Polis appointed two new members of the Colorado Oil and Gas Conservation Commission (COGCC). *See* Press Release, COGCC, "Appointments to the Colorado Oil & Gas Conservation Commission Announced" (June 17, 2022). As of July 1, 2022, and for a term expiring July 1, 2026, Brett Ackerman will serve as a member with training or experience in environmental protection, wildlife protection, or reclamation, and Michael Cross will serve as a member with experience in the oil and gas industry. *Id.*

LOUISIANA – OIL & GAS

Gus Laggner, Court VanTassell & Kathryn Gonski, Reporters

Louisiana Supreme Court Holds Act 312 Limits Excess Remediation Damages

In *State v. Louisiana Land & Exploration Co.*, 2020-00685 (La. 6/1/22), 339 So. 3d 1163, the Louisiana Supreme Court doubled down on its prior holding that Louisiana's Act 312 prohibits damage awards for property remediation in excess of the actual costs of remediation, unless expressly provided by contract. *See* Vol. XXXVIII, No. 3 (2021) of this *Newsletter*.

In Louisiana, La. Stat. Ann. § 30:29, more commonly referred to as Act 312, is a statutory scheme which mandates that damage awards to remediate environmental damage to property must actually be used to remediate the property and not simply represent a windfall to plaintiffs. More specifically, Act 312 requires that damage awards for remediating property contaminated by historical oil and gas operations be deposited into the registry of the court and may only be used to remediate the property in accordance with state agency-regulated cleanup plans, statutorily referred to as the "feasible plan." La. Stat. Ann. § 30:29(D)(1), (I)(4). Any amount in the registry that is ultimately not used for remediation is to be returned to the party that deposited it.

In *Louisiana Land*, the Vermilion Parish School Board (VPSB) filed suit in 2004 alleging environmental damage to its property from historical oil and gas operations conducted pursuant to a 1935 mineral lease and a 1994 surface lease. VPSB alleged theories of negligence, strict liability, unjust enrichment, trespass, breach of contract, and violations of various Louisiana environmental laws. After a jury trial, the trial court awarded $3.5 million for remediation damages pursuant to Act 312, and an additional $1.5 million for VPSB's strict liability claims. According to the judgment, the strict liability damages were for "damage to the property" and "to restore the property." The trial court further found that there was no liability for VPSB's breach of contract claims.

The question before the Louisiana Supreme Court was whether, in the absence of an express contractual provision, the 2006 version of Act 312 allows a landowner to recover an award for remediation damages that exceeds the cost of the feasible plan. The court held it does not. The court found that the plain language of the statute reserved "private claims" to the landowner but expressly required that all damages awarded for the "evaluation or remediation of environmental damage" be paid into the registry of the court to fund the remediation. *La. Land*, 339 So. 3d at 1167 (citing La. Stat. Ann. § 30:29(D)(1)).

VPSB argued that the feasible plan is only a minimal state standard, leaving some excess remediation award owed to the landowner as "private claims suffered as a result of environmental damage." *Id.* (citing La. Stat. Ann. § 30:29(H)). The court rejected this argument, finding that the statute plainly states that remediation damages in excess of the feasible plan are to be returned to the responsible party, and a plaintiff can only recover remediation damages in excess of the feasible plan when expressly provided for by contract. *Id.* at 1167–68 (citing La. Stat. Ann. § 30:29(D)(4)).

The court concluded that Act 312 requires that all damages for evaluation or remediation of environmental damages be through the feasible plan, unless the claimant can establish one of the few exceptions requiring a heightened remedy in excess of the feasible plan, such as a contractual provision requiring the lessee to restore the property to "original condition." *Id.* at 1169. This case was decided based on the 2006 version of Act 312. The court's reasoning, however, applies equally to the current version of the Act.

Louisiana Legislature Prohibits Drilling Through Carbon Capture Storage Reservoirs

Many energy companies are investigating carbon capture and sequestration (CCS) projects as a means of reducing their carbon emissions. In addition to reducing carbon emissions, CCS projects often qualify for valuable income tax credits.

One such credit is a California state income tax credit under California's Low Carbon Fuel Standard program, overseen by the California Air Resources Board. This program allows for CCS project operators that operate outside of California to receive state income tax credits if they are engaged in direct air capture or sales of low carbon transportation fuel within the state of California. To qualify for the credits, the project operator must demonstrate that there is a binding agreement in place to prohibit mineral owners from drilling through the storage reservoir.

In Louisiana, however, the Louisiana Geologic Sequestration of Carbon Dioxide Act does not prohibit mineral interest owners from drilling through approved storage reservoirs in search of minerals. As currently written, the Act allows the project operator to expropriate the rights "necessary or useful" in constructing and operating the storage facility. La. Stat. Ann. § 30:1108(A)(1). However, the Act clarifies that "[t]he exercise of the right of eminent domain granted in this Chapter shall not prevent persons having the right to do so from drilling through the storage facility in such manner as shall comply with the rules of the [Commissioner of Conservation] . . . ." *Id.* § 30:1108(B). Thus, project operators seeking to qualify for California's tax credits via projects in Louisiana must successfully acquire contractual agreements from all affected mineral owners.

A recent amendment to the Act may help to alleviate a project operator's burden of acquiring contractual agreements, at least with respect to projects located in Caldwell Parish, Louisiana. The amendment expands the project operator's expropriation rights to allow for the exercise of eminent domain to "prohibit persons having the right to do so from drilling through the storage facility located in Caldwell Parish" if the following two requirements are satisfied: (1) five years have passed from the actual drilling or operation of an oil or gas well within the boundaries of the storage facility to depths below the base of the underground reservoir, and (2) all formerly productive reservoirs below the underground reservoir are no longer capable of producing in paying quantities. House Bill 267, 2022 La. Sess. Law Serv. Act 163 (amending La. Stat. Ann. § 30:1108(B)). This new exception is not absolute or indefinite—if a person is prohibited from drilling through the reservoir as a result of this new exception, the prohibition will terminate if the Commissioner of Conservation finds that the storage facility operator abandoned reasonable efforts to use the storage facility prior to any use of the underground storage reservoir component. *Id.*

The amendment is effective as of August 1, 2022. It is possible that the amendment will be expanded to cover additional parishes in the future as carbon capture and sequestration projects continue to expand.

United States Fifth Circuit to Decide Whether LDEQ Was Properly Dismissed from Suit Alleging Failure to Warn

After oral argument in June 2022, the U.S. Court of Appeals for the Fifth Circuit is set to decide whether the Louisiana Department of Environmental Quality (LDEQ) can be sued in tort for failure to warn private property owners that their property had been contaminated by hydrocarbons stemming from a manufacturing facility in Louisiana.

In *D&J Investments of Cenla, LLC v. Baker Hughes*, No. 1:20-cv-01174, 2021 WL 3553509 (W.D. La. Aug. 11, 2021), *appeal docketed*, No. 21-30523 (5th Cir. Aug. 24, 2021), the plaintiffs filed suit in Louisiana state court against Baker Hughes, Halliburton, and others alleging property contamination stemming from the defendants' operation of an industrial valve manufacturing facility in Pineville, Louisiana, over the course of approximately 50 years.

The plaintiffs also named as defendant the LDEQ, alleging that the state agency was liable for failing to warn the plaintiffs of contamination allegedly caused by the other defendants. The plaintiffs claimed that the operator of the facility notified the LDEQ that it discovered elevated levels of hydrocarbons in the groundwater adjacent to the facility in 2012, at which point the LDEQ instructed the operator to submit an investigation in compliance with the LDEQ's Risk Evaluation/Corrective Action Program (RECAP). As a result of the initial investigation, the scope of the site assessment was broadened to encompass a larger area that may have also been contaminated. The LDEQ did not notify property owners in affected areas until several years later.

The defendants removed the litigation to the U.S. District Court for the Western District of Louisiana on diversity grounds, where the plaintiffs moved to remand on the basis that the LDEQ was a non-diverse defendant. The defendants responded that the LDEQ was fraudulently joined for the sole purpose of precluding diversity jurisdiction and the district court agreed. The court applied a Rule 12(b)(6) analysis to the plaintiffs' claims against the LDEQ, finding that the LDEQ could not be held liable for contamination caused by private industry, nor did Louisiana tort law create a duty on the part of the LDEQ to inform landowners of reported contamination within any particular time frame. The district court dismissed the LDEQ and denied the plaintiffs' motion to remand. *See D&J Invs. of Cenla LLC v. Baker Hughes*, 501 F. Supp. 3d 389 (W.D. La. 2020).

Subsequently, one of the plaintiffs sought to collaterally challenge the district court's conclusion by filing a declaratory judgment action in state court against the LDEQ seeking a declaratory judgment that the LDEQ *does* owe a duty to provide notice to landowners, essentially seeking a second bite at the apple by asking a different court to reach the conclusion the plaintiffs were denied by the Western District of Louisiana. The defendants in the federal action filed a motion to stay the declaratory judgment proceeding in state court and also moved to enter partial final judgment as to the dismissal of the LDEQ in order that the Fifth Circuit could resolve the matter. The defendants' motion was granted, staying the state court declaratory judgment action and certifying the LDEQ's dismissal as a final appealable judgment.

