ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 9 NUMBER 2

PENNSYLVANIA

Nathaniel I. Holland,[*] *Jon C. Beckman*[**] *& Benedict J. Kirchner*[***]

Table of Contents

* Member, Steptoe & Johnson, PLLC.
** Member, Steptoe & Johnson, PLLC.
*** Of Counsel, Steptoe & Johnson PLLC.

I. Introduction

In the past year, Pennsylvania saw one new statute of note as well as several significant cases relating to oil and gas law. The new legislation amended the Oil and Gas Lease Act to permit royalty owners to file claims against operators who fail to make required payment disclosures, and also created deadlines for making royalty payments after oil and gas are sold (Act 153 of 2022). A Supreme Court case upheld certain contested provisions of new regulations applicable to unconventional oil and gas operators regarding impact analysis of a proposed well and notification requirements for operators (*Marcellus Shale Coalition v. DEP*). In another case, the Supreme Court rejected challenges to the state's use of state oil and gas lease revenue under the Environmental Rights Amendment (*PEDF v. Com.*). The Superior Court held a provision in a deed relating to oil and gas constituted an exception of the oil and gas, rather than a reservation that expired upon the death of the reserving party (*Hunnell v. Krawczewicz*). The Commonwealth Court held challengers to the zoning approval of a wellpad under the Pennsylvania Environmental Rights Amendment lacked standing (*Lodge v. Robinson Twp. ZHB*) and the Pennsylvania Public Utility Commission erred in failing to consider environmental impacts related to approving the exemption of a proposed gas reliability station from a Township's zoning ordinance (*Twp. of Marple v. PUC*). A federal district court rejected a constitutional challenge to Pennsylvania's statute permitting cross-unit wells and held pooling provisions in leases also permitted cross-unit wells (*Warner Valley Farm, LLC v. SWN Prod. Co., LLC*). In another case, a district court held a finding of gross negligence did not require a finding of recklessness in an indemnification dispute between an oil and gas operator and a water hauling contractor (*Johnson v. Keane*

Group Holdings, LLC). In a final case, a district court rejected a lessor's argument that the lessee's failure to drill additional wells on a lease held by production violated the implied covenant to develop the lease (*Diehl v. SWN Prod. Co., LLC*).

II. Legislation

A. Act 153 of 2022

- The Oil and Gas Lease Act was amended to permit royalty owners to file claims against operators for failing to provide mandated royalty information and obtain attorney's fees and court costs. Operators are also required to pay royalties within 120 days of the first sale of oil, gas, or natural gas liquids and within 60 days of each month of subsequent sales.

The Oil and Gas Lease Act[1] requires oil and gas operators to provide payment information to royalty owners, including wells produced, the period for the production being paid, price received by the operator, deductions made by the operator, the operator's net and gross sale, the royalty owner's fraction or decimal interest in gross and net value of production, and the operator's contact information.[2]

Act 153 of 2022,[3] effective as of March 3, 2023, amends the Oil and Gas Lease Act to permit royalty owners to bring civil actions against unconventional oil and gas operators who fail to provide payment statements compliant with the Act and to receive attorney's fees and court costs.[4] It also requires operators to pay royalty owners no later than 120 days from the date of the first sale of oil, gas or natural gas liquids and within 60 days after the end of each subsequent month of production sales.[5] Unpaid royalties are subject to interest at the legal rate of six percent.[6] Operators may suspend payment when the royalty owner cannot be located or there is a bona fide dispute over the royalty owner's interest of the owner lacks marketable title.[7] If accumulated royalties for a twelve-month period are less than $100, they may be paid annually.[8]

1. 58 P.S. § 33.1, et seq.
2. 58 P.S. § 35.3.
3. P. L. 182, No. 60.
4. *Id.*
5. *Id.*
6. 41 P.S. § 202.
7. *Id.*
8. *Id.*

III. Cases

A. Pennsylvania Supreme Court

1. Marcellus Shale Coalition v. Dep't of Env't Prot.

- The Pennsylvania Supreme Court upheld regulations for unconventional oil and gas operations under the Oil and Gas Act challenged by a trade association, holding regulatory requirements that operators notify owners of "public resources" of proposed operations and the DEP consider the impact of proposed wells on such resources and "critical communities" did not exceed the agencies' rulemaking authority.

The Supreme Court of Pennsylvania considered the "breadth of the legislative rulemaking authority given to the Department of Environmental Protection (the "Department") and the Environmental Quality Board (the "Board") (collectively, the "Agencies") by the General Assembly in the Pennsylvania Oil and Gas Act of 1984."[9] The General Assembly amended the Oil and Gas Act when it enacted Act 13 of 2012. "Act 13 comprises sweeping legislation affecting Pennsylvania's environment and, in particular, the exploitation and recovery of natural gas in a geological formation known as the Marcellus Shale."[10] Act 13 enabled the Agencies to promulgate regulations for unconventional gas well development. The Board published regulations stating requirements that must be satisfied to obtain a permit to drill an unconventional well.[11] The Marcellus Shale Coalition ("MSC") challenged the rulemaking in October of 2016. The Supreme Court's decision centers on the MSC's challenge to "portions of the regulations set forth at Sections 78a.1 and 78a.15."

The challenged regulations both related to "well location restrictions" noted in Section 3215 of the Oil and Gas Act of 2012, 58 Pa. Cons. Stat. §§ 2301-3504. Section 3215, dealing with well location restrictions, directs the Agencies to consider certain public resources when reviewing a well permit application. Section 3215 states the following in relevant part:

---

9. Marcellus Shale Coal. v. Dep't of Env't Prot., 292 A.3d 921, 923 (Pa. 2023) ("*MSC III*").

10. *Id.* at 924, (citing Robinson Twp., Washington Cnty. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 913 (2013) (OAJC)).

11. *Id.*

> (c) Impact.--On making a determination on a well permit, the department shall consider the impact of the proposed well on **public resources**, including, but not limited to:
>
> (1) Publicly owned parks, forests, game lands and wildlife areas.
>
> (2) National or State scenic rivers.
>
> (3) National natural landmarks.
>
> (4) Habitats of rare and endangered flora and fauna and **other critical communities**.
>
> (5) Historical and archaeological sites listed on the Federal or State list of historic places.
>
> (6) Sources used for public drinking supplies in accordance with subsection (b).[12]

The regulations require the well permit applicant to supply "the information required by the Department to evaluation the application."[13] That includes information pertaining to specific "public resources[,]" with corresponding obligations to notify any applicable "public resource agency" managing those public resources.[14] Notably, the General Assembly did not define the term "public resources" in the Oil and Gas Act. The Agencies, however, listed eight "public resources" in the regulations.[15] The MSC challenged two: "other critical communities" and "common areas on a school's property."

Furthermore, if the proposed well "may impact" any of these public resources, the applicant must notify "the applicable public resource agency, if any."[16] "Public resource agency" is not limited in the regulation to government entities, instead, private entities may be considered public resource agencies under the rulemaking:

> An entity responsible for managing a public resource identified in § 78a.15(d) or (f)(1) (relating to application requirements) including the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game

12. MSC III, 292 A.3d at 924–25, (citing 58 Pa. Cons. Stat. § 3215(c)) (emphasis supplied).
13. 25 Pa. Code § 78a.15(a).
14. *Id.* § 78a.15(f).
15. *Id.* § 78a.15(f)(1)(iv).
16. MSC III, 292 A.3d at 926 (citing 25 Pa. Code § 78a.15(f)).

