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## Virginia

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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## VIRGINIA



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### *I. Introduction*

The following is an update on Virginia legislative activity and case law relating to oil, gas and mineral law from August 1, 2016 to July 1, 2017.

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## *II. Legislative and Regulatory Developments*

The following is a discussion of notable legislation:

### *A. House Bill 2169*

House Bill 2169 (“H.B. 2169”)—An Act to amend and reenact § 58.1–3713 of the Code of Virginia, relating to local gas severance tax; extension of sunset date.

Generally, Virginia Code § 58.1–3713 authorizes any county or city to adopt a license tax on every person engaging in the business of severing gases from the earth. Although set to expire in 2018, H.B. 2169 amended Virginia Code § 58.1–3713 by extending the sunset date from 2018 to 2020.

### *B. Senate Bill 910*

Senate Bill 910 (“S.B. 910”)—An Act to amend and reenact § 45.1–361.43 and Virginia Code § 45.1–361.44 of the Code of Virginia, relating to gas and oil drilling; groundwater.

Virginia Code § 45.1–361.43 and Virginia Code § 45.1–361.44 HB 910 grant an oil and gas operator the right to enter upon the surface of a property at reasonable times and in a reasonable manner to obtain samples of water from water wells. Previously, limited to 750 feet surrounding a proposed or existing gas well, S.B. 910 amended Virginia Code § 45.1–361.43 and Virginia Code § 45.1–361.44 by extending this right to an area from 750 feet to 1,320 feet.

## *III. Judicial Developments*

### *A. Supreme Court Cases*

The Supreme Court of Virginia issued two opinions addressing the application of Virginia Code § 56–49.01, which provides for a means by which a company operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, can enter onto the premises of a non-consenting land owner for the purpose of making examinations, tests, surveys, etc., for a proposed pipeline.

#### *1. Chaffins v. Atlantic Coast Pipeline, LLC*<sup>1</sup>

In *Chaffins v. Atlantic Coast Pipeline, LLC*, the Supreme Court of Virginia clarified the notice provision under Virginia Code § 56–49.01(C).

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1. 293 Va. 564, 801 S.E.2d 189 (2017).

*a) Facts and Proceedings*

While in the process of constructing a pipeline for the purpose of transporting natural gas, the Atlantic Coast Pipeline, LLC sought permission from Charles Chaffins, Linda Chaffins, Michael Huntley, and Beverly McQuary (collectively, the “Landowners”) to enter onto their property to conduct preliminary surveys and studies as required by the Federal Energy Regulatory Commission.<sup>2</sup> The Landowners refused to grant their permission, after which Atlantic Coast Pipeline, LLC relied on Virginia Code Section (“V.C.”) § 56–49.01 in order to gain access to the premises.<sup>3</sup> Pursuant to V.C. § 56–49.01(C), a natural gas company must provide notice of their intent to enter the premises, and that notice must “set forth the date of the intended entry.”<sup>4</sup> Atlantic Coast Pipeline, LLC provided notice to the Landowners, stating therein that entry would occur “on or after April 27, 2015.”

Atlantic Coast Pipeline, LLC filed petitions with the circuit court seeking declaratory judgments against the Landowners, seeking an order declaring that, pursuant to V.C. § 56–49.01, Atlantic Coast Pipeline, LLC had the right to enter the Landowners’ properties.<sup>5</sup> The Landowners argued that the notices failed to establish the date of the intended entry required under V.C.S. § 56–49.01(C) because the time frame provided in the notice, “on or after April 27, 2015,” was too broad.<sup>6</sup> On April 13, 2016, the circuit court issued a final order entitling Atlantic Coast Pipeline, LLC to enter the Landowners’ properties pursuant to Code § 56–49.01.<sup>7</sup>

*b) Ruling of the Supreme Court of Virginia*

The Supreme Court of Virginia granted appeal and overruled the decision of the Circuit Court, holding that Virginia Code § 56–49.01(C) “requires that a notice of intent to enter provide dates certain upon which entry is intended.”<sup>8</sup> Atlantic Coast Pipeline, LLC’s “on or after notices failed to do this.”<sup>9</sup> The Supreme Court of Virginia reasoned that

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2. *Id.* at 566–67.

3. *Id.*

4. VA. CODE ANN. § 56–49.01(C) (West 2017).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 570.

9. *Id.* (internal quotations omitted).

[w]hile in some cases the above interpretation of Code § 56–49.01(C) may require [Atlantic Coast Pipeline, LLC] to reissue a notice of intent to enter, this does not render the statute internally inconsistent or incapable of operation. It would be, at most, inconvenient or logistically difficult for [Atlantic Coast Pipeline, LLC]. However, the General Assembly has determined that such difficulties are necessary in exchange for the privilege of entering private property without the owner’s permission.<sup>10</sup>

## 2. *Palmer v. Atlantic Coast Pipeline, LLC*<sup>11</sup>

In *Palmer v. Atlantic Coast Pipeline, LLC*, the Supreme Court of Virginia clarified the residency requirements under Virginia Code § 56–49.01(A) and affirmed its constitutionality.