The plaintiffs appealed to the Fifth Circuit seeking reversal of the lower court's finding that the LDEQ had no duty to warn the plaintiffs of the contamination and seeking to lift the stay of the state court proceedings imposed by the Western District of

Louisiana. At oral argument on June 8, 2022, the plaintiffs' counsel argued that the LDEQ has a duty to protect the public, and that the court's analysis should not focus on whether a Louisiana court would find that such a duty exists, but whether the plaintiffs have a possibility of proving it (i.e., whether the plaintiffs stated a claim upon which relief could be granted against the LDEQ for failure to warn the plaintiffs of the contamination). The defendants argued in response that the Fifth Circuit already addressed these very issues in *Butler v. Denka Performance Elastomer, LLC*, 16 F.4th 427 (5th Cir. 2021), which affirmed the district court's dismissal of a plaintiff's failure to warn claim against the LDEQ. The defendants further argued that the plaintiffs' state court declaratory judgment action was solely intended to contravene the Western District of Louisiana's dismissal of the LDEQ and undermine its jurisdiction.

The Fifth Circuit is anticipated to issue a decision in the coming weeks.

NEW MEXICO – MINING

Christina C. Sheehan, Reporter

New Mexico Court of Appeals Upholds Issuance of Discharge Permit for Copper Mine

On May 16, 2022, the New Mexico Court of Appeals affirmed the New Mexico Water Quality Control Commission's (WQCC) decision upholding the New Mexico Environment Department's (NMED) issuance of a discharge permit for New Mexico Copper Corporation's Copper Flat Mine in Sierra County, New Mexico. *See Elephant Butte Irr. Dist. v. WQCC*, Nos. A-1-CA-38474, A-1-CA-38478, 2022 WL 1537831 (N.M. Ct. App. May 16, 2020). Two neighboring ranches, a nearby irrigation district, and an environmental group appealed the WQCC's decision, which called into question key provisions of the New Mexico Water Quality Act and the regulations adopted thereunder, specifically the regulations governing copper mines that are referred to as the "Copper Rule." *See* N.M. Code R. § 20.6.7.10. The court of appeals considered the Copper Rule's use of the term "undue risk to property" in considering whether discharges are authorized pursuant to the Copper Rule and further considered whether the mine's future pit lake, an evaporative sink into which certain groundwater and surface water will flow, is exempted "private water" or a "surface water of the state" subject to New Mexico water quality standards.

The decision first addressed whether the WQCC erred in finding that the permitted discharges would not create an undue risk to property. In the decision, the court considered the appellants' arguments that the phrase should be read broadly to not only include potential impacts to groundwater quality from permitted discharges, but also to consider water quantity and depletions based on source water. In rejecting these arguments, the court concluded that the phrase "undue risk" as used in the Copper Rule must relate and be attributed to the discharge authorized under the permit, as neither NMED nor the WQCC has authority to regulate anything but the discharge. *Elephant Butte*, 2022 WL 1537831, at *4.

The court then considered whether the WQCC erred in finding that the pit lake is exempted private water rather than a surface water of the state that is subject to surface water quality standards. The WQCC had found that when there would be no outflow of water from the pit to groundwater or surface water and that only evaporation will cause water loss in the pit lake it was private water. One appellant argued that while the pit lake is a hydraulic sink, because it will draw groundwater from surrounding areas that will combine with water in the lake it becomes a surface water of the state as defined in the surface water regulations. In rejecting this argument, the court considered the technical expertise of witnesses and determined that the WQCC's interpretation of the definition as applied to an evaporative sink was not arbitrary, capricious, or otherwise not in accordance with the law. *Id.* at *7.

As of the time of this writing, all the appellants except the irrigation district have petitioned the New Mexico Supreme Court for a writ of certiorari in hopes of further appealing their losses at both the WQCC and the court of appeals. The supreme court has yet to decide whether it will accept certiorari and hear the appeal.

Editor's Note: The reporter represents New Mexico Copper Corporation in this litigation.

OHIO – OIL & GAS

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

Supreme Court of Ohio Holds That *Duhig* Rule Has Narrow Application in Ohio

The *Duhig* rule, first promulgated in *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940), is a deed interpretation rule rooted in equity that "estops a grantor from claiming title to a severed oil and gas interest when doing so would breach the grantor's warranty as to the title and interest purportedly conveyed to the grantee." *Senterra, Ltd. v. Winland*, 2022-Ohio-2521, ¶ 2. The *Duhig* rule, therefore, may arise in situations where a grantor purports to convey to a grantee a larger interest in oil and gas than they own at the time of the deed. In a case of first impression, the Supreme Court of Ohio held in *Senterra* that the *Duhig* rule may be utilized in Ohio only when the grantor owns the exact oil and gas interest purported to be transferred to the grantee in such deed. *Id.* ¶ 20.

Senterra involved three severances of oil and gas underlying one property. In 1925, Lulu E. and James H. Winland and Alta H. and William H. Dermot conveyed the property to Joseph E. Russell and George W. Russell while excepting one-quarter of the oil and gas. *Id.* ¶ 3. In 1941, Joseph Russell and George Russell conveyed the property to George Russell while excepting all of the oil and gas. *Id.* ¶ 4. In 1954, George Russell conveyed the property to Stanley and Margaret Juzwiak while excepting one-quarter of the oil and gas. *Id.* The 1954 deed did not reference the 1925 and 1941 exceptions. *Id.* The question in *Senterra* centered on what interest in the oil and gas, if any, George Russell excepted in 1954.

Senterra, Limited, as successor-in-interest to the Juzwiaks, argued that, pursuant to the *Duhig* rule, because George Russell purported to convey a three-fourths interest in the oil and gas to the Juzwiaks in the 1954 deed, while he only owned a three-eighths interest therein, preference must be given to the grant and his exception was void ab initio, transferring all of his three-eighths interest to the Juzwiaks. *Id.* ¶ 7. Conversely, the purported heirs of George Russell argued that because he excepted a one-quarter interest in the oil and gas while owning a three-eighths interest therein, the *Duhig* rule does not apply. *Id.* ¶ 9.

Over a sharp dissent, the majority of the justices on the Supreme Court of Ohio held that the *Duhig* rule is a "narrow, equitable principle" that did not apply to the facts at issue. *Id.* ¶ 23. The justices followed the reasoning of *Trial v. Dragon*, 593 S.W.3d 313, 319 (Tex. 2019), in holding that the *Duhig* rule only applies "if the grantor owns the exact interest to remedy the breach at the time of execution and equity otherwise demands it." *Senterra*, 2022-Ohio-2521, ¶ 20 (emphasis omitted). If effect

was given to the grant in 1954, the Juzwiaks would have been conveyed the three-eighths interest in the oil and gas owned by George Russell. *Id.* ¶ 22. However, this would not satisfy the purported conveyance of three-fourths of the conveyance referenced in the deed. *Id.* Therefore, the *Duhig* rule is not applicable to the 1954 deed and George Russell's exception of a one-quarter interest in the oil and gas was valid. *See id.*

The supreme court's decision in *Senterra* is significant. Historically, properties with severed oil and gas interests have been the subject of numerous lawsuits. These lawsuits typically claim ownership of the oil and gas pursuant to either the Ohio Marketable Title Act, Ohio Rev. Code §§ 5301.47–.55, or the Ohio Dormant Mineral Act, *id.* § 5301.56. With respect to chains of title with multiple severances of oil and gas, it appears that the supreme court has opened at least one narrow bright-line avenue for surface owners to claim ownership of oil and gas interests under their properties through use of the *Duhig* rule.

PENNSYLVANIA – MINING

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

Preliminary Injunction Granted for RGGI Rule

On July 8, 2022, the Commonwealth Court of Pennsylvania granted a preliminary injunction preventing the State from participating in the Regional Greenhouse Gas Initiative (RGGI) pending resolution of a case. As previously reported in Vol. 39, No. 2 (2022) of this *Newsletter*, the Pennsylvania Department of Environmental Protection's (PADEP) CO_2 Budget Trading Program rule, which links the commonwealth's cap-and-trade program to RGGI, was published in the *Pennsylvania Bulletin* in April 2022. *See* 52 Pa. Bull. 2471 (Apr. 23, 2022). RGGI is the country's first regional, market-based cap-and-trade program designed to reduce carbon dioxide (CO_2) emissions from fossil fuel-fired electric power generators with a capacity of 25 megawatts or greater that send more than 10% of their annual gross generation to the electric grid.

