The PIOGA Press

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2020 brings retainage relief for Goodwin producers—finally

After enduring extraordinarily high monthly retainage rates of 60 percent to more than 90 percent from 2009 through 2013—including an incredible 158 percent in November 2011 while under the control of an Equitable Gas Company unregulated affiliate and then a fixed annual rate of 85 percent beginning in January 2014 after control passed to a Peoples Natural Gas Company unregulated affiliate—producers of conventional natural gas on the Goodwin pipeline system located in Greene and Washington counties will experience gradual and consistent retainage rate reductions over the period of Peoples' full remediation of the Goodwin system, expected to take seven years.

On January 16 the Pennsylvania Public Utility Commission (PUC) voted 4-1 to approve the acquisition of the Peoples utilities (Peoples and the former Equitable Gas company, and Peoples Gas f/k/a TW Phillips) by water/wastewater utility Aqua America in accordance with a settlement among most of the parties in the case.

The lone holdouts from the settlement were the Office of Small Business Advocate (OSBA) and the PUC's Bureau of Investigation and Enforcement (I&E), and the lone dissenter from PUC approval was Commissioner Andrew Place. Commissioner Place was concerned primarily with the acquisition's "absence of synergistic cost savings" and what he viewed as the settlement's inadequate "ring fencing" of the PUC-regulated operations of both utilities and their ratepayers from the potential effects of the $2 billion acquisition (or "goodwill") premium, because of the magnitude of the premium.

With respect to Goodwin, Commissioner Place agreed

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Harrisburg update

Amended Conventional Oil and Gas Act poised for House approval

A Senate bill creating a separate regulatory scheme for Pennsylvania's conventional oil and gas operators is up for approval by the full House of Representatives.

Senate Bill 790 was amended and then approved on a 16-9 vote by the House Environmental Resources and Energy Committee on January 13. The amendments removed a provision that would have allowed the resumption of spreading of produced water as a dust suppressant on dirt roads and also raised the threshold for reporting of spills of crude oil and produced water.

It was anticipated that the full House would vote on the bill the week of January 20, but it was not brought

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Retainage relief *Continued from page 1*

with the OSBA's position that the full remediation of the Goodwin system did not belong in this proceeding, having been addressed in the December 2013 Peoples/Equitable Gas acquisition settlement. The commissioner also agreed with the I&E's position that full remediation of the 223 miles of bare steel on the Goodwin system (three unconnected pipelines totaling 262 total miles, serving over 770 customers) is not cost effective, thus potentially leaving Peoples' ratepayers on the hook for more than the estimated $120 million cost (which includes full remediation of the 106-mile Tombaugh pipeline system, also serving more than 770 customers).

Nonetheless, the other four commissioners concluded that the acquisition would result in the substantial net affirmative public benefits required for PUC approval. While Chairman Gladys Brown Dutrieuille sympathized with the OSBA and I&E positions, she concluded that full remediation of the Goodwin system "will have a substantial environmental benefit and should reduce the potential of a catastrophic natural gas explosion."

So, in addition to the safety benefits, Peoples' distribution service customers will continue to enjoy the benefits of natural gas service over propane, which would be the fuel source for customers on pipelines abandoned by Peoples. In its statement supporting full remediation of these pipeline systems, PIOGA argued against transferring customers located right in the middle of a significant area of natural gas production from PUC-regulated utility service to unregulated propane service.

This settlement culminates PIOGA's efforts to obtain relief for conventional producers on the unregulated Goodwin system. As previously explained in the August 2019 *PIOGA Press,* in the unanimous Peoples/Equitable Gas acquisition settlement approved by the PUC in December 2013, Peoples agreed to impose gathering charges on only the producers' net deliveries rather than on their gross deliveries, as the Equitable Gas affiliate had done. This meant these conventional producers would no longer pay gathering charges on their substantial delivered volumes that were lost or unaccounted for by Peoples, even though Goodwin would continue to be unregulated by either the PUC or the Federal Energy Regulatory Commission.