### a) *Facts and Proceedings*

While constructing a pipeline for the purpose of transporting natural gas, Atlantic Coast Pipeline, LLC sought permission from Hazel Palmer (“Landowner”) to enter onto her property to conduct preliminary surveys and studies as required by the Federal Energy Regulatory Commission.<sup>12</sup> Landowner refused to grant permission to access her property, and Atlantic Coast Pipeline, LLC provided notice of their intent to enter onto her property under Virginia Code Section (“V.C.”) § 56–49.01.<sup>13</sup> Atlantic Coast Pipeline, LLC petitioned the circuit court for a declaratory judgment requesting a declaration of its rights under Virginia Code § 56–49.01.<sup>14</sup>

V.C. § 56–49.01(A) provides that:

Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i) to satisfy any regulatory requirements and (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities, and for such

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10. *Id.* at 570.

11. 293 Va. 573, 801 S.E.2d 414 (2017).

12. *Id.* at 576.

13. *Id.* at 577.

14. *Id.*

purposes, by its duly authorized officers, agents, or employees, may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C. A natural gas company may use motor vehicles, self-propelled machinery, and power equipment on property only after receiving the permission of the landowner or his agent.<sup>15</sup>

Landowner argued that V.C. § 56–49.01 “only applies to domestic public service companies because it is within Title 56 of the Code of Virginia,”<sup>16</sup> which governs Public Service Companies, and that Atlantic Coast Pipeline, LLC, as a company organized under the laws of the State of Delaware, was outside of this definition. Additionally, Landowner argued that the statute must be interpreted to avoid conflicting with Article IX, § 5 of the Constitution of Virginia.<sup>17</sup> The circuit court held that Virginia Code § 56–49.01 “turns upon a definition borrowed from [15 U.S.C. § 717a] rather than an implied definition suggested by its placement within the Code of Virginia” and that “[a] landowner has no constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes.”<sup>18</sup>

*b) Ruling of the Supreme Court of Virginia*

The Supreme Court of Virginia granted appeal, and affirmed the ruling of the circuit court. With regard to Landowner's first argument, that V.C. § 56–49.01 only applies to domestic natural gas companies because it is located within Title 56 of the Virginia Code, which governs Public Service Companies,<sup>19</sup> the Supreme Court of Virginia noted that under Title 56, the definition of “corporation” and “company” includes “*all corporations . . . doing business therein.*”<sup>20</sup> Accordingly, the Supreme Court of Virginia held that “both domestic corporations and foreign corporations that are “doing

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15. VA. CODE ANN. § 56–49.01(A) (West 2017).

16. *Palmer*, 293 Va. at 577, 801 S.E.2d at 417.

17. *Id.* at 578.

18. *Id.* at 577, 801 S.E.2d at 416 (internal quotations omitted).

19. *Id.* at 578.

20. *Id.* (citation omitted).

business” within the Commonwealth—such as [Atlantic Coast Pipeline, LLC]—are included in the definition of “corporation” for the purposes of Title 56.”<sup>21</sup>

Regarding Landowner’s second argument, in which V.C. § 56–49.01 impermissibly burdens a fundamental right, the Supreme Court of Virginia noted that with respect to the constitutionality of an act of the legislature, “[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.”<sup>22</sup> The Supreme Court of Virginia went further, citing both statutory and common law precedent dating back to 1782 allowing surveyors to enter private land for specified purposes without permission of the land owner.<sup>23</sup> Landowner acknowledged this precedent, but asserted that the 2012 amendment to Article I, § 11 of the Constitution of Virginia vitiates these precedents.<sup>24</sup> Article I, § 11 of the Constitution of Virginia, as amended in 2012, states in relevant part: “a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.”<sup>25</sup> The Supreme Court of Virginia held that the 2012 constitutional amendment “did not add any sticks to [Landowner’s] bundle of property rights that did not already exist,”<sup>26</sup> and therefore held that her “fundamental property rights do not include the right to exclude [Atlantic Coast Pipeline, LLC] in the present case.”<sup>27</sup>

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21. *Id.*

22. *Id.* at 581, 801 S.E.3d at 418 (quoting *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S.E. 401, 403 (1906)) (internal quotations omitted).

23. *See Palmer*, 293 Va. at 581-84, 801 S.E.3d at 418-20.

24. *Id.* at 583-84.

25. VA. CONST. ART. I, § 11.

26. *Palmer*, 293 Va. at 583, 801 S.E.3d at 418.

27. *Id.* at 584.