> Commission, the United States Fish and Wildlife Service, the United States National Park Service, the United States Army Corps of Engineers, the United States Forest Service, counties, municipalities and **playground owners**.[17]

Moreover, the final rulemaking requires the Department to consider several factors before issuing a permit based on potential impacts to public resources:

> (g) The Department will consider the following prior to conditioning a well permit based on impacts to public resources:
>
> (1) Compliance with all applicable statutes and regulations.
>
> (2) The proposed measures to avoid, minimize or otherwise mitigate the impacts to public resources.
>
> (3) Other measures necessary to protect against a probable harmful impact to the functions and uses of the public resource.
>
> (4) The comments and recommendations submitted by public resource agencies, if any, and the applicant's response, if any.
>
> (5) The optimal development of the gas resources and the property rights of gas owners.[18]

The MSC challenged the rulemaking as "unlawful, illegal, void and unenforceable" by filing a Petition for Review in October 2016. The Supreme Court summarized the arguments as follows:

> The fundamental proposition advanced within the Petition was that these regulations served to "inject[ ] an entirely new, back door, 'pre-permitting' scheme into the oil and gas well permitting process without statutory authority." The MSC contended that four specific definitions—public resource agencies, common areas of school property, playgrounds, and other critical communities—are unlawful. "There is no statutory authority for Section 78a.15(f) or the related definitions in Section 78a.1." The MSC argued that "Act 13 does not authorize newly defined 'public resource agencies' or others not referenced in Act 13 to comment upon or object to a well permit application[.]" The central premise underlying the MSC's

17. *Id.* (citing 25 Pa. Code § 78a.1) (emphasis supplied).
18. 25 Pa. Code § 78a.15(g).

> arguments for all four challenges was that, absent express statutory authority, the Agencies were limited to employing the Section 3215 criteria.[19]

In August 2018, the Commonwealth Court agreed in-part with the MSC's position and invalidated the "public resources" permit review process in 25 Pa. Code §§ 78a.1 and 78a.15(f), (g), holding the public resources agencies created in the regulations were beyond the Environmental Quality Board's legal authority.[20] The Commonwealth Court, acting in its original jurisdiction, had previously issued an order enjoining enforcement of the challenged regulatory provisions pending a final resolution of the challenges to the regulations on the merits. The Commonwealth Court's grant of injunctive relief went up to the Supreme Court, where it was affirmed in part and reversed in part.[21] Turning to the merits, the Commonwealth Court granted partial summary relief on the first count of MSC's complaint by unanimous decision, invalidating certain public resources provisions found in 25 Pa. Code §§ 78a.1 and 78a.15(f) and (g), but upholding other portions of Sections 78a.15(f) and (g).[22]

The Commonwealth Court considered whether the definition of "other critical communities" in Section 78a.1 unlawfully expanded the list of public resources identified in Act 13 by including "species of special concern."[23] The court held the definition unlawful for two reasons. First, including "species of special concern" in the definition was beyond the scope of the statutory list of "other critical communities." Looking to the context of Section 3215(c) of Act 13, the court noted a species of "special concern" is not of the same general nature or class of the statutory listed items, which were subject to greater risk of harm, such as endangered or threatened species.[24] To be within the scope of the statute, the species had to be "rare."[25] "Species of special concern" is a resource classification that falls below endangered or threatened and is outside the scope of Section 3215(c).[26] Second, the court held the definition improperly avoided the

19. MSC III, 292 A.3d at 292 (internal citations omitted).

20. Marcellus Shale Coal. v. Pa. Dep't of Env'l Prot., 193 A.3d 447 (Pa. Commw. Ct. 2018) ("MSC II").

21. Marcellus Shale Coal. v. Pa. Dep't of Env'l Prot., 185 A.3d 985 (Pa. 2018) ("MSC I").

22. MSC II, 193 A.3d at 455.

23. *Id.* at 469.

24. *Id.* at 475 - 476.

25. *Id.* at 475.

26. *Id.*

rulemaking process. The inclusion of "species of special concern" in the definition was invalidated.

The Commonwealth Court then considered whether the inclusion of "common areas of a school's property or a playground" in the pre-permit notification process was lawful and enforceable. The public resources provisions obligated drilling permit applicants to provide pre-application notices relative to "public resources."[27] The regulation includes "common areas on school's property or a playground" and "other critical communities."[28] Under the regulation, the permit applicant must notify each "public resource agency" which manages a public resource of the proposal. This would include playground owners.[29] MSC argued "common areas of a school's property and playgrounds" are not within the same general class or nature as other public resources listed in Act 13.[30] The court agreed, stating "[a]s for playgrounds . . . the definition is so broad as to defy quantification and compliance" and embraces both publicly and privately owned playgrounds.[31]

Finally, the Commonwealth Court also declared the requirement within Section 78a.15(g), that the Department consider comments and recommendations submitted by municipalities, was unconstitutional and unenforceable based on the Supreme Court's decision in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013). In that decision, the Court declared Section 3215(d) of Act 13 unconstitutional and enjoined its application. Section 3215(d) provided the statutory authority for the Section 78a.15(g) comment and recommendation requirement. Therefore, the court held it is unenforceable.

A divided Supreme Court of Pennsylvania reversed the Commonwealth Court's 2018 decision that the definitions of "other critical communities," "common areas of a school's property," and "playground" contained in 25 Pa. Code § 78a.1 are void and unenforceable.[32] Likewise, the Supreme Court reversed the Commonwealth Court's declaration that "the definition of 'public resource agency,' contained in 25 Pa. Code § 78a.1 and as used within 25 Pa. Code § 78a.15(f), (g) void and unenforceable to the extent that it includes 'playground owners.'"[33] The majority of the Court's

27. 25 Pa. Code § 78a.15(f)(1)(vi).
28. MSC II, 193 A.3d at 478.
29. *Id.*
30. *Id.* 478; *see* 52 Pa. C.S.A. 3215(c) (listing public resources).
31. *Id.* at 480.
32. MSC III, 292 A.3d at 936–37.
33. *Id.* at 956.

analysis garnered little support, but the reduced size of the bench on this matter led to a complete reversal of the Commonwealth Court.[34]

The Majority framed the issue as being one "key question, which is simply whether the Agencies acted within their statutory grant of authority."[35] "[A]t the end of the day," the Majority continued, "the **only** point that matters is whether the Agencies were authorized to act." *Id.* at 937 (emphasis original). Taking each of the Commonwealth Court's holdings in turn, the Majority reversed every single determination made by the lower court based upon the Majority's view the Oil and Gas Act authorized the Agencies' actions.

First, the Majority held the Commonwealth Court erred by striking the Agencies' definitions of "other critical communities," "common areas of a school's property," and "playground" within the ambit of "public resources."[36] The Majority concluded Section 3215(e) specifically "directs the Board to develop regulatory criteria concerning 'public resources.'"[37] The Majority viewed this as "limiting language"—i.e., without the statutory requirement to develop that regulatory criteria, the Board could have ignored it.[38] Furthermore, the Majority did not view the statutory language as setting a "floor" regarding what the Agencies could include within the definition of "public resources."[39] The Majority concluded the Agencies acted within their statutory authority.