The Aqua/Peoples acquisition settlement provides a remedy that delivers much more meaningful relief to the conventional producers on the Goodwin system by providing that the producers will begin to reduce their payments for lost and unaccounted for gas on the Goodwin systems and thereby begin receiving payment for more of their delivered gas. As explained in the previous article, the Aqua/Peoples acquisition settlement provides a formula that will consistently reduce the retainage rate annually based on Peoples' rate of annual pipeline replacement. In other words, the annual percentage rate of decline in the retainage rate will match the same year-over-year percentage rate of decline in removing old pipe from the Goodwin system (14.29 percent, based on the seven-year replacement timeframe). This would reduce the annual retainage rate from 85 percent in year 1 to near 0 percent by year 7, subject to Peoples' then-effective systemwide producer retainage charge, currently a minimum 2 percent.

PIOGA commends Peoples for once again agreeing to do what they were not legally required to do with respect to an unregulated system but instead agreeing to do what is fair and the right thing to do with respect to retainage on the Goodwin system, first in the Peoples/Equitable Gas acquisition settlement and now in this settlement. PIOGA also commends Aqua America for not being limited by strict legal requirements with respect to an unregulated system, but instead going above and beyond legal requirements by agreeing to full remediation of the Goodwin system. PIOGA also commends the Office of Consumer Advocate for putting the interests of Peoples' Goodwin customers in having safer, more reliable and lower cost natural gas service first and foremost by supporting full remediation of the Goodwin system.

As PIOGA testified in this proceeding, enabling Goodwin producers to receive payment for more of their natural gas by paying lower retainage rates will put more money into the producers' pockets and thereby help ensure they can continue to produce gas, maintain a level of employment for well tenders, generate income and tax revenues for the Commonwealth, and provide money for additional investment to provide additional supply from conventional production directly into the Goodwin system. This retainage rate relief for Goodwin conventional producers and the benefits to Peoples' distribution service customers on Goodwin helped to establish the substantial net affirmative public benefits required for PUC approval of the Aqua America/Peoples acquisition.

The filings in this matter can be accessed at www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=A-2018-3006061. ■

PIOGA®
Pennsylvania Independent Oil & Gas Association

Spring Meeting 20/20

A Clear Vision for the Future

April 1, 2020 / Rivers Casino / Pittsburgh

Perception vs. reality. Today's world is dominated by online information sources, social media and a 24/7 news cycle that must be fed constantly—all of which can easily result in dissemination of bad data, and misperceptions become the accepted "reality." We in the oil and natural gas industry know this all too well. Join us for PIOGA's Spring Meeting 20/20 as we wipe away the distortions and take a clear look at where markets are headed, solutions to challenges confronting our industry and strategies for highlighting the good things we are doing.

The event returns to Rivers Casino on Pittsburgh's North Shore on Wednesday, April 1. Here you will gain the knowledge you need to succeed in these changing times for the oil and natural gas industry. We are excited to present an array of engaging speakers on topics such as economics, regulatory and legislative matters, industry opportunities, and more. We will have our exclusive Exhibitors' Row again, and as always there will be plenty of time for networking.

Registration opens at 8 a.m. The program will kick off at 9 a.m. and run until 5 p.m., followed by a networking reception and casino time until 7 p.m. Participants receive $10 free slots play.

Registration for attendees and exhibitors is open now, and we will soon be releasing the complete agenda. **Visit pioga.org > PIOGA Events.**

Fun for a cause!

Also be sure to join us on Thursday, April 2, for the Pittsburgh Pirates home opener at PNC Park and an event benefitting the PIOGA Political Action Committee. Not only will you have an enjoyable time at one of the nation's finest ballparks, but you'll also help us support our friends in the Pennsylvania General Assembly who support our industry. This is an important year at the polls, with the entire House of Representatives and half of the Senate up for grabs.

Pennsylvania Supreme Court reinstates rule of capture for hydraulic fracturing operations

By George A. Bibikos
GA BIBIKOS LLC

In *Briggs v. Southwestern Energy Production Company*, — A.3d —, No. 63 MAP 2018, 2020 WL 355911 (Pa. Jan. 22, 2020), the Pennsylvania Supreme Court confirmed that the rule of capture immunizes oil and gas owners or their lessees when hydraulic stimulation activities conducted within the boundaries of the leased premises allegedly drain oil or natural gas from adjacent properties.

