PENNSYLVANIA OIL + GAS LITIGATION UPDATE (2019)

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I. INTRODUCTION

A. We're almost 15 years into the Marcellus play, and Pennsylvania oil and gas law continues to develop, probably at a slower rate than everyone thought. Although the courts have addressed a fair amount of issues in various cases over the past year, there's still a long way to go.

B. This outline discusses cases in Pennsylvania since June 2018 involving oil and gas ownership (including the rule of capture); oil and gas lease disputes (including government challenges to oil and gas leasing activities and disputes over royalties); disputes over oil and gas transactions (such as gas purchase agreements, drilling contracts and MSAs); regulatory litigation (including challenges to oil and gas regulations, claims under the "Environmental Rights Amendment," and local zoning of oil and gas wells); and oil and gas pipeline litigation (including challenges to condemnation authority and state water quality certifications for interstate pipeline projects under Section 401 of the Clean Water Act).

II. PENNSYLVANIA OIL + GAS LITIGATION – YEAR IN REVIEW

A. Oil + Gas Ownership and Related Issues

1. Rule of Capture.

a) The rule of capture provides that landowners and their lessees engaged in oil and gas development on the leased premises are not liable for damages for the value of drainage of oil or gas underlying adjacent unleased properties.

b) In *Briggs v. Southwestern Energy Production Company*, 184 A.3d 153 (Pa. Super. 2018), *appeal granted*, No. 63 MAP 2018, 197 A.3d 1168 (Pa. 2018), unleased landowners sued Southwestern for trespass, alleging that hydraulic fracturing operations near adjacent leased boundaries created cracks in the shale that crossed the plaintiffs'

subsurface boundary and drained gas from beneath their property. The trial court granted summary judgment in favor of Southwestern based on the rule of capture.

c) The Superior Court held that the rule of capture does not preclude an action for trespass for damages resulting from fracture-stimulation operations on the leased premises that allegedly drain adjacent unleased tracts. Among other things, the court reasoned that fracture-stimulation is a new technique and the fractures that may cross subsurface boundaries constitute an actionable trespass.

d) The Supreme Court of Pennsylvania granted SWN's petition for allowance of appeal. Numerous *amici* supported SWN's petition and opening brief, arguing (among other things) that the Supreme Court of Pennsylvania should reverse and reinstate the rule of capture as a bedrock tenet of Pennsylvania oil and gas law that applies whether or not fracture-stimulation techniques are involved.

2. Conveyance/Reservation of Oil + Gas Interests

a) There is one universal rule for granting or reserving oil and gas interests: words matter.

b) If grantors wish to reserve oil and gas interests, they should expressly say so. In *Three Rivers Royalty v. Lorraine Canestrale Trust*, --- A.3d ---, No. 1302 WDA 2018 (Pa. Super., June 21, 2019), the Superior Court held that a grantor conveying the "surface tracts" including "all the property" described in the deed, without expressly reserving oil and gas, conveyed the entire fee and did not reserve the oil and gas.

c) The same is true for atypical transactions such as deeds in lieu of condemnation. In *O'Layer McCready v. Dep't of Cmty. & Econ. Dev.*, --- A.3d ---, No. 778 C.D. 2018, 2019 WL 1028540 (Pa. Cmwlth., Mar. 5, 2019), the Commonwealth Court concluded that a grantor failed to reserve any part of the subsurface estate in a deed in lieu of condemnation granted to the state to build part of the Pennsylvania Turnpike. The deed did not include any express reservation, and the grantor could not rely on her belief that (a) she only conveyed the surface estate; or (b) the state did not need the subsurface estate to construct a part of the turnpike.

d) When granting or reserving royalties from existing or future leases, be precise. In *Julia v. Huntley*, --- A.3d ---, No. 632 MDA 2018, 2019 WL 311121 (Pa. Super., Jan. 24, 2019), the Superior Court of Pennsylvania held that a deed reserving "one half of any and all royalties and income or return from any oil or gas which may be produced on or from the premises hereby conveyed" unambiguously reserved a one-half royalty interest and income on any oil or gas produced from the property without limiting the interests to any particular lease in place.

3. Takings

a) "State Litigation Requirement" Overruled.

(1) A recent decision on the Fifth Amendment may change the way owners of interests in oil and gas challenge regulatory or *de facto* takings by government entities.