On April 25, 2022, owners of coal-fired power plants and other stakeholders filed a petition for review and an application for special relief in the form of a temporary injunction, and a group of state lawmakers filed a challenge as well. *See Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022). The commonwealth court held a hearing on May 10 and 11, 2022, on the application for special relief.

Because the commonwealth court had not granted the application for preliminary injunction by July 1, 2022, the date on which compliance was to begin under the rule, sources were obligated to begin tracking CO_2 emissions for compliance purposes and planned to participate in the upcoming RGGI CO_2 allowance action in September 2022.

On July 8, 2022, the commonwealth court granted a preliminary injunction. The order and opinion enjoined the administration and enforcement of RGGI until further order. The court found there is substantial legal question with respect to whether RGGI is an unconstitutional tax given the revenue expected to be generated versus the cost to administer the regulations. The court also found that the petitioners would face immediate and irreparable harm if the rulemaking is ultimately held invalid because the cost of compliance, including lost profits, would not be recoverable because PADEP and Pennsylvania's Environmental Quality Board (EQB) enjoy sovereign immunity. The court concluded an injunction is reasonably suited to abate the effects of the rulemaking should it be deemed invalid.

Upon appeal of the preliminary injunction by PADEP and the EQB to the Supreme Court of Pennsylvania, the July 8 ruling was automatically stayed, which occurs as a matter of procedure when a state entity appeals to the supreme court. On July 25, 2022, the commonwealth court reinstated its earlier preliminary injunction ruling that a group of state lawmakers who filed one of two legal challenges against the rule had satisfied their burden of proof to establish the requirements to vacate the stay.

On July 12, 2022, natural gas companies Calpine Corp., Tenaska Westmoreland Management LLC, and Fairless Energy LLC filed a third legal challenge to the rule with arguments similar to those brought in the other two cases. *See Calpine Corp. v. PADEP*, No. 357 MD 2022 (Pa. Commw. Ct. filed July 12, 2022). Oral argument before the commonwealth court on the merits of these three cases will not likely occur prior to September 2022, at the earliest.

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

EQB to Finalize Rulemaking on Water Quality Standards for Manganese

The agenda for the August 9, 2022, Pennsylvania Environmental Quality Board (EQB) meeting included a vote on the final rulemaking for water quality standards for manganese in 25 Pa. Code chs. 93 and 96. This rulemaking was prompted by the addition of subsection (j) to section 1920-A of the Administrative Code of 1929, 71 Pa. Stat. § 510-20, by Act 40 of 2017. Act 40 directed the EQB to promulgate regulations under Pennsylvania's Clean Streams Law, 35 Pa. Stat. §§ 691.1–.1001, and related statutes to require that the water quality criteria for manganese established under 25 Pa. Code ch. 93 be met.

The EQB approved the proposed manganese rule in December 2019 and the Pennsylvania Department of Environmental Protection (PADEP) held three public hearings on the rulemaking in 2020. *See* Vol. XXXVII, No. 4 (2020); Vol. XXXVII, No. 1 (2020) of this *Newsletter*. Since the proposed rulemaking, PADEP has met with the Mining and Reclamation Advisory Board, the Aggregate Advisory Board, the Public Water Systems Technical Assistance Center Board, and the Water Resources Advisory Committee to discuss the proposed rule.

The proposed manganese rule adds to table 5 in 25 Pa. Code § 93.8c a numeric water quality criterion for manganese of 0.3 mg/L intended to "protect human health from the neurotoxicological effects of manganese." Executive Summary at 1. Section 93.8c establishes human health and aquatic life criteria for toxic substances, meaning PADEP is now regulating manganese as a toxic substance. The existing criterion of 1.0 mg/L, which was established in section 93.7 as a water quality criterion, will be deleted. The 0.3 mg/L standard will apply to all surface waters in the commonwealth. PADEP identifies the parties affected by the rule to be "[a]ll persons, groups, or entities with proposed or existing point source discharges of manganese into surface waters of the Commonwealth." *Id.* at 3.

PADEP also specifically identifies "[p]ersons who discharge wastewater containing manganese from mining activities" as affected parties, and expects mining operators to have to perform additional treatment to meet this new criterion. *Id.* Final amendments to treatment systems will be implemented through PADEP's permitting process and other approval actions. Consulting and engineering firm Tetra Tech estimated the overall cost to the mining industry to achieve compliance with the 0.3 mg/L criterion "could range between $44–$88 million in annual costs (that is, for active treatment systems using chemi-

cal addition for manganese removal) and upwards of $200 million in capital costs." Comment and Response Document at 213.

The proposed manganese rule had included language supporting two alternative points of compliance for the proposed manganese criterion. The first alternative proposed to move the point of compliance to the point of all surface potable water supply withdrawals. The second alternative proposed to maintain the point of compliance in all surface waters at the point of discharge. PADEP received over 800 comments supporting maintaining the point of compliance at the point of discharge and in the final rulemaking has removed the first alternative option.

The EQB was scheduled to vote on the final rulemaking at its August 9, 2022, meeting. If the EQB adopts the regulation as final, it will then be sent to the House and Senate Environmental Resources and Energy standing committees and the Independent Regulatory Review Commission for approval. If approved, the regulation then goes to the Attorney General's Office for final approval before being published in the *Pennsylvania Bulletin*. The EQB meeting agenda and other materials can be found at https://www.dep.pa.gov/PublicParticipation/EnvironmentalQuality/Pages/2022-Meetings.aspx.

PADEP Finalizes Cap and Liner Guidance for Coal Refuse Disposal Areas

On May 28, 2022, the Pennsylvania Department of Environmental Protection (PADEP) finalized the draft technical guidance that explains PADEP's considerations when evaluating liners and cap systems installed at coal refuse disposal areas (CRDAs) that was discussed in Vol. XXXVIII, No. 4 (2021) of this *Newsletter*. *See* PADEP, Final Technical Guidance Document—Liners and Caps for Coal Refuse Disposal Areas (May 28, 2022). The purpose of the guidance document is to "explain[] the procedures that [PADEP] will use in approving liners and caps for facility designs and the criteria for as-built certifications for [CRDAs]." *Id.* PADEP issued a comment and response document with the final guidance. *See* PADEP, Comment and Response Document (May 28, 2022).

Commenters raised concerns with the extent to which PADEP could enforce the requirements in the guidance document because the document is cited in the regulatory text at 25 Pa. Code § 90.50. PADEP, however, explained that this reference does not make the guidance document binding, as "[g]uidance does not rise to the level of regulation because it is possible to deviate from guidance as necessary." Comment and Response Document at 5.

PADEP also clarified that it is not the agency's intent to revisit CRDAs that are already reclaimed and have achieved their final configuration and vegetation. *Id.* Where final configuration and vegetation has not yet been achieved, however, PADEP will require that "the operation is completed with a minimum combined thickness of 4 feet of cover, or a demonstration that the previously approved cover material and thickness will be as effective as 4 feet of combined thickness as per [25 Pa. Code § 90.125(c)]." *Id.* The guidance document does not acknowledge the waiver in section 90.125(c) for "coal refuse disposal areas permitted prior to July 27, 1991 if the requirements of [25 Pa. Code §§ 90.150–.157 and 90.159–.165] can be attained." *Id.* at 13.

In response to one comment pointing out that section 90.50 does not explicitly distinguish between liners and caps, PADEP clarified that the agency's main purpose in issuing this revised guidance is "to incorporate caps because they are necessary components of most permits under the requirements of Chapter 90." *Id.* at 4.

PADEP also reiterated its position that clay layers as a cap are not typically suitable for "circumstances with high hydraulic head conditions, slurry impoundments or as a permanent cap for any coal refuse," but applicants will have the opportunity to make a demonstration that a clay cap is at least as effective as a synthetic one. *Id.* at 7. PADEP also reiterated that synthetic liners currently constitute the "best available technology currently feasible." *Id.* at 14. Additionally, PADEP revised the guidance to require a minimum hydraulic conductivity for "low hydraulic conductivity soils" (clay) of 1 x 10^{-7} cm/sec. *Id.* at 10.

The final technical guidance document was effective upon issuance on May 28, 2022.

OSMRE Approves Amendments to Pennsylvania's Regulatory Program for Beneficial Use of Coal Ash

Effective May 12, 2022, the Office of Surface Mining Reclamation and Enforcement (OSMRE) approved amendments to the Pennsylvania regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). *See* 87 Fed. Reg. 21,561 (Apr. 12, 2022). The Pennsylvania Department of Environmental Protection (PADEP) submitted the amendments to OSMRE for approval in 2012, and years of correspondence between the agencies followed. OSMRE determined that Pennsylvania's proposed regulations are in accordance with SMCRA and not inconsistent with the federal regulations implementing SMCRA. By approving the amendments, OSMRE is amending the federal regulations at 30 C.F.R. pt. 938, which codify decisions concerning the Pennsylvania program, to include these amendments to the Pennsylvania program.