The rule of capture provides that if an oil or gas lessee drills a well within the boundaries of the leased premises, the lessee is not liable to an adjacent landowner for the value of alleged drainage from a common source of supply underlying both properties. The adjacent landowner's exclusive remedy for alleged drainage is to do likewise on his or her property, not to sue the neighboring lessee for drainage damages. The rule of capture precludes that monetary remedy.

Briggs involved unleased landowners who sued Southwestern Energy Production Company (SWN) for trespass and conversion, alleging that the company's hydraulic fracturing operations on adjacent leased property drained gas from beneath the plaintiffs' property. The plaintiffs requested damages for the value of natural gas the company allegedly drained from the plaintiffs' property, but they never alleged in their pleading that fractures during stimulation activities (or anything else) actually traversed subsurface boundaries. The trial court granted SWN's summary judgment motion based on the rule of capture, holding that the rule precluded the recovery that the plaintiffs requested.

On appeal, a two-judge panel of the Superior Court held that the rule of capture did not shield SWN from trespass liability for drainage damages. Among other things, the court reasoned that the rule does not apply when hydraulic fracturing activities are involved because (a) hydraulic fracturing creates artificial (as opposed to natural) pathways to release gas; (b) natural gas development using hydraulic fracturing presumptively results in a trespass; and (c) gas migration and drainage is itself evidence of the trespass because (in the court's view) there can be no drainage from tight formations underlying adjacent properties without a physical incursion into the subsurface boundary. In effect, the Superior Court's decision abrogated the rule whenever hydraulic fracture stimulation activities are involved in the development of oil or natural gas.

The Supreme Court disagreed and held that the rule of capture immunizes an energy developer from liability in trespass where the developer uses hydraulic fracturing on the property it owns or leases and such activities allow it to obtain oil or gas that migrates from beneath the surface of another person's land. The Supreme Court rejected the assumptions on which the Superior Court's decision relied and explained that "developers who use hydraulic fracturing may rely on pressure differentials to drain oil and gas from under another's property, at least in the absence of a physical invasion."

The court spent considerable time addressing the pleadings, noting that the plaintiffs never alleged any physical incursion into their subsurface. Consequently, the court vacated the opinion and remanded for an evaluation of whether the plaintiffs stated a claim on the extant record consistent with the court's decision on the applicability of the rule of capture in the absence of any physical incursion. Justices Dougherty and Donahue concurred with the majority's analysis on the rule of capture but would have implied from the allegations in the pleadings that a physical intrusion actually incurred.

There are several takeaways from the court's resolution of the "limited" issue it addressed on appeal:

• First, the court acknowledged the argument that a subsurface incursion into boundary lines miles beneath the surface can never be an actionable trespass, just as airlines flying planes over air space miles above the earth cannot commit actionable trespasses. However, the court confined its analysis to the more narrow issue on appeal and did not address the merits of this argument.

• Second, the court acknowledged and confirmed the traditional "self-help" remedy of drilling offset wells or leasing property in order to achieve the same result that a damage award would yield in a successful trespass case. The court deferred to the Pennsylvania General Assembly as the branch of government better equipped to decide whether or not to change that longstanding and exclusive remedy.

• Third, the court seemingly imposed a more heightened pleading standard for trespass-by-frac claims. The opinion explains that plaintiffs must allege an actual physical intrusion with specific facts. Although the court stated that plaintiffs can do so "on information and belief," they cannot rely on general pleadings or assumptions about fractures necessarily causing drainage even if they cross subsurface boundaries.

• Fourth, if plaintiffs survive the pleading stage, they will be compelled to prove with expert testimony on a case-by-case basis that a physical intrusion actually occurred.

• Finally, the court expressly identified only two types of potential "physical intrusions" that may support a trespass claim: laterals crossing subsurface boundaries (*i.e.*, a slant hole) or propelling proppants or fluids across adjacent property lines. The court did not expressly state that fractures alone (excluding proppants or fluids) qualify as a "physical intrusion" even if they cross subsurface boundaries.

In the end, the court's decision appropriately vacated an opinion that called the rule of capture into question, reinstated the rule of capture when hydraulic fracturing is involved, and avoided the considerable chaos and industry disruption that a contrary decision would

engender. But the court stopped short of eliminating trespass-by-frac claims altogether, at least in the context of this case.