Second, the Majority concluded the term "public resources" derives meaning from the Environmental Rights Amendment ("ERA").[40] The Majority acknowledged a problem with the expansive definition of "public resources" the Agencies (and now the Majority) advanced, stating "This Court has not been asked to definitively resolve what would qualify as a 'public resources,' and it is perhaps impossible to do so."[41] Expanding that premise, the Majority undertook to consider privately-held, manmade

34. Without the late Chief Justice Baer or Justice Brobson, the remaining five members of the Court broke down as Justice Donohue authoring the lead opinion, joined by Chief Justice Todd and Justice Dougherty (only as to Parts I – V and VI(C)(2) (concluding the Agencies' inclusion of the PNDI process in the regulatory definition of "other critical communities"); Justice Dougherty concurring and dissenting; Justice Wecht concurring and dissenting; and Justice Mundy dissenting.

35. *Id.* at 936.

36. *Id.*

37. *Id.* at 938.

38. *Id.*

39. *Id.*

40. *Id.* (citing Pa. Const. art. I, § 27).

41. *Id.*

objects as within the concept of "public resources" tying that view back to the ERA.[42]

Third, the Majority rejected the Commonwealth Court's (and the two concurring and dissenting opinions' and lone dissenting opinion's) analysis of the rulemaking under the ejusdem generis.[43] The Majority concluded the ejusdem generis analysis was misplaced. The Agency was not held to fit the "public resources" into the list of six statutory items codified in the Oil and Gas Act. The Majority concluded the ejusdem generis analysis is inappropriate because the term "public resources" already carries a legally significant meaning from the ERA.[44] As such, the Majority held the proper test of the Agencies' authority is "whether the items chosen by the Agencies fall within the ERA's conception of a 'public resource.'"[45] The Majority then analyzed the Agencies' definitions of "other critical communities," "common areas of a school's property," and "playground" under that test.

The Majority reversed the Commonwealth Court's striking down of the "other critical communities" as a "public resource." The Majority leaned on the public trustee duties in the ERA to conclude:

> A species that is presently in a proposed state of risk could be thrust into further jeopardy by nearby unconventional well development. We do not agree with the Commonwealth Court's notion that the Agencies were required to wait until a species reaches an even higher threat threshold as a prerequisite to protection where the interest of future generations of citizens must be considered.[46]

Additionally, the Majority did not find the inclusion of "other critical communities" as a "public resource" violated the Documents Law by failing to follow public notice requirements. The MSC argued, and the Commonwealth agreed, the definition of "other critical communities" violated the Documents Law because it included "species of special concern identified on a [Pennsylvania Natural Diversity Index ("PNDI")] receipt."[47] That is because the PNDI database changes over time—adding and removing species—without going through a public notice process. The

42. *Id.* at 941.
43. *Id.* at 943.
44. *Id.* 943–44.
45. *Id.* at 945.
46. *Id.* at 945.
47. 25 Pa. Code § 78a.1(i).

Commonwealth Court held in line with precedent that "the inclusion of the PNDI process in the regulatory definition of 'other critical communities' amounts to a continuing, de facto amendment of the regulation, exposing it to endless public notice requirements."[48] The Majority distinguished the information contained in a PNDI receipt from the "process," stating,

> While the PNDI receipt information may vary by site and over time, the basis for inclusion in the statutorily mandated database does not. It would indeed be illogical to require an inventory of the special ecological features of our Commonwealth but prohibit the Department from referencing it when considering permit applications.[49]

The Majority held the Commonwealth Court erred by concluding the regulatory definition of "other critical communities" violates the Documents Law.

Turning to the definitions of "common areas of a school's property" and "playgrounds" as "public resources," the Majority extended similar analysis to conclude the Agencies were within their authority. Again, tying back to the ERA, the Majority reasoned "Unadulterated outdoor recreation space is a basic component of quality of life and encompassed in the broadly defined values of the environment protected by the ERA. An unconventional gas well near spaces used by the public for recreational purposes could threaten the ambient air quality and cause significant noise pollution."[50]

Additionally, the Majority found the rulemaking reasonable. The Majority concluded the Commonwealth Court substituted its judgment for the Agencies in striking down the rulemaking as unreasonable. Additionally, the Majority found the burdens imposed by the regulations to "border[] on de minimis" because the features are "within the small-scale boundaries of a proposed new unconventional well."[51]

Finally, the Majority concluded the regulatory provision in 25 Pa. Code § 78a.15(g) allowing commentary from "public resource agencies" is not invalidated by the Court's decision in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013). In *Robinson Township*, the Court invalidated Section 3215(d) of the Oil and Gas Act. Section

48. MSC III, 292 A.3d at 946.
49. *Id.* at 946–47.
50. *Id.* at 947.
51. *Id.* 953.

3215(d) limited a municipalities ability to appeal the Department's decision related to a well permit. The Majority held the Agencies derived the authority to promulgate the regulation not from Section 3215(d), but from "surviving sections" of the Oil and Gas Act.

Justices Dougherty and Wecht both filed concurring and dissenting decisions, specifically taking issue with the Majority's analytical approach.[52] Justice Wecht noted the Majority's opinion, without paying heed to ejusdem generis, upsets the balance of statutory authority in favor of the regulator. "[A]s the Supreme Court of the United States more recently (and more pithily) put it," Justice Wecht continued, "Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[53]

Furthermore, Justice Wecht noted the problems with the Majority's rationale in relating the term "public resources" to the ERA. The principal problem with this rationale is, despite its repeated invocation of "the ERA's conception of 'public resources,'" the Lead Opinion glosses over the fact the ERA does not, in fact, refer to "public resources."[54] Justice Wecht distinguished, pointing out the ERA speaks of "public *natural* resources."[55] Not the manmade structures the Majority read into the definition.[56]

Moreover, Justice Wecht dissented from the Majority's holding the definition of "other critical communities," which depends on an evolving list of plants and animals included on the PNDI receipt, "fails to meet the requirements necessary to become lawful regulations."[57] Justice Wecht found this to be a fatal procedural defect.[58]

Finally, Justice Mundy dissented, finding "the Commonwealth Court correctly determined the Agencies exceeded their authority in promulgating the challenged regulations," and "that the requirements related to 'species of special concern' identified on a PNDI receipt violate the Documents

52. *See* MSC III, 292 A.3d at 956 (Doughtery, J., concurring and dissenting) ("I would also hold the Agencies exceeded their rulemaking authority by including private owners of such areas in the definition of '[p]ublic resource agency' codified at 25 Pa. Code § 78a.1.") and *Id.*, (Wecht, J., concurring and dissenting) (disagreeing with the "categorical rejection of *ejusdem generis*.").

53. *Id.* at 960.

54. *Id.* at 962.

55. *Id.* (emphasis original).

56. *Id.* at 963.

57. *Id.* 968–69.

58. *Id.* at 970.

Law."[59] At its base, Justice Mundy's dissent noted the standard of the review the Court must undertake:

> The Court must not ask if anything in an enabling statute **restricts** an agency from promulgating certain regulations, but rather if anything in the enabling statute **permits** an agency to promulgate the challenged regulations.[60]

Justice Mundy noted the Majority's opinion looked to the former, while the Commonwealth Court analyzed whether the Oil and Gas Act permitted the rulemaking.