(2) In *Knick v. Township of Scott*, No. 17-647, --- S.Ct. ---, --- U.S. --- (U.S., June 20, 2019), a township passed an ordinance that required right-of-way access from the nearest public road to a cemetery. The township entered the plaintiff's land without permission, found a cemetery on the plaintiff's property, and stated that the plaintiff violated the ordinance. The plaintiff first sued in state court and then in federal court under Section 1983, alleging a taking of property without just compensation.

(3) Under the so-called "state litigation requirement," the courts required takings plaintiffs to exhaust state remedies and receive a final order on compensation before pursuing any federal action.

(4) The Supreme Court overruled the state litigation requirement and held that plaintiffs can bring takings claims directly to federal court without exhausting state remedies.

b) Landlocked Subsurface Estates

(1) In *PBS Coals, Inc. v. Dep't of Transportation*, --- A.3d ---, No. 140 C.D. 2018, 2019 WL 1387883 (Pa. Cmwlth., March 28, 2019), coal operators sued the Commonwealth, alleging a *de*

facto taking without just compensation after PennDOT's operations rendered the coal estate landlocked.

(2) The Commonwealth Court concluded that PennDOT's landlocking activities resulted in a *de facto* taking regardless of whether the coal was mineable and permittable, reserving those questions for the board of view to decide at the just-compensation stage.

B. Oil + Gas Leases

1. Oil + Gas Leasing Activities

a) Oil and gas leasing activities may be subject to the consumer protection provisions of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") if a recent Commonwealth Court decision stands.

b) In *Anadarko Petroleum Corp. v. Commonwealth of Pennsylvania*; --- A.3d ---, No. 58 C.D. 2018, 2019 WL 1211892 (Pa. Cmwlth., Mar. 15, 2019), the attorney general brought a civil action under the statute on behalf of landowners against two lessees, alleging that, during leasing activities with landowners, the lessees engaged in deceptive conduct under the "catchall" provision of the statute. The lessees filed preliminary objections, arguing (among other things) that the statute does not apply to an oil and gas lease transactions as a matter of law. The trial court overruled the preliminary objections but certified the order for immediate appellate review.

c) In a case of first impression, the Commonwealth Court majority concluded that the Attorney General alleged enough to state a claim under the statute that oil and gas leasing activities constituted "trade or commerce" under dictionary definitions of those terms and rejected the lessees' argument (endorsed by the dissent) that the statute only applies to protect buyers in consumer transactions – not landowners who essentially sell their oil and gas rights under a lease. The lessees have asked for allowance of appeal.

2. Formation – "Bonus" Consideration

a) It is common for lessees to take leases and give themselves some time to check title before making preliminary payments (whether

they be couched as "bonus" payments or delay rentals) as consideration for the lease.

b) In *Walney v. SWEPI LP*, --- F. Supp. 3d ---, No. CV 13-102, 2019 WL 1436938 (W.D. Pa., Mar. 31, 2019), a federal judge decertified a class action alleging that the lessee owed the class plaintiffs bonus payments.

c) The judge reasoned that good title preconditioned the payment obligation, and the "bad title" issues were so different from plaintiff to plaintiff that they now predominated over issues common to the class.

3. Granting Clause – Surface Use and Related Issues

a) Surface Use

(1) Oil and gas lessees have surface rights with which lessors and/or severed surface owners cannot interfere.

(a) In *Porter v. Chevron Appalachia, LLC*, --- A.3d ---, 2019 PA Super 31, 2019 WL 493216 (Pa. Super., Feb. 8, 2019), landowner-lessors blocked Chevron's access to the surface area of the leased premises to prepare for well-drilling activities.

(b) The Superior Court concluded that Chevron would suffer irreparable harm without an order enjoining lessors from blocking access to the leased premises to prepare for well-drilling activities.

(c) The court reasoned that Chevron had access rights under the oil and gas lease that it acquired from its predecessor-in-interest, the lessors deprived Chevron of those contract rights by blocking access, and the delay-related costs resulting from the lessor's actions would be impossible to quantify such that an injunction was proper.

(2) Sometimes, those who hold interests in the subsurface attempt to negotiate with surface owners regarding access

to and activities on the surface estate. If those negotiations break down, the implied surface rights still remain.

(a) In *Monongalia County Coal Company v. Weiss World L.P.*, --- A.3d ---, No. 962 WDA 2018, 2019 WL 2004042 (Pa. Super., May 7, 2019), a coal company and a surface owner entered into negotiations regarding surface access and use for coal operations. After negotiations broke down, the coal owner sued to prevent the surface owner from blocking access to the surface area to conduct operations.