Although the court's decision does not eliminate the prospect of trespass-by-frac claims, plaintiffs will face great cost and difficulty alleging in good faith in a verified pleading (and then proving with expert testimony) not only that proppants or fluids actually crossed subsurface boundaries and caused drainage from their side of the boundary but also the specific amount of gas that escaped from beneath their property.

Given the time, cost and resources that the judiciary and parties will be constrained to expend in order to resolve these claims, time will tell whether the courts will take the next steps left open by *Briggs* and either abrogate deep subsurface trespass claims altogether or dismiss such cases as a matter of law based on the longstanding "self-help" remedy that precludes drainage damages. ■

George Bibikos is the Managing Member of GA BIBIKOS LLC and represented PIOGA, the Marcellus Shale Coalition, and a group of royalty owners as amici aligned with SWN and other industry stakeholders. A copy of the brief may be accessed at gabibikosllc.sharefile.com/d-sdb79c70987f4f819.

EQB approves 150 percent increase in unconventional well permit fees

By Teresa Irvin McCurdy
TD Connections

The Environmental Quality Board met January 21 to consider three final rulemakings, including an increase in unconventional well permit fees. Department of Environmental Protection Deputy Secretary Scott Perry presented DEP's case for the increase and answered questions. For unconventional well permit applications, the department is seeking an increase from $5,000 for non-vertical unconventional wells and $4,200 for vertical unconventional wells to $12,500 for all unconventional wells.

Perry said the increase is needed to meet current staffing and operating expenses. He cited recent cost-savings measures such as the implementation of ePermitting and electronic inspections which saved about 38 percent of cost and staff time, in addition there was a reduction of staff from 226 to 190. However, the decrease in the number of unconventional well permit applications has also dropped dramatically, from 3,360 about five to six years ago to 1,693 in the last fiscal year. When DEP started the fee increase process more than three years ago, the department based its projected increase on 2,000 applications per year, 190 employees and operating cost which brought the projected annual costs to be $25 million.

Conventional well permit application fees are not changing with this rulemaking. However, Perry clarified that the fees from conventional well permits along with the $6 million Act 13 Impact Fees are part of the Oil and Gas Program's overall budget. These and other revenue sources are needed to provide a funding buffer in the event of permit projection shortfalls, additional staff and other program enhancements.

Members of the EQB raised several questions before adopting the final-form rulemaking with four negative votes, such as: The actual number of well permit applications are already below the projected number of well permit fees, so isn't the proposed increase already insufficient? If there are fewer permits to review, why does the department need more staff? What other funding sources could be considered if this trend continues?

This final-form rulemaking was adopted with four negative votes and will be effective upon final-form publication in the Pennsylvania Bulletin. Prior to publication, the rulemaking must go to the House and Senate Environmental Resources and Energy Committees for review, as well as the Independent Regulatory Review Commission and the attorney's general office. At this time, DEP does not anticipate the rulemaking to be finalized until May or later.

PIOGA has objected to the magnitude of the permit fee increase, but agrees with DEP that a legislative solution is needed to provide more stable funding to the oil and gas program by way of the annual state budget process. ■

PUC announces reduction in impact fee schedule for 2019

Unconventional producers will pay $5,000 less per well in impact fees for the 2019 calendar year, according to a notice from the Pennsylvania Public Utility Commission in the January 25 *Pennsylvania Bulletin*. The change in the impact fee schedule was triggered by the decline in the average price for natural gas in 2019.

A first-year horizontal well will incur a fee of $45,700, down from $50,700 for the 2018 calendar year. The fee schedule is as follows:

Year of Well	Horizontal	Vertical—Producing
1	$45,700	$9,100
2	$35,500	$7,100
3	$30,400	$6,100
4-10	$15,200	$3,000

According to an estimate published in January by the Independent Fiscal Office *(January PIOGA Press, page 16)*, the lower fee schedule will result in a decline of $53.6 million in revenue from the tax for 2019.

Fees for the previous calendar year must be paid by producers by April 1 and are to be distributed by the PUC by July 1 to municipalities, counties and a variety of state programs. ■

Pins & Pints!