The amendments to the Pennsylvania program are related to the beneficial use of coal ash at active surface coal mining sites. OSMRE identified key provisions of the amendments as "operating requirements for beneficial use, including certification guidelines for chemical and physical properties of coal ash beneficially used and water quality monitoring requirements." 87 Fed. Reg. at 21,562.

The amendments include adding definitions to 25 Pa. Code chs. 287 and 290 as well as adding sections to chapter 290 that included the following, among others: general requirements for beneficial use (§ 290.101); beneficial use at coal mining activity sites (§ 290.104); coal ash certification (§ 290.201); exceedance of certification requirements (§ 290.203); water quality monitoring (§ 290.301); requirements for monitoring points (§ 290.302); and standards for wells and casing of wells (§ 290.303).

TEXAS – OIL & GAS

William B. Burford, Reporter

Pipeline Company's Condemnation Power Upheld, but Landowners May Establish Value Based on Use for Pipeline Route

The Texas Supreme Court in *Hlavinka v. HSC Pipeline Partnership, LLC*, No. 20-0567, 65 Tex. Sup. Ct. J. 1234, 2022 WL 1696443 (Tex. May 27, 2022), *aff'g in part, rev'g in part* 605 S.W.3d 819 (Tex. App.—Houston 2020), was faced with the challenge by the Hlavinkas, owners of agricultural land near the Texas gulf coast, to HSC Pipeline Partnership, LLC's (HSC) authority to condemn an easement across their land for a pipeline to be used to transport high-polymer propylene. *See* Vol. XXXVII, No. 3 (2020) of this *Newsletter*.

Chapter 111 of the Texas Natural Resources Code confers condemnation authority on common-carrier pipelines, identifying certain products a common carrier with such authority may transport. According to section 2.105 of the Texas Business Organizations Code, pipeline companies engaged in transporting "oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions" have all the rights conferred on a common carrier by the relevant provision of the Natural Resources Code. If a transporter's pipeline will transport a product listed either in the Natural Resources Code or in the Business Organizations Code, according to the court, the statutes afford a common carrier the power to condemn an easement for it. *Id.* at *5–6. Because HSC's evidence established that the high-polymer propylene it would transport was derived from the refinement of crude petroleum oil, the court concluded, it was an "oil product" for which condemnation authority was available. *Id.* at *7.

The Hlavinkas maintained that HSC's condemnation would not serve a public use, as the Texas Constitution requires. The court observed that "a pipeline serves a public use as a matter of law if it is reasonably probable that, in the future, the pipeline will 'serve even one customer unaffiliated with the pipeline owner,'" *id.* (quoting *Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd.*, 510 S.W.3d 909, 917 (Tex. 2017)), although "[a] pipeline built to transport a company's product from one of its own sites to another it also owns is not a public use," *id.* Because HSC had a contract with an unaffiliated customer to transport propylene for the customer's end use, HSC had met the public use test, notwithstanding that the propylene was to be sold to the customer by an affiliate of HSC immediately before entering the pipeline. *Id.* The court declined to impose an additional requirement, as the Hlavinkas urged, that the manufacturer of the transported product, not just the transportation customer, must have no affiliation with the pipeline owner. *Id.* at *8. In the absence of any disputed facts about the relationship between HSC and its customer, the court of appeals had erred in remanding the case for a finding of whether or not the pipeline would serve a public use. *Id.*

The court's treatment of the compensation to be paid the landowner for the condemnation is the aspect of its decision likely to have the greatest impact. In the trial court one of the Hlavinkas had proffered testimony that the highest and best use of the land was for pipeline development and that, based on comparisons to other arm's-length sales to pipeline companies, he calculated a per-rod valuation of the easement of $3.3 million. The trial court excluded that testimony and awarded the Hlavinkas only $132,293.36 for the value of the easement relative to the land's agricultural use and for crop and surface damages. The court reversed the rejection of the Hlavinkas' testimony on condemnation damages.

The court acknowledged that

> [t]o value condemned land for the purpose of compensating the landowner, one generally measures the difference in the market value of the land immediately before and immediately after the taking. . . . The existing use of the land is presumed to be its highest and best use, "but the landowner can rebut this presumption by showing a reasonable probability that when the taking occurred, the property was adaptable and needed or would likely be needed in the near future for another use."

Id. (quoting *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002)).

In this case the Hlavinkas' testimony was that they had purchased the property for the express purpose of pipeline development, that the land's location made it particularly suitable for that purpose, and that they had in fact negotiated two pipeline easements across the property during the previous two years. *Id.* at *9. Arm's-length sales to the other pipeline companies were, according to the court, some evidence that the highest and best use of the property was as a pipeline easement. *Id.*

"The impact of HSC's taking was the loss [to the Hlavinkas] of the ability to sell the [easement] tract to a different pipeline," the court went on. *Id.* at *10. "In the ordinary condemnation case, there is no credible evidence to suggest that, if the land had not been condemned, a pipeline easement could be sold to another." *Id.* This was no ordinary condemnation case, the court declared. *Id.*

> Sales of easements on this property to other pipeline companies, combined with the existence of [other] pipelines running parallel and adjacent to HSC's pipeline, provide[d] some evidence from which a factfinder reasonably could conclude that the Hlavinkas could have sold to another the easement that they instead were compelled to sell to HSC.

Id.

"A condemnation should not be a windfall for a landowner," the court concluded, "[n]or should it be a windfall for a private condemnor." *Id.* "A condemnor must pay a fair price for the value of the land taken," it said. *Id.* "Evidence of recent fair market sales to secure easements running across the property that precede the taking are admissible to establish the property's highest and best use, and its market value, at the time of the taking." *Id.*

Water Disposal Facility Approved by TCEQ Before Rescission of RRC No-Harm Letter Upheld

Dyer v. TCEQ, 646 S.W.3d 498 (Tex. 2022), *aff'g* 639 S.W.3d 721 (Tex. App.—Austin 2019), addressed a permit granted to TexCom Gulf Disposal, LLC (TexCom) by the Texas Commission on Environmental Quality (TCEQ) for an underground commercial waste disposal facility in Montgomery County, Texas. The permit would allow injection of industrial wastewater below an aquifer system. The City of Conroe and others filed suit alleging that TCEQ's order was void for noncompliance with statutory permitting requirements. *See also* Vol. XXXVI, No. 4 (2019) of this *Newsletter*.

Among other things, the plaintiffs asserted failure to meet the statutory requirement that TCEQ may not proceed until the permit applicant submits a letter from the Texas Railroad Commission (RRC) "concluding that drilling or using the disposal well and injecting industrial and municipal waste into the subsurface stratum will not endanger or injure any known oil or gas reservoir." *Dyer*, 646 S.W.3d at 502 (quoting Tex. Water Code § 27.015(a)). TexCom, the applicant, had submitted such a "no-harm" letter with its application in 2005. After years of contested TCEQ hearings, however, RRC issued an order on January 13, 2011, after proceedings initiated by a new mineral lessee, rescinding its 2005 no-harm letter, with an effective date 90 days later. Two weeks after RRC's rescission, TCEQ voted to approve the TexCom permit.

The plaintiffs argued that the TCEQ order was void because a no-harm letter is statutorily mandatory for approval of an injection well permit and, further, that TCEQ had acted arbitrarily and capriciously by failing to consider RRC's rescission before issuing its final order. The supreme court rejected both argu-

ments. The court pointed out that the applicable statute required that the applicant "submit with the application" RRC's no-harm letter, which it had done, and the TCEQ could not proceed to hear any relevant issues "until the letter . . . is provided." *Id.* at 506–07 (quoting Tex. Water Code § 27.015(a), (b)). The 2005 letter remained in effect when TCEQ issued its final order granting the permit; thus, the plain language of the statute was satisfied. *Id.* at 507. There was no explicit language in the statute, the court remarked, "indicating that the Legislature intended the draconian and inefficient consequence of [the plaintiffs'] argument—that RRC's rescission of a no-harm letter six years after it was issued voids a TCEQ order granting a permit application issued in the meantime." *Id.* The court refused to find, moreover, that TCEQ had acted arbitrarily and capriciously in approving the permit. TCEQ had heard and considered during its administrative process the evidence that had resulted in RRC's rescission. *Id.* at 508–09. The court held that TCEQ "did not abuse its discretion by declining to reopen the administrative record to rehear evidence it had already considered." *Id.* at 509.

Editor's Note: The reporter's law firm represented Denbury Onshore, LLC, the owner of mineral leases whose application to RRC had brought about the rescission of the no-harm letter and whose appeal of the trial court's disposition was voluntarily dismissed.

Production Need Not Be in Paying Quantities to Perpetuate Lease Where Lease So Specifies

Thistle Creek Ranch, LLC v. Ironroc Energy Partners, LLC, No. 14-20-00347-CV, 2022 WL 1310957 (Tex. App.—Houston [14th Dist.] May 3, 2022, no pet.) (mem. op.), involved a dispute between Thistle Creek Ranch, LLC (Thistle Creek), the lessor, and Ironroc Energy Partners, LLC (Ironroc), the lessee, over whether their oil and gas lease covering Thistle Creek's mineral interest had been perpetuated by oil and gas production or had instead expired.