(b) The Superior Court concluded that surface owners could not block the company's right to construct a road to access coal facilities after negotiations between the company and the surface owner broke down.

(c) The court reasoned that surface rights exist without the additional agreement and enjoined the surface owners from preventing the coal company's access rights.

(3) The government may be liable for damages for blocking access to government-owned surface areas, but those damages might not make the operator entirely whole.

(a) In *Duhring Resource Co. v. United States*, --- F.3d ---, No. 18-1289, 2019 WL 2359392 (3d Cir., June 4, 2019), an oil and gas company sued the United States for interfering with surface access to develop underlying oil and gas interests in the Allegheny National Forest.

(b) The Third Circuit denied the government's motion to dismiss under the economic loss doctrine, holding instead that the company had surface rights by virtue of its interest in the underlying oil and gas estate under settled Pennsylvania law.

(c) The court stated that the company could pursue "rental value" damages for tortious interference with a servitude despite the economic loss doctrine

because surface rights are property rights derived from the common law, not a contract. However, the court did not endorse the company's right to pursue further damages, such as lost profits.

b) Payments in Lieu of Free Gas

(1) Some oil and gas leases give the owner of the drill-site tract the option to take free gas from a well on the property or a payment in lieu of free gas.

(2) In *Mitch v. XTO Energy, Inc.*, --- A.3d ---, No. 2096 WDA 2018, 2019 WL 1873161 (Pa. Super., Apr. 26, 2019), a lessor demanded payment instead of free gas for a horizontal well under the lessor's property.

(3) The Superior Court held that the lessor was not entitled to payment in lieu of free gas for a horizontal well under the property where the lease language says the well must be "on" the surface of the leased premises.

(4) The court reasoned that the portion of the horizontal well under the leased premises is not the same as a vertical well because there are no surface disturbances that would justify additional payments from the lessee.

4. Royalties

a) Affiliate Transactions

(1) There is nothing inherently unlawful about gas sales between production companies and their downstream affiliates. However, lessors continue to question these transactions in the context of royalty disputes.

(2) In *Atlantic Hydrocarbon, LLC v. SWN Production Company*, --- F. Supp. 3d ---, No. 4:17-CV-02090, 2019 WL 928996 (M.D. Pa., Feb. 26, 2019), the lease calculated royalties as a percentage of the "proceeds realized" from gas sales less certain post-production costs "assessed by third parties." The lessor questioned royalty payments that accounted for

cost charged by the lessee's affiliate to move the gas downstream of the wellhead.

(3) The court dismissed the claim with prejudice, acknowledging that that the lessee's separately incorporated affiliate is a "third party," rejecting the plaintiff's invitation to disregard the corporate formalities of both companies, and holding that the plaintiffs could not establish how voluntary, arms-length transactions between affiliates satisfied alter ego theories of liability.

(4) In *Chambers v. Chesapeake Appalachia, L.L.C.*, --- F. Supp. 3d ---, No. 3:18-CV-00437, 2019 WL 183854 (M.D. Pa., Jan. 14, 2019), however, the Middle District of Pennsylvania denied a motion to dismiss a claim alleging that a lessee circumvented a proceeds royalty clause by selling gas at the well to affiliates and paying royalties based on the wellhead sale.

(5) The court noted that the parties deleted the phrase "less or net any post-production costs paid by the Lessee to prepare for and/or deliver the oil, gas, and/or coalbed methane gas for sale" from the royalty clause. Although the lessee paid royalties on the proceeds from the wellhead sale per the lease, the court concluded that, despite an express disclaimer, the lease imposed a duty to market that the lessee may have breached by selling low at the wellhead so the affiliate can sell high at downstream markets and the two companies can share in the gains.

b) Post-Production Costs "Actually Incurred" by the Lessee

(1) Some leases provide that a lessor and lessee share in post-production costs "actually incurred" by a lessee.

(2) In *Municipal Authority of Westmoreland County v. CNX Gas Company, L.L.C.*, --- F. Supp. 3d ---, No. 2:16-CV-422, 2019 WL 1427155 (W.D. Pa., Mar. 29, 2019), the lessor questioned whether its lessee "actually incurred" a processing charge for wet gas built into a blended gathering fee when, as the plaintiff alleged, the well at issue produced only dry gas.

(3) The court first denied the lessor's claim that the lessee's predecessors in interest permanently waived the right to charge the lessor its proportionate share of post-production costs by paying royalties without deducting those costs in the past.