In sum, the Commonwealth Court's opinion is reversed and unconventional oil and gas well applicants must now notify the "public resource agency responsible for managing the public resources identified in [25 Pa. Code § 78a.15(f)(1)] if any."[61]

2. Pa. Env't Def. Found. v. Commonwealth

- The Supreme Court rejected a challenge under the Environmental Rights Amendment to the Commonwealth's use of state oil and gas lease revenue to fund the DCNR's general operations and environmental projects outside of regions with state leases and also rejected a challenge to the commingling of lease revenue with other funds.

The Supreme Court of Pennsylvania decided the latest in a string of appeals brought by the Pennsylvania Environmental Defense Foundation ("PEDF") challenging the use of proceeds from oil and gas leases covering state forest and park lands.[62] PEDF argued certain Fiscal Code sections and the Commonwealth's use of lease proceeds violated the Environmental Rights Amendment in Article I, Section 27 of the Pennsylvania Constitution ("ERA").[63] Affirming the Commonwealth Court, a majority of the Supreme Court held neither the challenged use of the funds nor the Fiscal Code sections violated the Pennsylvania Constitution.

The ERA created a trust to conserve and maintain Pennsylvania's public natural resources.[64] The Pennsylvania Supreme Court struck down certain

59. *Id.* (Mundy, J. dissenting).
60. *Id.* at 971 (emphasis original).
61. 25 Pa. Code § 78a.15(f)(2).
62. Pa. Env'l Def. Found. V. Commonwealth, 279 A.3d 1194 (Pa. 1194) ("PEDF VI").
63. Pa. Const. art. I, § 27.
64. PEDF VI, 279 A.3d at 1197.

budgetary provisions regarding the use of oil and gas revenue for "non-trust purposes" via transfers of that revenue to the Commonwealth General Fund in PEDF's prior challenges.[65] PEDF's latest action challenged the constitutionality of certain provisions of the General Appropriations Act of 2017 and 2018, and the 2017 Fiscal Code amendments, all of which were enacted after *PEDF II*.[66] The challenges break down into four groups: (i) PEDF contests the constitutionality of the use of trust resources to fund the Department of Conservation and Natural Resources' ("DCNR's") general operations; (ii) PEDF seeks a declaration the revenue from oil and gas leasing on State forest and park lands should be reserved for environmental programs tied to the Marcellus Shale region from which the oil and gas revenue derived; (iii) PEDF challenges the repeal of the Oil and Gas Lease Fund Act and the transfer of the Oil and Gas Lease Fund ("Lease Fund") to the control of the General Assembly; and (iv) PEDF questions the constitutionality of specific aspects of the Lease Fund.[67]

First, PEDF argued the Section 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018 violated the Commonwealth's trustee duties by using trust resources to pay for general operations of DCNR.[68] PEDF took issue with the Commonwealth using Lease Fund revenue to pay for DCNR's general operations, including *inter alia*, the "salaries, wages or other compensation and travel expenses" of DCNR officers and employees of the Commonwealth, or for the "purchase or rental of goods and services" or "any other expenses . . . necessary for the proper conduct of the duties, functions and activities."[69] The Commonwealth distinguished the expenditures from those found unconstitutional in previous actions. In *PEDF II*, funds were placed in the General Fund which "removed DCNR's ability to act as trustee."[70] Here, DCNR maintained control over the funds and could continue to use them toward conversation and maintenance efforts.[71]

---

65. *Id.* (citing PEDF v. Commonwealth, 640 Pa. 55, 161 A.3d 911 (2017) ("PEDF II"); PEDF v. Commonwealth, 255 A.3d 289 (2021) ("PEDF V")).

66. *Id.*

67. *Id.* at 1197–98. The Commonwealth Court dismissed the challenges under the reasoning of Commonwealth Court's decision in PEDF v. Commonwealth, 214 A.3d 748 (Pa. 2019) ("PEDF III"), which was later rejected by the Supreme Court in PEDF V.

68. *Id.* at 1023.

69. *Id.* (citing General Appropriations Act of 2017 Section 104(P)).

70. *Id.*

71. *Id.*

The Supreme Court affirmed the Commonwealth Court's denial of the challenge. Looking to trust law, the Court concluded the Commonwealth, as trustee, is *empowered* by the ERA to incur reasonable costs in administering the trust to conserve and maintain Pennsylvania's public natural resources.[72] "Given these statutory responsibilities," the Supreme Court continued, "we conclude that the use of trust assets to fund DCNR's operations is within the authority of the Commonwealth as trustee to incur costs in administering the Section 27 trust, absent demonstration that these administrative costs are unreasonable or that the DCNR has failed to act with prudence, loyalty, or impartiality in carrying out its fiduciary duties."[73]

Second, the Court analyzed whether the Lease Fund monies could be used for environmental projects outside of the Marcellus Shale region.[74] PEDF argued doing so violated the ERA because "Commonwealth trustees should not be permitted 'to deplete, degrade, or diminish our State Forest and Park public natural resources to benefit another resource.'"[75] The Commonwealth countered, stating the plain language of Section 27 "does not provide geographic restrictions on the use of trust resources."[76] The Commonwealth Court rejected PEDF's argument as "myopic, when the Commonwealth was confronting a multitude of 'environmental threats from climate change to polluted waters to invasive species.'"[77] The Supreme Court agreed,

> Section 27 speaks in the unifying terms of "Pennsylvania's natural resources" and twice encompasses "all the people." Accordingly, we affirm the Commonwealth Court's denial of PEDF's proposed declaration seeking to regionalize Pennsylvania natural resources and to limit expenditure of oil and gas revenue to the Marcellus Shale Region from which it derived.[78]

Third, the Court reviewed PEDF's specific challenges to the 2017 repeal of the 1955 Oil and Gas Lease Fund Act, and the enactment of Section 1601.2-E of the Fiscal Code.[79] Again, PEDF argued the legislative changes

72. *Id.* at 1205 (emphasis added).
73. *Id.* at 1206.
74. *Id.*
75. *Id.*
76. *Id.* 1207.
77. *Id.* (citing PEDF IV, 2020 WL 6193643 at *8).
78. *Id.* at 1208 (internal citations omitted).
79. *Id.* (citing 2017 Fiscal Code Amendments § 20(2)(i); 72 P.S. § 1601.2-E(a)).

violated the ERA. PEDF claimed removing the Lease Fund from the sole control of the DCNR violated the ERA's mandate that the General Assembly "shall consider the Commonwealth's trustee duties . . . when making appropriates form the Lease Fund."[80] Furthermore, PEDF argued "the repeal of the Oil and Gas Lease Fund Act and transfer of the Lease Fund in Section 1601.2-E violated the [ERA] because the General Assembly eliminated the restrictions on the use of the funds that had been explicitly imposed by the Oil and Gas Lease Fund Act."[81] The Supreme Court relied on its decision in *PEDF II* to uphold the Commonwealth Court's denial of both challenges. As noted in *PEDF II*, "all Commonwealth entities, including the General Assembly, are bound to conserve and maintain Pennsylvania's public natural resources."[82] Simply shifting control of lease monies from DCNR to another Commonwealth Agency is not unconstitutional.