The lease's habendum clause provided that it would remain in effect for its three-year primary term and "as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation of more than ninety (90) consecutive days." *Id.* at *2. It then defined "operations" as including "production of oil, gas, sulphur or other mineral[s], whether or not in paying quantities." *Id.* Ironroc presented evidence that gas had been produced continuously under the lease but conceded it had not been profitable for some time. After the trial court granted summary judgment to Ironroc that its lease had not terminated, Thistle Creek appealed, contending that well-settled case law interpreted the word "produced" or "production" to mean production "in paying quantities."

The court of appeals affirmed the summary judgment. It pointed out that the habendum clause did not use the word "produced" but instead allowed the lease's term to extend as long as "operations" were conducted, defining "operations" to include production "whether or not in paying quantities." *Id.* "[A] court cannot rewrite [a lease] contract to ignore the definition of 'operations' that expressly states production need not be in paying quantities." *Id.* at *3. Ironroc was, therefore, neither required to show that its production, if continuous, was profitable nor that a reasonably prudent operator would continue to operate the well. *Id.*

Mineral Owner's Suit to Avoid Tax Foreclosure Sale Held Barred by One-Year Statute of Limitations

Mary Haynes, the owner of mineral interests in land in Martin County, Texas, sued DOH Oil Co. and others—the purchasers at a sheriff's sale following a suit by local taxing authorities to foreclose the statutory lien against Haynes's mineral interests for delinquent taxes—alleging that the sheriff's deeds purporting to convey her interests were void under the statute of frauds because they contained inadequate property descriptions. In *Haynes v. DOH Oil Co.*, No. 11-20-00158-CV, 2022 WL 1498246 (Tex. App.—Eastland May 12, 2022, no pet. h.), the court of appeals affirmed summary judgment for the purchasers at the tax sale.

Although the court acknowledged that a conveyance of real property, to be valid, must contain a legally sufficient description of the property to be conveyed, it held that a sheriff's tax deed challenged on that ground can only be challenged within the Texas Tax Code's one-year statute of limitations. Because Haynes had not filed her suit until more than 10 years after the sheriff's deed was recorded, her claim was barred whether couched as a direct challenge to the tax foreclosure's validity or as an action in trespass to try title or quiet title.

The court's analysis is puzzling and seems incomplete. The sheriff's deed, Haynes argued, was void and passed no title at all. If the tax deeds in question were void, as Haynes alleged, and not merely voidable, how could the true property owner's suit, regardless of when brought, breathe life into them? The court did not explain.

Operating Agreement's Exculpatory Clause Held Inapplicable to Operator's Unauthorized Charges to Non-Operators

In *Bachtell Enterprises, LLC v. Ankor E&P Holdings Corp.*, No. 14-20-00544-CV, 2022 WL 1670772 (Tex. App.—Houston [14th Dist.] May 26, 2022, no pet. h.), the court of appeals reversed the trial court's award of damages to Ankor E&P Holdings Corp. (Ankor), the operator under what appears to have been a typical form of oil and gas operating agreement, in its suit against non-operating owners for failure to pay joint interest billings.

Ankor contracted with a company called CDM Max (CDM) for the construction and operation of a gas plant that evidently would serve the production from the parties' joint oil and gas operations. It informed the non-operators that CDM would bankroll the construction of the plant and would own it but requested the non-operators to authorize the purchase of the plant site, rights-of-way, and engineering studies, estimated to cost approximately $385,000, which they did. After the plant was constructed, Ankor informed the non-operators that CDM would retain all plant revenue until the plant was paid off and that the balance, for which Ankor billed the non-operators, was $1.6 million. Counterclaiming against Ankor's suit on their refusal to pay, the non-operators alleged that Ankor had breached the operating agreement by charging for construction of the gas plant without consent.

There was no dispute that Ankor had breached the provision of the operating agreement requiring Ankor to obtain the consent of all parties to undertake any single project reasonably estimated to require an expenditure in excess of $50,000. Ankor argued, however, that the operating agreement's exculpatory clause, providing that the operator would have no liability to the other parties for losses sustained or liabilities incurred in the conduct of its activities as operator except such as may result from willful misconduct, broadly covered all its alleged conduct. The court disagreed.

The court acknowledged that in *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012), the Texas Supreme Court held that an exculpatory clause like the one addressed here relieved the operator of liability arising from any of its activities as operator, not just from operations. *Bachtell*, 2022 WL

1670772, at *5. It declined, though, to extend *Reeder* to hold that "activities" is so broad as to protect an operator from liability from any breach of contract, absent willfulness. *Id.* Exculpatory clauses, the court explained, are "designed to protect one party against risks and losses," but they are "not meant for offensive use to impose liabilities knowingly incurred without consent." *Id.* Because the non-operators' allegation that Ankor breached the operating agreement by failing to obtain the consent to charges over $50,000 was not based on activities envisioned by the exculpatory clause, the court rendered judgment against Ankor pursuant to a jury finding on that breach. *Id.* at *6.

Mineral Owner Held Not to Own Right to Utilize Cavern Space Resulting from Its Removal of Salt for Underground Gas Storage

Myers-Woodward, LLC (Myers-Woodward) owned the surface estate of a 160-acre tract of land in Matagorda County, Texas, and a "royalty of 1/8 of all the gas or other minerals in, on, or under, or that may be produced from" the land. Underground Services Markham, LLC and United Brine Pipeline Company, LLC owned the executive mineral interest in the salt underlying the land. The court in *Myers-Woodward, LLC v. Underground Services Markham, LLC*, No. 13-20-00172-CV, 2022 WL 2163857 (Tex. App.—Corpus Christi-Edinburg June 16, 2022, no pet. h.) (mem. op.), decided disputes between them concerning the calculation of the royalty and the use of the land for hydrocarbon storage.

The executive mineral owners had filed suit, seeking a declaration that after mining the salt mass underlying the land through brine mining, they would have the right to use the resulting cavern space for storage of oil, gas, and other gases or liquids. After several years of brine mining, the owners of the surface and the royalty interest counterclaimed for unpaid royalty and for a judgment denying the mineral owners the right to use the land for underground storage. The trial court granted summary judgment generally favorable to Myers-Woodward except for a declaration that the mineral owners were the owners of the subsurface caverns created by their salt mining, albeit with a clarification that they could only use the subsurface for mining, drilling, and operating for salt.

The court of appeals first addressed the quoted royalty clause. Consistent with the trial court's analysis, it held that the royalty on the produced salt was to be calculated, according to the general rule, based on its market value at the well in the absence of any contrary intention appearing in the deed that created the interest. If the parties to the deed had intended for the royalty to be based on the amount realized from sale, as Myers-Woodward contended, "they could have and should have so contracted," the court remarked. *Id.* at *6.

In support of their claimed right to use the subsurface for hydrocarbon storage, the mineral owners argued that their creation of cavern space by their mining operations vested in them a property interest in the caverns. The court disagreed. "Although a mineral owner may have a real property interest in the minerals in place," the court observed, "[t]here is no case law that supports a conclusion that a mineral estate owner who does not own the surface estate owns the subsurface of the property and may then use [it] for its own monetary gain even after extracting all the minerals." *Id.* at *11. To the contrary, the surface owner owns the subsurface, including the caverns at issue here. *Id.*

Indemnity Under Master Service Agreement Held Not to Apply to Claims Unrelated to Contracted Work

The court in *RKI Exploration & Production, LLC v. Ameriflow Energy Services, LLC*, No. 02-20-00384-CV, 2022 WL 2252895 (Tex. App.—Fort Worth June 23, 2022, no pet. h.) (mem. op.), addressed the application of master service agreements (MSAs) between RKI Exploration & Production, LLC (RKI), the operator of a well being drilled in Winkler County, Texas, and two contractors, Ameriflow Energy Services, LLC (Ameriflow) and Crescent Services, LLC (Crescent), to liability of some $11 million resulting principally from the death of an employee of an RKI subcontractor in the explosion of a sand separator furnished by Ameriflow. The court of appeals reversed the trial court's summary judgment that RKI owed indemnification to both Crescent and Ameriflow under the MSAs between RKI and each of the contractors.