(4) But the court also denied the lessee's request for summary judgment, concluding that the lessor's evidence created a genuine dispute of fact over whether the lessee's blended gathering fee assessed the royalty owner for wet gas processing that the company did not "actually incur" as required by the royalty clause in the oil and gas lease.

5. Shut-in Royalties.

a) A shut-in payment is a substitute for actual production that a lessee can tender to keep a lease alive during the secondary term if a well is drilled but not producing.

b) In *Wheeland Family Ltd. Partnership LP v. Rocdkale Marcellus LLC*, No. 4:18-CV-01976, 2019 WL 2868937, (M.D. Pa. July 3, 2019), the lessee pooled leases into a unit that included two wells that were not producing and tendered shut-in payments pursuant to a standard shut-in provision.

c) The provision authorized the lessee to tender the payment for a well that is "not producing for any reason whatsoever[.]" The lessor rejected the shut-in payments for unit wells and sued to invalidate several of its leases.

d) The court dismissed the case on the pleadings, reasoning that the lessee complied with the shut-in provision by tendering payment and rejecting the claim that the lessee engaged in bad-faith pooling to hold the leases with a shut-in payment because the express provision authorized the lessee to shut in the wells for any reason.

6. Notice-and-Cure Provisions

a) Many leases contain notice-and-cure provisions that require a lessor to notify the lessee of any breach before bringing an action to sue.

b) In *Elbow Energy, LLC v. Equinor USA Onshore Properties Inc.*, --- F. Supp. 3d ---, No. 4:19-CV-00764, 2019 WL 2868927 (M.D. Pa., July 3, 2019), the lease's notice-and-cure provision stated that the lessor must notify the lessee of any breach and give the lessee one year to cure before bringing a cause of action. The lessor notified the lessee of alleged underpaid royalties, and before the one-year period expired, sued for breach of contract and an accounting. The lessee moved to dismiss; in response, the lessor argued that the court should ignore the premature filing because the adjudication would occur after the one-year period expired; the notice-and-cure provision did not apply to accounting claims (even though it applied to all damage claims); and the lessor's violation is immaterial.

c) The court dismissed the case without prejudice, rejecting the plaintiff's arguments and holding that the lessor violated the plain and unambiguous terms of the lease by suing before the one-year stay-out period expired.

C. Oil + Gas Transactions

1. Gas Purchase Agreements

a) There are very few contemporary cases involving disputes over gas purchase contracts in Pennsylvania.

b) In *Meanor v. Peoples Natural Gas Co.*, No. 1757 WDA 2017, 2019 WL 291284 (Pa. Super., Jan. 23, 2019), individual oil and gas well owners alleged that the purchaser breached an agreement by paying below-market rates on gas.

c) The contract stated that the "posted price" set by the buyer would change "from time to time" based on market forces.

d) The Superior Court held that the buyer breached the contract by failing to increase the posted price over time based on market conditions, rejected the buyer's argument that the posted price for gas is presumptively reasonable despite market conditions, and remanded to the trial court to determine the seller's damages.

2. Drilling Contracts

a) Standard drilling contracts and their addenda negotiated by production companies and their drilling contractor typically include provisions regarding the supply and safe use of equipment at the well site.

b) In *Orion Drilling Co. LLC v. EQT Production Co.*, No. 2:16-cv-1516 (W.D. Pa., January 29, 2019), a production company terminated a drilling contract after discovering that one of two rigs suffered from faulty and unsafe conditions that the contractor didn't resolve within the cure period.

c) A jury concluded that the company did not breach the drilling contract when it stopped using the faulty rig. Although the company breached the contract by not using other rigs per the agreement, the drilling contractor also breached the deal by failing to maintain its equipment in a safe condition such that the contractor could not recover liquidated or other damages for the company's breach.

3. Master Service Agreements

a) Production companies and contractors typically execute an MSA that doesn't always outline the exact services or materials to perform or furnish but authorizes the contractor to submit invoices for products or services performed at a given well site.

b) In *Stingray Pressure Pumping, LLC v. EQT Prod. Co.*, --- F. Supp. ---, No. 2:16-CV-00279-BRW, 2019 WL 1880034 (W.D. Pa., Apr. 26, 2019), a contractor supplied stimulation services at a well site and invoiced separate pump down services that the production company believed were part of a base fee. The contract sued under the PA Contractor and Subcontractor Payment Act when the company neglected to pay for separately invoiced services.

c) The jury returned a verdict, upheld by the district judge, imposing liability on the production company for improperly withholding about $1.6 million in payments for pump down services.