Finally, PEDF's challenges to Fiscal Code Sections 1601.2-E(b) (regarding commingling of funds) and 1726-G (the Keystone Fund) were equally unavailing. PEDF argued commingling trust assets with non-trust assets pursuant to Section 1601.2-E(b) violated the ERA. The Commonwealth argued the ERA does not expressly require separate accounts.[83] The Supreme Court agreed, concluding "PEDF failed to demonstrate that Section 1601.2-E(b) is facially unconstitutional given that the Commonwealth may fulfill the dictates of Section 1601.2-E(b) without violating its trustee duties under Section 27, by segregating the monies from the different funds and keeping an accurate accounting."[84]

Likewise, PEDF challenged Section 1726-G's transfer of funds from the Keystone Recreation, Park and Conservation Fund ("Keystone Fund") to the General Fund. PEDF argued such a transfer effects the public trust in a manner requiring public notice and evaluation of the "effect of the transfer."[85] The Commonwealth Court disagreed, noting "the Keystone Fund derives not from the proceeds of oil and gas leasing but instead from the sales of bonds and notes and the State Realty Transfer Tax."[86] Additionally, the Commonwealth Court concluded "Commonwealth entities are not obligated by their fiduciary responsibilities under Section 27

80. *Id.*1209.
81. *Id.*
82. *Id.* at 1210 (citing PEDF II, 161 A.3d at 931 n.23).
83. *Id.* at 1212.
84. *Id.* at 1212–13.
85. *Id.* at 1213.
86. *Id.* (citing PEDF IV, 2020 WL 6193643 at *15).

to provide public evaluation of every transfer of non-trust funds that might implicate Pennsylvania's natural resources."[87] The Supreme Court agreed:

> The Keystone Fund does not involve trust assets but rather allocates funds derived from non-trust sources of Commonwealth revenue. We likewise do not find support in Section 27 or basic trust law for PEDF's claim that the Commonwealth must provide a public evaluation for every decision that could potentially impact Pennsylvania's natural resource trust.[88]

The Supreme Court affirmed the Commonwealth Court's order denying PEDF's challenge.

B. Pennsylvania Superior Court

1. Hunnell as Tr. of Hunnell Fam. Revocable Living Tr. v. Krawczewicz

- The Superior Court affirmed summary judgment in favor of oil and gas lessors and their lessee and against the surface owner, holding a provision in a deed constituted an exception rather than a reservation of the oil and gas.

The plaintiffs, the Hunnells, owned the surface of 104 acres in West Bethlehem County, Washington County (the "Property"), and filed a claim for declaratory judgment of their ownership of the oil and gas rights under the Property against the Krawczewiczes and their oil and gas lessee, EQT Production Company ("EQT").[89] At the trial court level, the Court of Common Pleas of Washington County granted summary judgment in favor of the Krawczewiczes and EQT, which the Hunnells appealed.[90]

The relevant undisputed facts were: (1) on December 7, 1920, W.N. and Abbie Theakston entered into an oil and gas lease with The Manufacturers Light & Heat Company for the captioned property for a term of one year and a production based secondary term ("Lease"); and (2) on February 23, 1924, W.N. and Abbie Theakston conveyed the property to Ernest Brtkow, by a deed which excepted and reserved the coal and minerals and further provided "[a]ll the oil and gas within and underlying the hereinbefore described tract of land is also reserved together with such rights to drill or

87. *Id.*

88. *Id.* at 1213–14.

89. Hunnell as Tr. of Hunnell Fam. Revocable Living Tr. v. Krawczewicz, 2022 PA Super 166 (Sept. 29, 2022).

90. *Id.* at 1195.

operate for same as are set forth in full in lease by said W.N. Theakston et ux, lessors, to Manufacturers Light and Heat Company, lessee, dated Dec. 7, 1921."[91] "The Lease [leased] granted 'unto said lessees all the oil and gas in and under the tract of land … for the purpose and with the exclusive right of draining and operating thereon for said oil and gas, together with the right of way, and the right to use sufficient water and gas from the premises to drill and operate wells thereon, and such other rights and privileges as are necessary for conducting and operations, and the right to remove, at any time, all property placed thereon by the lessee.'"[92] EQT intervened as it had subsequently acquired interests from a number of the Theakston heirs named in the Hunnell's writ of summons.

The Hunnells argued "(a) the language in the Theakston Deed constituted a 'reservation' of oil and gas rights which passed to the surface owner at Theakston's death; and (b) there is no evidence oil and gas production occurred under the Manufacturers Lease prior to February 3, 1924."[93] Whereas EQT argued the language in a deed was an "exception" of the fee interest in the oil and gas in place, which was retained therein by the Theakstons. The trial court granted summary judgment in favor of EQT and the Hunnells appealed.

In deed interpretation a court must focus on the intent of the parties and interpret it against the drafters using the meaning of the words therein. Absent fraud, accident, or mistake the court cannot use parol evidence in deed interpretation. The court then proceeded to provide background as to the interpretation of exceptions and reservations.

> The terms "exception" and "reservation" have been used interchangeably in deeds. *Walker v. Forcey*, 396 Pa. 80, 151 A.2d 601, 606 (1959). A reservation pertains to incorporeal things that do not exist at the time the conveyance is made. [*Walker*, 151 A.2d at 606.] See *Lauderbach—Zerby Co. v. Lewis*, 283 Pa. 250, 129 A. 83, 84 (1925) (reservation is creation of a right or interest that did not exist prior to grant). However, even if the term "reservation" is used, if the thing or right reserved is in existence, then the language in fact constitutes an exception. *Walker*, 151 A.2d at 606; *Silvis v. Peoples Natural Gas Co*., 386 Pa. 453, 126 A.2d 706, 708 (1956) (where no new rights are created, language treated as exception). If there is a

91. *Id.*
92. *Id.*
93. *Id.* at 1196.

> reservation, it ceases at the death of the grantor, because the thing reserved was not in existence at the time of granting and the thing reserved vests in the grantee. [*Silvis*, 126 A.2d at 708.] An exception, on the other hand, retains in grantor the title of the thing excepted. Id. Because the exception does not pass with the grant, it demises through the grantor's estate absent other provisions. Id. at 709.[94]

Applying the above analysis to the fact of the case the Superior Court held

> "[b]ecause the oil and gas clause in the Theakston Deed created no new right or interest, we agree with the trial court's conclusion that the oil and gas clause constituted an 'exception' of oil and gas rights. See Wright, 125 A.3d at 819 ('A reservation pertains to incorporeal things that do not exist at the time the conveyance is made. . . . However, even if the term 'reservation' is used, if the thing or right reserved is in existence, then the language in fact constitutes an exception.')."[95]

Therefore, the Superior Court held the Hunnells did not own the oil and gas and affirmed the Court of Common Pleas.[96]

C. Pennsylvania Commonwealth Court

1. Lodge v. Robinson Twn. Zoning Hearing Bd.

- The Commonwealth Court affirmed the decision of the Court of Common Pleas of Washington County, which dismissed a land use appeal where the objectors to an oil and gas zoning ordinance lacked standing.