The principal issue the court considered was whether the MSA between RKI and Crescent required RKI to indemnify Crescent. The MSA required RKI to indemnify Crescent against claims for injury or death suffered by employees of RKI's contractors (other than Crescent) "arising in connection herewith." *Id.* at *2. RKI had engaged Crescent only to provide a boom lift and a light tower to its well site, and it was undisputed that the equipment was not involved in the explosion. RKI argued that the claim at issue did not arise "in connection with" the Crescent MSA, and the court agreed. The plain meaning of the phrase "arising in connection herewith," according to the court's interpretation, was originating from the document, the obvious subject of which was the performance it called for. *Id.* at *17. To construe the scope of that performance in its most general sense as anything the contractor does at the well site, as the trial court had, could impose an obligation to indemnify for activities independent of the parties' contractual obligations. *Id.* Because Crescent's alleged liability was for work done at the site but for Ameriflow, outside the scope of its performance under the RKI-Crescent MSA, the court refused to impose the MSA's indemnity obligation on RKI. *Id.* at *19. The court remanded the case to the trial court, though, for a determination of whether Crescent was an affiliate or parent of Ameriflow and whether, if it was, it might be entitled to indemnification by RKI because of the Crescent MSA's coverage of not only Crescent but also its affiliates and subsidiaries. *Id.* at *22.

Editor's Note: The reporter's law firm has represented RKI in this appeal.

Oil and Gas Leases' Forum Selection Clause Enforced

The court in *SM Energy Co. v. Union Pacific Railroad Co.*, No. 11-21-00052-CV, 2022 WL 2252423 (Tex. App.—Eastland June 23, 2022, no pet. h.), considered three oil and gas leases between Union Pacific Railroad Co. (Union Pacific), as lessor, and SM Energy Co. (SM Energy), as lessee, each providing that "[v]enue of all disputes arising out of or relating to this Lease shall be exclusively in Omaha, Nebraska and no other place." *Id.* at *1 (alteration in original). After Union Pacific demanded that SM Energy pay liquidated damages for violation of the leases' most-favored-nations clauses, which SM Energy denied it owed, SM Energy filed suit in Howard County, Texas, with a petition pleading the case as an action in trespass to try title. The trial court granted Union Pacific's motion to dismiss on the basis of the leases' forum selection clauses, and the court of appeals affirmed.

Forum selection clauses, though once disfavored in Texas, are now presumptively valid, the court began. *Id.* at *2. The court observed that a party seeking to avoid enforcement of a

forum selection clause must clearly show that "(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial." *Id.* at *3 (quoting *Rieder v. Woods*, 603 S.W.3d 86, 93 (Tex. 2020)). SM Energy's principal arguments were that enforcement of the forum selection clause would be unreasonable and unjust and that it would contravene Texas's strong public policy for adjudicating title disputes where the real property is located. The court disagreed.

Although SM Energy's petition characterized its action as one for title, the court said, a review of the substance of its petition revealed that it asserted a claim for a declaratory judgment to determine its obligations under the leases. *Id.* at *4. Although Union Pacific had threatened to terminate the leases for SM Energy's alleged breach, according to a provision allowing for that remedy, it would not have that right absent a breach of the leases, which SM Energy denied. *Id.* at *5. "[I]n order to reach the title issue as cast by SM Energy's pleadings, a court must first determine the validity of the liquidated damages provision" that Union Pacific alleged it had breached, the court noted. *Id.* It concluded that SM Energy's petition therefore did not allege a trespass-to-try-title action or one to remove a cloud on title requiring that it be litigated in Texas. *Id.*

Prospective Broker's Claim for Compensation from Oil and Gas Lessee Rejected

Giant Processing, LP (Giant), whose business was brokering oil and gas transactions, entered into a confidentiality agreement with Lonestar Resources, America, LP (Lonestar), an affiliate of Lonestar Resources, Inc. The agreement, with a term of one year from September 30, 2014, contemplated Giant's furnishing information about prospective acquisitions. It prohibited use of information other than in the evaluation of a possible transaction and expressly provided that Lonestar would not acquire oil, gas, and other mineral interests within the area during the term of the agreement. The agreement also expressly provided that no contract would exist for a transaction between the parties unless and until a definitive agreement had been executed and delivered. Around May 1, 2015, Giant provided Lonestar with information about the availability for lease of acreage in Gonzales County, Texas, stated to be under Giant's control. Lonestar advised Giant it was not interested. Shortly after the expiration of the confidentiality agreement, however, an affiliate of Lonestar acquired oil and gas leases directly from the landowners, bypassing Giant. Giant sued, seeking compensation for the reasonable value of the services it claimed to have provided Lonestar. In *Giant Resources, LP v. Lonestar Resources, Inc.*, No. 02-21-00349-CV, 2022 WL 2840265 (Tex. App.—Fort Worth July 21, 2022, no pet. h.), the court of appeals affirmed the trial court's summary take-nothing judgment, although on different grounds from the statute of frauds defense on which the lower court had granted its summary judgment.

Because Giant's claim involved future business transactions or opportunities, compensation under Giant's quantum meruit theory was not allowed as a matter of law, the court held. *Id.* at *4. The information Giant had provided Lonestar was expressly submitted pursuant to the confidentiality agreement, and given that no "definitive agreement" for Giant's compensation was ever executed, Giant could have had no reasonable expectation of being compensated under the confidentiality agreement, the court explained. *Id.* "Whatever work Giant had performed in preparing information to send to Lonestar was, by definition, performed for the purpose of obtaining future business, i.e., a hoped-for 'definitive agreement.' Such a claim does not justify a quantum meruit recovery." *Id.*

Regulatory Taking Judgment Against City of Dallas Affirmed

The court in *City of Dallas v. Trinity East Energy, LLC*, No. 05-20-00550-CV, 2022 WL 3030995 (Tex. App.—Dallas Aug. 1, 2022, no pet. h.) (mem. op.), affirmed the trial court's damage award of some $33.6 million to Trinity East Energy, LLC (Trinity), the oil and gas lessee of tracts owned by the City of Dallas, on its claim that the City's denial of drilling permits necessary to develop the acreage rendered the lease and others in the vicinity valueless.

In 2007 the City of Dallas requested proposals for the leasing of city-owned property on the west edge of the city within the Barnett Shale area of gas development. Trinity successfully bid on a group of properties and acquired a lease from the City in 2008, paying a lease bonus of over $19 million. The lease covered over 2,000 acres and identified several tracts as drill site locations. After a period of planning and design, in March 2011 Trinity applied to the City for necessary special use permits to drill and develop its leases from the City and others, which the City ultimately denied on August 28, 2013, after lengthy delays. In December 2013 the City amended its ordinance governing gas drilling to impose strict setback and other restrictions that essentially precluded drilling within the city. Following a jury trial in Trinity's inverse condemnation lawsuit against the City, the trial court determined that the City had committed a regulatory taking by failing to approve the special use permits and awarded damages found by the jury to be the value of Trinity's leases before the City's taking and their zero value afterward.

The City principally argued that the evidence was legally and factually insufficient to support the trial court's finding of a regulatory taking, defined by the court as "a condition of use 'so onerous that its effect is tantamount to a direct appropriation or ouster.'" *Id.* at *4 (quoting *City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2015)). A property owner alleges a regulatory taking, the court further explained, by asserting that "a property regulation denied the owner of all economically beneficial or productive use of the property." *Id.* Given Trinity's testimony that it could not have fully developed its interests from any available drill site and the City's failure to identify any that were feasible, the court determined that the evidence was legally and factually sufficient to support the trial court's finding that other than the sites for which the City had denied permits, Trinity did not have reasonable access to locations from which it could economically develop its interests. *Id.* at *6. The City also complained that Trinity's expert testimony was unreliable, but the court concluded that the evidence was "not so weak as to [make] it clearly wrong and manifestly unjust," pointing out that "[t]he jury is the sole judge of the weight and credibility of the evidence." *Id.* at *10.

WYOMING – OIL & GAS

Amy Mowry, Reporter

Wyoming Supreme Court Revisits Breach of Contract and Covenants Principles in Dispute over Return of Earnest Money

In *Skyco Resources, LLP v. Family Tree Corp.*, 2022 WY 72, 512 P.3d 11, the Wyoming Supreme Court affirmed in part and reversed in part the grant of summary judgment by the Laramie County District Court in favor of Family Tree Corporation (Family Tree) against Skyco Resources, LLP (Skyco) on Skyco's

claims of breach of contract and conversion, breach of the covenant of good faith and fair dealing, and fraud and intentional misrepresentation.

In 2019, Family Tree hired a broker to sell mineral interests it owned in Laramie County. Skyco expressed interest in purchasing the interests. The broker claimed that less than 10% of the interests were encumbered by drilling permits owned by third parties. Family Tree and Skyco entered into a purchase and sale agreement (PSA) in December 2019. Skyco agreed to purchase 13,056.68 leasehold acres for $13,709,514, with a closing date of February 3, 2020. The PSA specified that time was of the essence. *Id.* ¶¶ 3, 4.

Under the PSA, Skyco was required to give Family Tree a nonrefundable earnest money deposit of 2% of the total purchase price in the event Skyco did not complete the transaction, unless the transaction was terminated pursuant to Section (I)(b)(iii) of the PSA. Skyco had broad authority to terminate the transaction due to title objections. Under that same provision, either the buyer or the seller could cancel the contract if more than 50% of the title was refused by Skyco. *Id.* ¶¶ 4, 5.