D. Oil + Gas Settlements and Fee Awards

1. Enforcement of Settlements

a) Oil and gas lease disputes in Pennsylvania are settled more often than they are fully litigated. Sometimes there's an oral agreement that the parties plan to reduce to writing.

b) In *SWEPI, LP v. Wood*, 508 MDA 2018 (Pa. Super., April 15, 2019), a landowner attempted to back out of a settlement resolving an oil and gas lease dispute before executing a written agreement, claiming that the parties never agreed on all material terms and never intended to settle the without reducing the agreement to writing.

c) The Superior Court upheld an order granting a motion to enforce the settlement, concluding that the parties' agreed orally to all material terms and the parties did not need to reduce the agreement to writing before the court could enforce it.

2. Fee Awards

a) Several cases have addressed attorneys' fees in disputes involving oil and gas development.

(1) In *Pennsylvania General Energy Co. LLC v. Grant Township*, --- F. Supp. 3d ---, No. 1:14-cv-00209 (W.D. Pa., April 1, 2019), a federal judge ordered Franklin Township to pay a production company more than $100,000 in attorneys' fees after the company successfully challenged a frac waste ban under Section 1983.

(2) In *Kelly v. Repsol Oil & Gas USA, LLC*, --- A.3d ---, No. 420 MDA 2018, 2019 WL 1965648 (Pa. Super., May 1, 2019), the Superior Court upheld $50,000 in attorneys' fees awarded to an oil and gas company accused (unsuccessfully) of conversion of property and defamation.

b) Recently, the Environmental Hearing Board ("EHB") and Commonwealth Court have limited recovery of attorneys' fees in cases involving permits issued by the Department of Environmental Protection ("DEP").

(1) In *Sierra Club v. DEP*, --- A.3d ---, No. 563 CD 2018 (Pa. Cmwlth., June 12, 2019), the Commonwealth Court upheld the EHB's denial of Sierra Club's fee petition following settlement/discontinuance of the Sierra Club's appeal challenging certain permitted discharges. The court held that the Sierra Club's appeal did not cause the permittee to revise its plans (the permittee would have taken alternative measures based on cost, not because of the appeal) such that the organization was not entitled to fees under the EHB's standards for awarding fees.

(2) In *Clean Air Council v. DEP*, EHB No. 2017-09-L, Docket No. 309 & 313 CD 2019 (pending), the Commonwealth Court will decide whether the EHB properly denied a request for attorneys' fees following a settlement of a permit dispute under the Clean Streams Law when the permittee did not engage in any bad behavior.

E. Oil + Gas Regulatory Litigation

1. Chapter 78a

a) The Environmental Quality Board promulgated Chapter 78a in 2016, followed by a lawsuit challenging several provisions.

b) The Marcellus Shale Coalition challenged (a) the new definition of "public resources" that require well operators to protect certain privately owned property and certain unlisted species of special concern; (b) the new "area of review" ("AOR") regulations that require well operators to survey and plug/abandon wells within a certain radius of a well proposed in a permit application; (c) new requirements to upgrade water impoundments or shut down previously permitted impoundments; and (d) new requirements to conduct pre- and post-construction stormwater runoff analyses that are exempt in other regulations.

c) The court enjoined (a) the definition of "public resources" to the extent it treated certain privately owned property as "public" property; (b) the definition of "public resources" to the extent it imposed obligations on well operators to protect "special concern species" that are not classified as such by regulation as required by law; (c) part of the AOR regulations to the extent they require a well

operator to monitor and then plug all wells within a given area even if well operator cannot access them or does not own or operate those wells; (d) part of the regulations that penalized well operators for failing to upgrade previously permitted impoundments; and (e) the new site-restoration regulations to the extent they require well operators to conduct pre- and post-construction stormwater runoff analyses that are exempt under current law.

d) In *Marcellus Shale Coalition Marcellus Shale Coalition v. DEP*, 185 A.3d 985 (Pa. 2018), the Supreme Court of Pennsylvania agreed that the Commonwealth Court did not err in issuing its temporary preliminary injunction except with respect to (a) the contested regulations relating to existing well-development impoundments and (b) the purported abrogation of an exemption under the Clean Streams Law/Chapter 102 regarding PCSM activities. On those issues, the Court concluded that the MSC did not carry its burden to demonstrate a clear right to relief and, as such, reversed the grant of preliminary injunctive relief in that respect while the Commonwealth Court continues to consider the case on its merits.