The Board of Supervisors of Robinson Township passed the challenged zoning ordinance in 2014 ("Ordinance 1-2014").[97] Ordinance 1-2014 classified oil and gas well site development, oil and gas sub-surface facilities and activities, and natural gas compressor stations as "permitted principal uses" in the Interchange Business District, Agricultural, Rural Residential and Industrial Districts.[98] The ordinance provided certain

94. *Id.* at 1198.
95. *Id.* at 1201-02.
96. *Id.* at 1202.
97. Lodge v. Robinson Twn. Zoning Hearing Bd., 283 A.3d 910, 914-15 (Pa. Commw. Ct. 2022).
98. *Id.* at 915.

performance standards that the oil and gas development must comply with. Ordinance 1-2014 allowed oil and gas development as a conditional use in the Special Conservation and Commercial Districts, but was not permitted in Single Family Residential and General Residential Districts.[99]

The Objectors, Christopher Lodge, Cathy Lodge (the "Lodges"), Nolan Vance, Brenda Vance (the "Vances"), Richard Barrie, and Irene Barrie (the "Barries"), filed a pre-enforcement, facial substantive validity challenge with the Zoning Hearing Board ("ZHB") on September 2, 2014, based largely on Environmental Rights Amendment arguments that had recently been given life in the Supreme Court's plurality decision in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013). The Objectors argued Ordinance 1-2014 was "invalid because it does not promote the public health, safety and welfare, fails to satisfy the constitutional and statutory mandate that zoning laws promote and protect the preservation of the natural, scenic and historic values of the environment under the Environmental Rights Amendment" found in Article I, Section 27 of the Pennsylvania Constitution.[100]

Range Resources Appalachia received a zoning permit to development "Moore Park Well Pad" shortly after the Objectors filed the substantive validity challenge.[101] The ZHB held a hearing on the challenge on October 30, 2014. Range Resources moved to dismiss for lack of standing and ripeness.[102] The ZHB allowed the parties to submit briefs on these issues.

During that time, the Objectors filed a second substantive validity challenge on December 17, 2014, as-applied to the approved zoning permit.[103] The ZHB issued two decisions on the two challenges, which dismissed the Objectors' challenges. The ZHB dismissed the first validity challenge because Objectors did not allege the use or development of their properties were prohibited or restricted by Ordinance 1-2014.[104] Furthermore, they failed to establish they had standing because "they only presented generalized interests common to the entire Township's population, and their interests are neither substantial nor immediate."[105] The ZHB dismissed the second challenge because they filed it while the first

99. *Id.*
100. *Id.* at 915.
101. *Id.*
102. *Id.* at 916.
103. *Id.*
104. *Id.* at 916.
105. *Id.* at 916-17.

challenge remained pending.[106] The Objectors appealed to the Court of Common Pleas.

After developing the record at hearings, the trial court held the Objectors lacked standing to challenge the validity of the zoning ordinance.[107] The court concluded the Objectors had failed to meet their burden to establish that any of their concerns and alleged adverse impacts raised were caused "by the application of the challenged Ordinance to the permit application for the Moore Park well pad."[108] The court noted all the Objectors lived over half of a mile from the Moore Park well pad. The trial court found "Objectors' contention, that they suffered actual harm from facilities authorized by Ordinance 1-2014 to be speculative, unpersuasive[,] and unsupported by the hearing record as a whole."[109]

The Commonwealth Court began its analysis with Section 916.1 of the Municipalities Planning Code ("MPC"), which sets forth the requirements for standing in a validity challenge.[110] Section 916.1 states in relevant part:

> (a) A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use of development of land in which he has an interest shall submit the challenge. . . .
>
> (b) Persons aggrieved by a use or development permitted on the land of another by an ordinance or map, or any provision thereof, who desires to challenge its validity on substantive grounds shall first submit their challenge to the zoning hearing board . . . .[111]

Here, the Objectors could only establish standing under subsection (b), which allows persons who do not own the land affected by an ordinance to challenge the ordinance if they are *aggrieved* by a use or development permitted on the land by virtue of an ordinance.[112] To be "aggrieved," a

106. *See* 53 Pa. Stat. Ann. § 10916.1(i) ("A landowner who has challenged on substantive grounds the validity of a zoning ordinance or map . . . shall not submit any additional substantive challenges involving the same parcel, group of parcels or part thereof until such time as the status of the landowner's original challenge has been finally determined or withdrawn[.]").

107. Lodge, 283 A.3d at 917.

108. *Id.*

109. *Id.* at 921.

110. *Id.* at 924.

111. 53 Pa. Stat. Ann. § 10916.1.

112. Lodge, 283 A.3d at 924 (emphasis added).

party must have a party must have a "substantial, direct, and immediate interest in the claim sought to be litigated"[113]:

> To have a substantial interest, there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. Therefore, a property owner who asserts no interest in the zoning challenge other than the interest common to all citizens does not have standing. Therefore, it is not sufficient for the person claiming to be aggrieved to assert the common interest of all citizens in procuring obedience to the law.
>
> The interest must also be direct and immediate and not a remote consequence of the judgment. The interest is direct "if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative."[114]

The Commonwealth Court concluded there was ample evidence before the Court of Common Pleas to support its conclusion that the Objectors lacked standing. First, the Objectors did not demonstrate a causal connection between the harms complained of and the challenged Ordinance 1-2014.[115] In other words, "[a] key component of the *William Penn* standing analysis, and whether an objector is 'aggrieved' for purposes of the MPC, is whether the proposed use in question, or, in a substantive validity challenge, the challenged ordinance, *actually causes the injury complained of by the objector*."[116] "The Commonwealth Court noted, "Objectors' concerns about the 'sprawling nature of the construction and development of oil and gas facilities and infrastructure in Robinson Township and their concerns and feelings as to future development and the transformation of the vicinity of their homes and the Township into industrial areas' were speculative."[117] The Objectors' "speculative concerns regarding safety are not sufficient to confer standing."[118]

---

113. *Id.* (citing Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 284 (1975)).

114. Lodge, 283 A.3d at 924 (internal citations omitted).

115. *Id.* at 925.

116. *Id.* at 926 (emphasis added).

117. *Id.* (internal citations omitted).

118. *Id.* at 927.

2. Twn. of Marple v. Pa. Pub. Util. Comm'n

- The Commonwealth Court vacated a decision by the Pennsylvania Public Utility Commission's ("PUC") finding a proposed gas reliability station was "reasonably necessary for the public convenience or welfare of the public" and, therefore, should be exempt from Marple Township's Zoning Ordinance.[119]

PECO Energy Company initiated a project to construct a gas reliability station in Marple Township, Delaware County, Pennsylvania ("Project").[120] The Project included two buildings: a "Station Building" and a "Fiber Building."[121] PECO applied for a zoning permit from Marple Township's Zoning Hearing Board to construct the Project as a special exception under the Marple Township Zoning Ordinance.[122] The Zoning Hearing Board denied the application.[123]

After receiving the denial, PECO sought a determination from the PUC that the Project was exempt from the Township's Zoning Ordinance. Pursuant to Section 619 of the Municipalities Planning Code ("MPC"), 53 Pa. Stat. § 10619, the PUC has authority determine if the siting of a building used by a public utility corporation is exempt from local land use regulation (i.e., zoning) if the building is "reasonably necessary for the convenience or welfare of the public." This is an exception to the zoning powers the MPC confers upon municipalities.