Skyco made its $300,000 earnest money payment in January 2020. Skyco then extended the PSA closing date to secure financing. Family Tree demanded additional earnest money for the delay. During its due diligence, Skyco discovered that 67% of the mineral acres were encumbered by third-party permits, contrary to the broker's representations. On January 23, 2020, eight days after its earnest money payment, Skyco canceled the contract and demanded return of its earnest money. *Id.* ¶ 6. Skyco sent several emails to Family Tree, none of which received a response. *Id.* ¶¶ 7, 8. On February 3, 2020, Skyco sent Family Tree another email, explaining that Skyco terminated the PSA under Section (I)(b)(iii) because over 50% of the mineral leasehold was unacceptably encumbered. Again, Skyco received no response. *Id.* ¶ 9.

Skyco filed its complaint against Family Tree on April 14, 2020, asserting claims of breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, and fraud/intentional misrepresentation. Both parties filed cross-motions for summary judgment. Family Tree argued it was not obligated to return Skyco's earnest money because Skyco failed to provide 30 days' notice and an opportunity to cure as required under the PSA. Skyco argued the notice and cure period was not required because the defects it found could not be cured and notice was thus futile. Notice being futile, Skyco argued any failure to give it was not a material breach. *Id.* ¶ 10.

The district court found there were no issues of material fact and granted summary judgment to Family Tree on all claims. As to Skyco's breach of contract claim, the district court found the notice and cure period in the PSA was required without exception, as the PSA was unambiguous. *Id.* ¶ 12. The district court concluded Skyco's claim for conversion depended on the breach of contract claim, so that claim failed accordingly. The court found in favor of Family Tree on Skyco's breach of the covenant of good faith and fair dealing because Family Tree acted properly under the PSA terms, and Skyco's fraud/intentional misrepresentation claim was barred by the economic loss rule. *Id.* ¶ 13.

With respect to Skyco's breach of contract claim, the Wyoming Supreme Court found, notwithstanding Skyco's discretion to terminate for excessive title burdens, the PSA's obligation to provide notice and right to cure title defects was material and could not be ignored. *Id.* ¶ 19 (citing *Pope v. Rosenberg*, 2015 WY 142, ¶ 24, 361 P.3d 824 ("We do not construe contracts in a fashion that renders any provision of them meaningless.")). The court found Skyco repudiated the contract, but a futility defense to repudiation of the contract could entitle Skyco to the return of its earnest money. The doctrine of futility essentially states that a party to a contract may be excused from complying with a notice requirement if notice would be a "useless gesture." *Id.* ¶ 26 (quoting *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991)). On Skyco's summary judgment motion under this theory, Skyco bore the burden of proving that giving Family Tree notice and an opportunity to cure the title defects would have been useless, because it was impossible. *Id.* ¶ 30. The district court determined that no facts showed the defects could not be cured, but the court disagreed. Evidence presented by Skyco showed, in the court's estimation, that well over 50% of the minerals were encumbered by third-party permits, and it was appropriate for a jury to decide whether Skyco's repudiation of the contract was based on legitimate concerns and whether Family Tree could in fact have cured the defects. *Id.* ¶¶ 30, 31.

As for the return of Skyco's earnest money, the court found that if Skyco's futility defense were successful, Skyco could be unfairly penalized by forfeiting its earnest money. Because earnest money functioned in the breached PSA as liquidated damages, *id.* ¶ 32, and because Family Tree could not have performed the contract in light of the title defects, if Skyco proved its compliance with the PSA notice and cure provisions was excused, both parties would be discharged from their performance duties under the contract and no damage would exist, *id.* ¶ 35. Essentially, because Skyco raised a material question of fact as to whether it was entitled to a return of its earnest money, its conversion claim remained at issue. *Id.* ¶ 36 (citing *Lieberman v. Mossbrook*, 2009 WY 65, ¶ 21, 208 P.3d 1296 ("Conversion occurs when a person treats another's property as his own, denying the true owner the benefits and rights of ownership.")).

On Skyco's claim of breach of good faith and fair dealing, the court affirmed the district court. Family Tree "did what it was permitted to do under the PSA, and for that reason, it did not violate the covenant of good faith and fair dealing." *Id.* ¶ 41 (citing *Bear Peak Res., LLC v. Peak Powder River Res.*, LLC, 2017 WY 124, ¶ 69, 403 P.3d 1033 ("Under Wyoming law, a claim for breach of the implied covenant of good faith and fair dealing cannot exist where a party is simply exercising those right[s] that they are contractually entitled to exercise." (alteration in original))). The court allowed that a party "may not exercise its contractual rights in a manner that amounts to self-dealing or a violation of community standards of decency, fairness, or reasonableness." *Id.* ¶ 42 (citing *Jontra Holdings Pty Ltd v. Gas Sensing Tech. Corp.*, 2021 WY 17, ¶ 87, 479 P.3d 1222). However, Skyco failed to present evidence sufficient to meet its burden of persuasion that Family Tree violated its duty of good faith and fair dealing and, by extension, violated standards of decency, fairness, or reasonableness by failing to acquiesce to Skyco's "extra-contractual defense" of futility. *See id.* ¶¶ 43, 44.

With respect to Skyco's claim for fraud/intentional misrepresentation, the court agreed with the district court's conclusion that the claim was barred by the economic loss rule. That rule "bars recovery in tort when a plaintiff claims purely economic damages unaccompanied by physical injury to persons or property." *Id.* ¶ 46 (quoting *Rogers v. Wright*, 2016 WY 10, ¶ 30, 366 P.3d 1264). The rule rests on the theory that contracting parties may allocate their risks with regard to breach and do not need special tort law protections. *See id.* Skyco argued that Family Tree violated its duty to speak truthfully during negotiations by misrepresenting its interests, but the court observed that the

purpose of the economic loss rule invokes written contracts. *Id.* ¶¶ 48, 49. To determine whether Skyco's tort claim of fraud/intentional misrepresentation "is simply a 'repackaged contract claim'" based on the principles outlined in *Excel Construction, Inc. v. HKM Engineering, Inc.*, 2010 WY 34, ¶ 31, 228 P.3d 40, the court considered (1) the conduct alleged and its relationship to the contractual duties of the parties, (2) the source of the duty alleged to have been breached, and (3) the nature of the damages claimed. *Skyco*, 2022 WY 72, ¶ 49. Finding the economic loss rule applied directly to Skyco's fraud claim, the court affirmed the district court's judgment in favor of Family Tree. *Id.* ¶ 53.

Chief Justice Fox concurred in part and dissented in part, joined by Justice Boomgaarden.

Wyoming Attorney General Issues Opinion Clarifying Unit Size for Additional Wells

The Wyoming Oil and Gas Conservation Commission (Commission) has waived its attorney-client privilege related to the Wyoming Attorney General's opinion regarding Wyo. Stat. Ann. § 30-5-109(d), dated March 15, 2022 (Opinion). The question presented asks,

> When entering an order under Wyo. Stat. Ann. § 30-5-109(d) for "additional wells to be drilled within the established drilling units," does the [Commission] establish new, individual, smaller drilling units, and determine the specific acreage attributable to such new, individual, smaller drilling units, for each additional well allowed by such order?

Opinion at 1.

Answering in the negative, the Attorney General explained that under section 30-5-109(d), "the Commission is merely allowing for increased well density within an *existing* drilling unit." *Id.* at 2. The Attorney General further explained that section 30-5-109(d) authorizes the Commission "to modify *existing* drilling units by amending their size or by permitting additional wells within the established unit." *Id.* at 3. The Attorney General pointed to the language in section 30-5-109(d) specifically limiting changes in unit size to "established units" in order to avoid waste or to protect correlative rights. *Id.* In the case of expansion, section 30-5-109(d) allows expansion of the unit size if the Commission determines "the common source of supply underlies an area not covered by the [unit] order." *Id.* (quoting Wyo. Stat. Ann. § 30-5-109(d)).

Interpreting section 30-5-109, the Attorney General applied standard statutory interpretation principles, the most important of which is "to give effect to the legislature's intent." *Id.* (quoting *Sinclair Wyo. Ref. Co. v. Infrassure, Ltd.*, 2021 WY 65, ¶ 12, 486 P.3d 990). Finding section 30-5-109 to be clear and unambiguous in its meaning, the Attorney General gave effect to its plain language. *See id.* (citing *Ultra Res., Inc. v. Hartman*, 2010 WY 26, ¶ 69, 226 P.3d 889). Essentially, the Attorney General concluded section 30-5-109 "is clear and unambiguous as to which subsections authorize the creation of drilling units and which subsection gives the Commission authority to modify units." *Id.* at 5. Section 30-5-109(d) does not authorize new units, but only allows the Commission to modify an existing unit established under other subsections of section 30-5-109. *Id.*

CANADA –OIL & GAS

Brad Gilmour, Peter Ciechanowski, Maruska Giacchetto, Matthew Cunningham & David Wainer, Reporters

MMV Plans and Carbon Sequestration Operations

Carbon capture, utilization, and storage (CCUS) is attracting interest in the Canadian oil and gas sector as emissions reduction becomes an area of greater focus for the industry. A critical component of achieving Canadian net-zero goals, CCUS offers a unique value proposition as it can both reduce emissions directly from commercial operations and remove emissions from the atmosphere. Critical to the success of CCUS is ensuring that carbon dioxide (CO_2) is permanently stored within geological formations. Policies and procedures for the measurement, monitoring, and verification (MMV) of injected CO_2 are key to establishing and maintaining permanent storage.