2. Article I, § 27 of the Pennsylvania Constitution

a) Since the Pennsylvania Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"), several cases have made their way to the appellate courts over the past year involving claims that local ordinances violated Article I, § 27. They have not been successful.

b) In *Frederick v. Allegheny Township*, --- A.3d ---, No. 2295 C.D. 2015 (Pa. Cmwlth., October 26, 2018), for example, the Commonwealth Court of Pennsylvania concluded that a local ordinance authorizing oil and gas wells within a municipality does not violate Article I, sec. 27 of the Pennsylvania Constitution for failing to go "far enough" to protect so-called "environmental rights," reasoning that the local government's enactment of the measure accounted for environmental protections consistent with its statutory authority and that, as creatures of statute, municipalities have no authority to go beyond their enabling legislation to impose additional requirements on permit applicants to further protect the environment. The Supreme Court denied allowance of appeal. *Frederick v. Allegheny Township*, No. 449 WAL 2018 (Pa., May 14, 2019).

c) Relying in large part on the rationale *Frederick*, the Commonwealth Court rejected a constitutional challenge to a zoning ordinance that authorized oil and gas wells in residential/agricultural zones. *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, No. 2609 C.D. 2015 (June 26, 2019).

d) In *Protect PT v. Penn Township*, Nos. 39-42 C.D. 2018 (Pa. Cmwlth., November 8, 2018), *petition for allowance of appeal denied*, No. 470-473 WAL 2019 (Pa. 2019), an environmental organization challenge a local ordinance under Article I, § 27 to the extent it authorized zoning permits for well operators to store produced water at well sites that the organization believed to be "toxic." The Commonwealth Court held that (a) produced water is not "toxic" and therefore could be stored on site in a municipality under its ordinance; and (b) the municipality's decision to grant a zoning permit did not violate Article I, sec. 27 because unconventional gas well operations are permitted by special exception in the municipality, "which evidences a legislative decision that the uses are consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community." The Pennsylvania Supreme Court denied allowance of appeal.

3. Impact Fee – Stripper Wells

a) Pennsylvania's "impact fee" does not apply to "stripper wells."

b) In *Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, --- A.3d ---, No. 47 WAP 2017, 2018 WL 6817092 (Pa., Dec. 28, 2018), the Pennsylvania Public Utility Commission assessed the impact fee on various well operators whose wells did not exceed 90,000 cubic feet of natural gas per day in each month of a calendar year. The well operators challenged the assessment, arguing that the impact fee only applies if a well exceeds 90,000 cubic feet of natural gas per day in each month of a calendar year. The Commonwealth Court agreed.

c) The Pennsylvania Supreme Court reversed, concluding that the state's impact fee applies to wells that exceed 90,000 cubic feet of natural gas per day in any one month of the year.

4. Local Zoning

a) In addition to challenges under Article I, § 27, the courts have decided a number of cases involving local zoning of oil and gas

development activities, including limits on local ordinances that preclude oil and gas development, standing and ripeness issues, and evidentiary issues.

b) Oil + Gas Activities Authorized by Local Ordinances

(1) In *Gorsline v. Bd. of Sup. of Fairfield Twp.*, 186 A.3d 375 (Pa. 2018), a well operator applied for conditional-use approval to drill wells in a residential/agricultural zone. Although "oil and gas" was not expressly authorized in the ordinance, the local government authorized the use as "similar to" other uses in the district such as public utility infrastructure or other infrastructure for essential services. The Commonwealth Court later agreed.

(2) On appeal, the Supreme Court of Pennsylvania reversed the Commonwealth Court's conclusion that oil and gas wells and related facilities are similar to services provided by public utilities for purposes of obtaining special exceptions or conditional uses under local zoning ordinances.

(3) Importantly, the court stated: "In so ruling, this decision should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses."

(4) Rather, the court essentially held that local ordinances that should be amended to account for oil and gas development expressly.

(5) The dissent would have concluded that municipalities should be able to allow oil and gas wells in residential/agricultural zones under special-exception or conditional-use provisions even if not specified.

c) Standing in Zoning Cases

(1) General concerns about oil and gas wells – without more – are generally insufficient to confer standing before a zoning hearing board.

(2) In *Worthington v. Mount Pleasant Twp.*, --- A.3d ---, No. 1149 C.D. 2018, 2019 WL 2374919 (Pa. Cmwlth., June 6, 2019), for example, the Commonwealth Court concluded that an objector who lived more than three miles from a proposed well site in a township lacked standing to challenge a conditional-use approval based on her general concerns that the oil and gas well is too close to her granddaughter's school.

d) Standing to Appeal Zoning Cases Involving Oil + Gas Development.