The PUC held hearings and a two administrative law judge panel found PECO met its burden and the Project was exempt.[124] The panel found concerns raised by the Township and certain protestants regarding "noise, gas emissions, aesthetics, traffic, and other health and safety concerns were beyond the Commission's review." *Id*.

In reaching its finding, the PUC concluded it was not empowered under Section 619 of the MPC to evaluate the environmental impact of the project. The PUC deferred to "agencies with jurisdiction over such environmental impacts, including the Pennsylvania Department of Environmental Protection."[125] The Township and Protestants appealed to the Commonwealth Court.

---

119. Twn. of Marple v. Pa. Pub. Util. Comm'n, 294 A.3d 965 (Pa. Commw. Ct. 2023).
120. *Id.* at 968.
121. *Id.* at 969.
122. *Id.*
123. *Id.*
124. Twp. of Marple, 294 A.3d at 970.
125. *Id.* at 973.

The Commonwealth Court reviewed the PUC's order to "determine whether the Commission's findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated."[126]

The Commonwealth Court disagreed with the PUC's decision regarding the scope of the PUC's review, holding, "in proceedings of this nature, the Commission is *obligated* to consider 'the environmental impacts of placing [a building at [a] proposed location,' while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters."[127]

The Commonwealth Court concluded the PUC's obligation is not found in the MPC, but in the Environmental Rights Amendment ("ERA"), Article I, Section 27 of the Pennsylvania Constitution. The Court held "a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building site proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting."[128] The Court found the PUC failed to fulfill this obligation. The Commonwealth Court noted, "though it stated that it would defer to other agencies' determinations regarding environmental issues" the PUC "*failed to identify any such agency determinations* that pertained to explosion impact radius, noise, or heater emissions."[129]

The Court vacated the PUC's decision and instructed that "it issue an Amended Decision regarding the PECO Petition, which must incorporate the results of a constitutionally sound environmental impact review as to the proposed siting" of the buildings.[130]

D. United States District Courts

1. Warner Valley Farm, LLC v. SWN Prod. Co., LLC

- The United States District Court for the Middle District of Pennsylvania held the Oil and Gas Lease Act's provision permit cross-units wells was not unconstitutional and the parties' leases permitted cross-unit drilling.

126. Popowsky v. Pa. Pub. Util. Comm'n, 910 A.2d 38 (Pa. 2006).
127. Twp. of Marple, 294 A.3d at 974 (emphasis in original).
128. *Id.*
129. *Id.* at 974-5 (emphasis original).
130. *Id.* at 975.

Plaintiff oil and gas lessee, Warner Valley Farm, LLC ("Warner") sued defendant lessees, SWN Production Company and Repsol Oil & Gas, LLC ("Operators), for breach of 2006 leases on lands in Bradford County, Pennsylvania and seeking a declaration that Act 85 of 2019 is unconstitutional under the Contracts Clause of the Federal and Pennsylvania Constitutions.[131] Warner and the Operators brought cross-motions for summary judgment.

Act 85 of 2019 amended the Oil and Gas Lease Act[132] to add Section 34.2 regarding cross-unit drilling, which states, in part:

> **(a) General rule. –** If an operator has the right to drill an oil or gas well on separate units, the operator may drill and produce a well that traverses, by horizontal drilling, more than one unit, if:
>
> (1) The operator reasonably allocates production from the well to or among each unit the operator reasonably determines to be attributable to each unit. The operator may allocate production on an acreage basis for multiple units provided the allocation has a reasonable correlation to the portion of the horizontal well bore in each unit.
>
> (2) The traversing well is not expressly prohibited by the terms of a lease.[133]

Act 85 allows an operator to produce from two different units by one well (cross-unit drilling).[134] Act 85's purpose was to increase efficiency and reduce the environmental impact of oil and gas drilling by decreasing the number of wells necessary, commensurately reducing the need for additional appurtenant oil and gas production facilities.[135] Act 85 also removed a 330 foot well setback rule applicable to deep wells subject to the Oil and Gas Conservation Law.[136]

To determine whether legislation violates the Contracts Clause, the court first determines if it substantially impairs an existing contractual relationship.[137] A law substantially impairs a contract if it undermines the

131. Warner Valley Farm, LLC v. SWN Prod. Co., LLC, No. 4:21-CV-01079, 2023 WL 373237, *1 (M.D. Pa. Jan. 24, 2023).

132. 58 P.S. § 33.1, et seq.

133. 58 P.S. § 34.2.

134. Warner Valley Farm, LLC, 2023 WL 373237 at *2.

135. *Id.*

136. *Id.* (citing 58 P.S. § 406).

137. *Id.* at *3 (citing Nekrilov v. City of Jersey City, 45 F.4th 662, 678 (3d Cir. 2022)).

contractual bargain, interferes with a party's reasonable expectations and prevents the party from safeguarding their rights.[138] If a law substantially impairs a contractual relationship, the court evaluates whether the law (1) has a significant and legitimate public purposes; and (2) is drawn appropriately and reasonably to advance that public purposes.[139]

Warner argued Act 85 impairs its leases by authorizing cross-unit drilling. The District Court rejected this argument, noting the Act exempted leases that expressly prohibit cross-unit drilling.[140] The District Court also rejected Warner's argument that the allocation provision impaired their contract, because the allocation provision permits reasonable methods to allocate production.[141] Although the District Court had concluded the leases were not impaired by Act 85, it further concluded that even if it did so, the Act was an "appropriate and reasonable way to advance a significant and legitimate public purposes."[142]

The District Court next considered whether the leases permitted drilling of cross-unit wells. The Warner leases contained provisions granting lessees the right to "in [their sole discretion . . . pool, unitize or combine all or any portion of the Leasehold with any other land or lands, whether contiguous or not contiguous . . . so as to create one (1) or more drilling or production units."[143] The District Court noted the term "combining" was broader than the technical terms "pooling" and "unitizing" and concluded the term permitted lessees to combine the leases with non-unitized lands:

> Given the 2006 Lease's reference to non-contiguous lands, the Court interprets "combining," as used in the 2006 Lease, to allow Defendants to couple or join the Leasehold with contiguous or non-contiguous lands beyond unit boundaries. If they choose to do so, drilling on any parcel of land within that combination of parcels is as good as drilling on the Leasehold. That's cross-unit drilling.[144]

The District Court granted the Operators motions for summary judgment and denied Warner's motion.[145]

---

138. *Id.* at *3 (citing Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018)).
139. *Id.* at *4 (citing Nekrilov, 45 F.4th at 678).
140. *Id.*
141. *Id.* at *5.
142. *Id.* at *6 (quoting Sveen, 138 S. Ct. at 1822).
143. *Id.* at *2.
144. *Id.* at *8.
145. *Id.* at *9.

2. Johnson v. Keane Grp. Holdings, LLC

- The United States District Court for the Middle District of Pennsylvania denied motions for summary judgment by indemnitee oil and gas operator and contractor against water hauling contractor indemnitor on the ground that issues of fact as to indemnitees gross negligence precluded summary judgment in their favor.