Canadian Legislative Background

In 2021 the federal government of Canada adopted the *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c 22, which sets emissions reduction targets of 40 to 45% below 2005 emissions levels and net-zero by 2050. The 2030 Emissions Reduction Plan was introduced in March 2022 to implement these legislative requirements. Along with other industries, the oil and gas sector will need to introduce measures to comply with this legislation. One of these measures includes CCUS projects.

The purpose of an MMV plan is to confirm and verify that CO_2 is being successfully captured, injected, and permanently stored in a stable fashion within the injection formation. An MMV plan also sets out processes for early warning of leaks and migration of CO_2 from or within the subsurface inconsistent with the original design and containment modeling expectations. An MMV plan requires the collection and analysis of data to optimize CO_2 sequestration operations, as well as ensuring reliability in measuring the volumes of CO_2 injected, monitoring the migration and sequestration of the CO_2 plume, and managing the integrity of the geological formation. The Province of Alberta has been seen as a reference jurisdiction for carbon sequestration operations and what can be considered a strong MMV plan.

Alberta as a Reference Jurisdiction

With an abundance of geological formations suitable for carbon sequestration, Alberta has developed significant expertise in CCUS activities, including MMV plans. This was demonstrated in March 2021, when the federal government announced the formation of the Alberta-Canada CCUS Steering Committee, intended to leverage Alberta's early CCUS leadership.

In 2010, the Government of Alberta amended the provincial *Mines and Minerals Act*, R.S.A. 2000, c M-17, to reserve subsurface pore space for CO_2 sequestration activities, followed by enactment of the Carbon Sequestration Tenure Regulation (CSTR), Alta. Reg. 68/2011, to regulate such activities. The provincial government also supported the development of CCUS infrastructure, including a commercial-scale CCUS project, the Shell Canada Energy Quest Project (Quest Project), which is designed to capture one million tonnes of CO_2 per year. According to the 2020 Annual Summary Report released by Shell in 2021, the Quest Project has injected over five million tonnes of CO_2 since commencing operation in 2015.

As part of the CCUS project application process in Alberta, MMV plans must be filed with and approved by the provincial Minister of Energy. The Alberta Energy Regulator (AER) consid-

ers the MMV plan when reviewing applications and considering approvals for the development of a CCUS project.

MMV Plan as a Critical Component of CO_2 Sequestration Operations

For CCUS project proponents, a fundamental component of any proposed CO_2 sequestration operation is establishing and implementing an MMV plan throughout the operational lifecycle of the project. Besides optimizing sequestration operations, ensuring reliability in measuring the volumes of injected CO_2, monitoring the migration and sequestration of the CO_2 plume, and managing the integrity of the geological formation, all MMV plans enacted under the CSTR must also demonstrate that the CCUS project will not interfere with the recovery of other minerals.

The CSTR authorizes two types of dispositions for sequestration activities, both of which require approval of an MMV plan. The first is an evaluation permit, which allows a proponent to drill wells for evaluating the suitability of geological formations for CO_2 sequestration.

The second is a sequestration lease, which allows a proponent to drill wells to conduct evaluation and testing for the purpose of CO_2 injection and sequestration. The CSTR imposes additional requirements on MMV plans for sequestration leases compared to evaluation permits. The MMV plan must be submitted in greater detail for approval, an annual report must be provided to the Alberta government regarding findings and observations from the proponent's CCUS activities, and the MMV plan must be renewed and approved every three years.

Under section 19(3) of the CSTR, an MMV plan will also be a necessary requirement for the ultimate transfer of long-term liability to the Province of Alberta after a closure certificate for the applicable CCUS project is issued.

Lessons from the Quest Decision and Directive 065

Given the relatively recent nature of CCUS projects in Alberta, proponents can derive valuable insight from several sources. The AER has promulgated several directives setting out requirements for CO_2 transport and injection. In addition, the review and approval process associated with the Quest Project provides detail into what information should be presented in an MMV plan and its assessment by the AER. By way of background, initial applications for the Quest Project were filed in December 2010 with the Energy Resources Conservation Board (ERCB), now the AER. There were two rounds of supplemental information requests and a four-day public hearing, which were followed by a decision issued by the ERCB in July 2012 (Quest Decision).

One of the critical findings in the Quest Decision was the importance of an MMV plan for preventing adverse impacts to the environment. The ERCB viewed Shell's MMV plan as vital to every operational phase of the Quest Project and equally important to its post-operational closure and post-closure phases.

The chief concern raised in the public hearing portion of the application process was the proper containment of injected CO_2. However, the ERCB determined that the risk of a containment breach was extremely low, particularly due to the provisions of Shell's MMV plan regarding early detection and measures to mitigate impacts of a potential containment breach.

The ERCB accepted Shell's proposed process and that the MMV plan would be adaptive, flexible, and responsive to the operational phases of the Quest Project. In approving Shell's MMV plan, the ERCB considered several aspects of the plan, including collection of baseline data such as groundwater chemistry monitoring, wellbore integrity, general containment, and the extent and movement of the CO_2 plume, all with periodic reporting to the Alberta government and the ERCB.

The ERCB also imposed several conditions, such as requiring annual reporting of operational performance and immediate reporting of loss of containment. Approval of the Quest Project focused on compliance with the MMV plan and reporting of operational performance to ensure containment of CO_2, compliance with regulations, and conformity with model predictions and preliminary studies. According to the Quest Project report, the MMV data collected to date has indicated no migration of the sequestered carbon outside the injection reservoir (located in the Basal Cambrian Sandstone in central Alberta) and no insurmountable operational challenges to date.

On May 30, 2022, the AER released a revised draft version to Directive 065 (Draft Directive 065) that proposes details the AER will consider when assessing CCUS project applications and subsequent development approvals. Draft Directive 065 provides information on requirements for different aspects of a CCUS project application, including containment of the maximum expected fluid plume, safety of the CCUS project operations, and reporting requirements.

MMV Lessons from Alberta's CCUS Hub RFPP and MMV Guidelines

The Request for Full Project Proposals for CCUS Hubs (CCUS Hub RFPP) issued by the Government of Alberta on March 3, 2022, offers further insight into the information required for an MMV plan. It explains that an MMV plan should contain information about the project execution plan and the project design detail. In addition, the MMV plan should identify key project and sequestration risks as well as anticipated mitigation measures. The CCUS Hub RFPP adds that an MMV plan should include an initial assessment regarding anticipated capacity targets and potential impacts to activities of other subsurface pore space users, as well as the impact on the biosphere, geosphere, atmosphere, and hydrosphere. The MMV plan should include information about the project plan, timeline, modeling, and site characterization, as well as an assessment of the MMV techniques and technology to be used.

Following the release of the CCUS Hub RFPP, the Alberta government released a document in March 2022 providing further guidance as to what information should be presented in an MMV plan (MMV Guidelines). The MMV Guidelines specify key principles, including regulatory compliance and the use of the best available technologies economically available. The MMV Guidelines present the required criteria of an MMV plan for each operational lifecycle of a CCUS project for all project stages: pre-injection (for evaluation permit), pre-injection (for a sequestration lease), operation/injection, and closure period.

Conclusion

MMV plans will continue to be a key component of applications for future CCUS project proponents seeking to obtain regulatory approvals in Canada. The views of the ERCB (now the AER) in the Quest Decision are instructive for assessing issues that may be raised in respect of submitted MMV plans. Shell's Quest Project report and other annual reports of the Quest Project may provide guidance for assessing operational issues that MMV plans should consider proactively addressing. The recently released CCUS Hub RFPP, MMV Guidelines, and Draft Directive 065 evidence the importance of submitting a strong

MMV plan for approval of a CCUS project. During the operational phase of a CCUS project, MMV plans will confirm CO_2 is being contained in a manner consistent with original designs, regulatory approvals, and other legal requirements, including compliance with environmental and regulatory laws. Ultimately, the MMV plan will support closure of a CCUS project and long-term liability transfer. Given the importance placed on MMV plans in the Canadian regulatory regime, proponents of CCUS projects in Canada should consider the merits of their draft plans well in advance of any project application.

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