(1) Not everyone aggrieved by zoning decisions has automatic standing to appeal.

(2) Overruling two prior decisions, the Commonwealth Court in *Coppola v. Smith Twp. Bd. of Supervisors*, --- A.3d ---, No. 930 C.D. 2018, 2019 WL 1940357 (Pa. Cmwlth., May 2, 2019), held that an objector who merely submits a letter during a zoning case challenging a project does not have standing to appeal a decision of the zoning board unless the letter is submitted to the board, other parties have the opportunity to respond, and the board has an opportunity to consider it properly; otherwise, the letter is not part of the record and its author cannot preserve any appellate issues.

e) Ripeness. In *In re: Appeal of Penneco Environmental Solutions LLC*, --- A.3d ---, No. 931 CD 2018 (Pa. Cmwlth., March 8, 2019), the Commonwealth Court rejected claims by a municipality that an underground injection well operator should wait until it receives federal permits before challenging a local ordinance that prohibits disposal wells within the municipality.

f) Evidence in Zoning Cases Involving Oil + Gas Wells

(1) In zoning cases, objectors generally have an obligation to prove by clear and convincing evidence that a proposed land use poses a unique concern beyond general concerns attributed to the same or similar land uses in a municipality.

(2) In *EQT Production Company v. Borough of Jefferson Hills*, --- A.3d ---, No. 4 WAP 2018, 2019 WL 2313377 (Pa., May 31, 2019), environmental groups and landowners from other municipalities attempted to challenge zoning approvals

based on their experience with well sites in other municipalities. The Commonwealth Court concluded that the evidence did not suffice to support a denial of zoning approvals under evidentiary standards.

(3) The Pennsylvania Supreme Court reversed and held that a municipality, in addressing an applicant's zoning application for a well site, may consider as evidence the general observations of residents of another municipality regarding the impacts to their health, quality of life, and property which they attribute to a similar facility constructed and operated by the same company in their municipality.

(4) Justice Mundy offered a strong dissent, stating that "[t]he objectors presented no evidence that [the applicant's] oil and gas operations at the ... well site would have any effect on the community other than those normally associated with such activities. Instead, they presented speculative objections of a kind that courts have deemed insufficient to grant relief."

5. Climate Change Issues

a) There are a number of cases alleging that production companies and governments that support fossil-fuel development should be liable for damages caused by climate change.

(1) Many of these cases name children as plaintiffs. In *Juliana v. United States*, No. 18-80176 (9th Cir. 2018) (pending), a group of children sued the federal government for violations of what they claim is a Fifth Amendment right to a healthy climate. A district judge in Oregon concluded that fact disputes regarding climate change and its effect on the plaintiffs and the public precluded summary judgment in favor of the government on preliminary legal issues like standing and failure to state cognizable constitutional claims. The case was argued in the Ninth Circuit and remains pending.

(2) In Pennsylvania, a federal judge in the Eastern District dismissed a lawsuit brought by children who (similarly) claimed that the federal government isn't doing enough to counteract climate change, holding that an alleged right to

life-sustaining climate systems is not a fundamental liberty interest protected by the Constitution and criticizing the federal judge in Oregon who claimed otherwise to keep a similar case alive. *Clean Air Council v. U.S.*, No. 2:17-cv-04977 (E.D. Pa., Feb. 19, 2019).

b) In the pipeline context, the D.C. Circuit has signaled that FERC has the obligation to consider climate change impacts when issuing certificates for interstate pipeline projects. *Birckhead v. Fed. Energy Regulatory Comm'n*, --- F.3d ---, No. 18-1218, 2019 WL 2344836 (D.C. Cir., June 4, 2019). However, petitioners must have standing to raise concerns about the level of FERC's climate-change review. *Otsego 2000 Inc. v. FERC*, --- F.3d ---, No. 18-1188 (D.C. Cir., May 8, 2019).