Oil and gas operator Seneca Resources Company, LLC ("Seneca") operated a well site in Mt. Jewett, Pennsylvania. Seneca contracted with Defendants, Keane Group Holdings, LLC d/b/a Fracking and Drilling Services, LLC, and Keane Group, Inc. (collectively "Keane") and Patrik's Water Hauling (USA) Ltd. ("Patrik's") for wellsite services. Patrik's and Seneca had entered into a Master Services Agreement to govern their relationship ("MSA"). Section 7.2 of that MSA provided "[e]xcept in the case of [Seneca's] gross negligence or willful misconduct, [Seneca] shall not be responsible for, and [Patrik's] shall . . . hold Company Group . . . harmless from . . . any [c]laims . . . arising out of . . . [b]odily injuries or death of any member(s) of Contractor Group." "Company Group" referred to Seneca and Seneca's contractors other than Patrik's and "Contractor Group" referred to Patrik's and any of Patrik's agents.[146]

In 2018, a Keane employee fell into a hole and was injured. Afterwards, Danny Johnson, plaintiff and an employee of Patrik's, was directed to vacuum the water out of the hole, where he proceeded to fall in and hurt himself.[147] It is disputed what, if any other remedial steps were taken to make the wellsite safe after the initial Keane employee injury. Seneca demanded Patrik's indemnify or defend regarding the suit arising from the Johnson injury. The MSA had an exclusion for gross negligence by the indemnitee: "Under Section 7.2, Patrik's has no duty to indemnify or defend against claims against Seneca that arise out of Seneca's own 'gross negligence.'"[148]

"As is perhaps evident in their dispute, the precise definition of gross negligence is a source of confusion in Pennsylvania jurisprudence."[149] Seneca and Keane relied on a standard of gross negligence set forth in the Pennsylvania Superior court case *Williams v. State Civil Service*

146. Johnson v. Keane Grp. Holdings, LLC, No. 4:20-CV-00491, 2023 WL 3231620, *1 (M.D. Pa. May 3, 2023).

147. *Id.* at *2.

148. *Id.* at *4.

149. *Id.*

Commission.[150] Patrik's relied on a different Pennsylvania Superior Court decision: *Bloom v. Dubois Regional Medical Center.*[151] The *Bloom* court "noted that the Commonwealth Court of Pennsylvania in *Williams* defined gross negligence as the 'failure to perform a duty in reckless disregard of the consequences or with such want of care as to justify a conclusion of willfulness or wantonness.'"[152] *Bloom* concluded that gross negligence "clear[ly] . . . does not encompass wanton or reckless behavior."[153] The Pennsylvania Supreme Court has not adopted a standard for gross negligence, but commented in *Feleccia v. Lackawanna College*, "gross negligence does not rise to the level of the intentional indifference or 'conscious disregard' of risks that defines recklessness."[154] As a result of this analysis and the overarching lack of authority the District Court held "a finding of gross negligence does not require evidence of recklessness."[155]

The District Court held as applied to the facts of the case, there was evidence that some precautions could have been taken to prevent Johnson from being injured. However, what steps could have been taken and what would have been reasonable were disputed and as such the motion for summary judgment was denied.[156]

3. Diehl v. SWN Prod. Co., LLC

- The United States District Court for the Middle District of Pennsylvania granted defendant operator's motion to dismiss plaintiffs lessors' claim that the operator breached the implied covenant to develop the lease when operator had producing wells on two units that included the lease.

On October 25, 2007, Plaintiffs, the Diehls, leased 160.94 acres in Susquehanna County, Pennsylvania. Defendant, SWN Production Company, LLC ("SWN"), was assigned the lease and became the sole lessee.[157] Portions of the leasehold were included by Defendant in the

150. Williams v. State Civil Serv. Comm'n, 9 Pa. Cmwlth. 437, 306 A.2d 419 (1973).

151. Bloom v. Dubois Reg'l Med. Ctr., 409 Pa. Super. 83, 597 A.2d 671, 2 NDLR P 101 (1991).

152. Johnson, 2023 WL 3231620 at *4 quoting Bloom at 678

153. *Id.* (quoting Bloom, 597 A.2d at 679, citing Kasanovich v. George, 348 Pa. 199, 34 A.2d 525 (1943)).

154. Feleccia v. Lackawanna Coll., 654 Pa. 324, 215 A.3d 3, 20 (2019).

155. Johnson, 2023 WL 3231620 at *6.

156. *Id.* at *7.

157. Diehl v. SWN Prod. Co., LLC, No. 3:19-CV-1303, 2022 WL 3371327, at *1 (M.D. Pa. Aug. 16, 2022).

Walker Diehl North Gas Unit and the Walker Diehl South Gas Unit. Each unit had one producing natural gas well.

The Diehls, among other claims, asserted SWN breached the implied covenant to develop hydrocarbons under an oil and gas lease by failing to drill additional wells on the units. Previously, all other counts in their complaint had been dismissed and the Diehls were allowed to amend their claim for breach of the implied covenant to develop. The current motion was to dismiss the amended claim for breach of the implied covenant and a claim to quiet title to the oil and gas.[158]

Previously, the District Court had held "[t]he review of Pennsylvania Superior Court decisions indicates that the Superior Court has consistently concluded that an implied duty to develop was not applicable or was not breached when the lessor was not holding the property without developing it—where development had commenced it was the express terms of the lease that controlled."[159] The Diehls did not contend there was not production in paying quantities. As SWN was operating the premises, the District Court held the terms of the lease had been met and the implied duty to develop did not require further natural gas development of the leasehold by Defendant.[160]

In the alternative, Plaintiffs argued Defendant was not acting in good faith by not further developing the leasehold. The court disagreed with this argument, citing *Colgan v. Forest Oil Co*.[161]:

> So long as the lessee is acting in good faith on business judgment, he is not bound to take any other party's, but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith on his business judgment, but *fraudulently*, with intent to obtain a dishonest advantage over the other party to the contract. Nor is the lessee bound, in case of difference of judgment, to surrender his lease, even pro tanto, and allow the lessor to experiment. Lessees who have bound themselves by covenants to develop a tract, and have

158. *Id.*
159. *Id.* at *3.
160. *Id.* at *4.
161. Colgan v. Forest Oil Co., 45 A. 119 at 121 (Pa. 1899).

> entered and produced oil, have a vested estate in the land, which cannot be taken away on any mere difference of judgment.[162]

As a result, for SWN to be acting in bad faith, it would have to be acting fraudulently. The District Court concluded the Diehls introduced insufficient allegations of fraud: "Plaintiffs' conclusory assertion that Defendant's failed to develop the hydrocarbons in a 'reasonable and good faith manner' cannot sustain a claim under *Colgan*. Because fraud is not averred in Plaintiffs' Amended Complaint, Count IV cannot go forward on Plaintiffs' claim as pled."[163] The District Court declined to dismiss the separate claim for quiet title, because SWN failed to raise its arguments in its first motion to dismiss, as required under Rule 12(g)(2): "Defendant does not present any cogent analysis as to why it could not have raised the arguments regarding the duty to market or the failure of both wells to produce in paying quantities in its previous motion. Therefore, this Court will not entertain those arguments here."[164]

162. Diehl, 2022 WL 3371327, at *6 (emphasis added).
163. *Id.* at *6.
164. *Id.* at *8.