F. Oil + Gas Pipelines

1. Challenges to Pipeline Eminent Domain Authority

a) Interstate pipeline operators (certificated by FERC under the Natural Gas Act) and intrastate pipeline operators (certificated by the Pennsylvania Public Utility Commission) have eminent domain authority to condemn rights of way for pipeline construction activities.

b) *In re: Transcontinental Gas Pipe Line*, --- F.3d. ---, Nos. 17-3075, 17-3076, 17-3115, and 17-3116 (3rd Cir., Oct. 30, 2018), the Third Circuit rejected arguments that a district court's order granting an injunction to Transco following its condemnation of pipeline easements under the Natural Gas Act for the Atlantic Sunrise project violated separation of powers by effectively conferring "quick take" eminent domain authority reserved for the legislative branch of government. Instead, the court held that the pipeline operator already went through the rigors of the condemnation process under the NGA to establish its condemnation rights and the injunction merely gave the pipeline operator possession rights consistent with that authority. The Supreme Court of the United States denied a petition for a writ of certiorari.

c) In *In re: PennEast Pipeline Co*., --- F. Supp. 3d ---, No. CV 3:18-281, 2018 WL 6304192 (M.D. Pa., Dec. 3, 2018), the court held that the National Gas Act does not require that the holder of a FERC

certificate to satisfy conditions on that certificate (such as securing other authorizations) before exercising eminent domain authority.

2. Section 401 Certifications.

a) The Clean Water Act authorizes states to issue water quality certifications for interstate projects including interstate pipeline project subject to FERC approval under the Natural Gas Act.

b) In Pennsylvania, the Third Circuit held that it has jurisdiction over water quality certifications, not the EHB. *Del. Riverkeeper Network, et al. v. Dep't of Envtl. Prot.*, No. 16-221, 2018 WL 4201626 (3d Cir. Sept. 4, 2018).

c) States waive their authority to review a request for a water quality certification under Section 401 by failing to act on that request within one year under *New York State Dep't of Envtl. Conservation v. Fed. Energy Regulatory Comm'n*, 884 F.3d 450, 452 (2d Cir. 2018), and *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, No. 14-1271, 2019 WL 321025 (D.C. Cir. Jan. 25, 2019).

d) States also have the obligation to issue a reasoned decision when denying water quality certifications. In *National Fuel Gas Supply Corp. v. NYSDEC*, --- F.3d ---, No. 17-1164, 2019 WL 446990 (2d Cir., Feb. 5, 2019), the Second Circuit rejected the NYDEC's decision to deny Section 401 water quality certifications for NFG's Northern Access project, concluding that environmental regulators failed to provide a reasoned decision and remanding with instructions to clearly articulate the agency's basis for the denial and how that basis is connected to information in the existing administrative record.

3. Pipeline Protests.

a) Pipeline protesters have faced civil and criminal charges for their unlawful activities.

(1) *In re: Sunoco Pipeline, L.P., Appeal of Ellen S. Gerhart*, --- A.3d ---, No. 1561 C.D. 2018 (Pa. Cmwlth., May 8, 2019) the Commonwealth Court of Pennsylvania upheld a prison sentence imposed after a protester failed to comply with a preliminary injunction and subsequent contempt order that prevented her from interfering with a pipeline company's easement acquired by condemnation.

(2) The court noted that (during the contempt period) the defendant stood in front of moving construction vehicles; ignited fires next to the pipeline construction fence; threw ground meat on workers; and baited the area with food to entice wild animals (including bears) to the construction site.

(3) The court rejected the defendant's argument that the trial court improperly categorized the civil contempt matter as indirect criminal contempt which resulted in an illegal and excessive prison sentence.

b) Pipeline companies with eminent domain authority are not "state actors" for purposes of stating constitutional claims.

(1) In *Gerhart v. Energy Transfer Partners, L.P.*, --- F. Supp. 3d ---, No. 1:17-CV-01726, 2018 WL 6589586 (M.D. Pa., Dec. 14, 2018), pipeline protesters sued the government and a pipeline operator alleging constitutional violations against the pipeline company following the plaintiffs' anti-pipeline demonstrations that led to their arrest.

(2) The court concluded that the pipeline company is not a state actor for purposes of Section 1983 and did not engage in any conspiracy with law enforcement to violate the plaintiffs' constitutional rights.

4. Public Health and Safety Issues

a) In *Flynn et al. v. Sunoco Pipeline*, C-2018-3006116 (Pa. PUC) (pending), landowners along a pipeline route objecting to the Mariner East pipeline projects requested that the PUC enjoin the construction operation pending a public health and safety analysis.

b) The PUC confirmed an order of an administrative law judge denying bids by the residents to stop the Mariner East lines from construction and operation for safety reasons, noting that the residents did not meet their heavy burden of proving an imminent risk of harm to the public. The PUC remanded the case to the ALJ to decide the issues raised in the formal complaint.