Our first networking event of the year was a sellout, with 60 members and guest gathering on January 23 at Zone 28 in Harmarville for an evening of fun. You can find more scenes in the Photo Galleries section at pioga.org.

PIOGA food donation

If you recall, PIOGA members brought donations of non-perishable food to our Mix, Mingle & Jingle holiday networking event on December 17. It was an impressive demonstration of caring and generosity on your part! We had hoped to show you a photo of the food items being dropped off in the January issue, but the timing just didn't work out. As you can see in this photo from the day PIOGA's donations were delivered, the North Hills Community Outreach Loaves & Fishes Pantry is an impressive operation. The organization operates three food pantries in northern Allegheny County and as a member of the Greater Pittsburgh Community Food Bank, they provide food to nearly 700 families each month. For more information about the services they provide and how your company or organization can help, visit nhco.org.

Upcoming PIOGA Networking Events

Cigar Mixer

Thursday, February 20, 6-9 p.m.
BURN by Rocky Patel, Pittsburgh

••••• *pioga.org > PIOGA Events* •••••

"Cosmic" Axes & Ales

Wendesday, March 11, 6-9 p.m.
Lumberjaxes, Pittsburgh

Medical marijuana in Pennsylvania: What employers should know

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Employers face substantial challenges when addressing and preventing substance abuse in the workplace. These challenges may be compounded by recent enactment of state laws legalizing or decriminalizing marijuana. Employers in Pennsylvania should be ready to face medical marijuana use—and potentially recreational use—by their workforces.

National legal landscape

The federal Controlled Substances Act (CSA) categorizes marijuana as a Schedule I controlled substance. 21 U.S.C. § 844. Schedule I controlled substances are considered to have no accepted medical use with a high probability of addiction. Marijuana's neighbors within Schedule I include heroin and LSD.

Notwithstanding marijuana's continued categorization under the CSA, to date the District of Columbia and every state except Idaho and South Dakota have enacted laws providing various degrees of public access to marijuana. Public opinion regarding the medicinal and recreational use of marijuana has grown positively for several years, with two-thirds of Americans now supporting marijuana legalization, according to a recent Pew Research Center survey.

Pennsylvania legal landscape

Pennsylvania enacted the Medical Marijuana Act (MMA), 35 P.S. § 10231.101, *et seq.*, in 2016. The MMA provides an avenue for Pennsylvanians diagnosed with at least one of 23 serious health conditions to be certified to obtain and use medical marijuana. Notably, individuals are not prescribed medical marijuana; instead, they are certified for its purchase and use. Still, individuals may be subject to criminal penalties if they possess and use marijuana outside the parameters of the MMA.

The MMA restricts both employers and employees. Employees are prohibited from being under the influence while working with chemicals that require a permit, working with high-voltage electricity or other utilities, working in confined spaces or at heights, working in life-threatening situations, or working in any setting involving public safety risks.

Employers cannot discharge, threaten, refuse to hire, discriminate or retaliate against an employee solely on the basis of an individual's certification to use medical marijuana (or on the basis of an underlying disability). This prohibition covers most terms and conditions of employment. However, employers are not required to provide an employee a workplace accommodation to ingest marijuana on company property or during work time or to permit employees to work while under the influence.

"Under the influence" is currently a difficult standard to measure for marijuana. Tetrahydrocannabinol, or THC, can remain detectable in a person's system for weeks after last using marijuana. Further, it is difficult, if not impossible, to detect the severity of an individual's level of impairment simply because a drug test detects the presence of THC. This grey area will make the enforcement of drug testing policies difficult under Pennsylvania law. Additionally, the issue of whether a positive drug test is indicative of current impairment will undoubtedly be disputed.

The conflict between the federal CSA and Pennsylvania's MMA has presented a quandary for employers in Pennsylvania seeking to enforce drug policies, especially zero-tolerance policies. In fact, enforcement of these drug policies has already exposed employers in Pennsylvania and other states to litigation over a certified medical marijuana user's employment protection.

Courts in jurisdictions with medical and recreational marijuana laws are split regarding applicant and employee protections for marijuana use. In *Coats v. Dish Network, LLC*, the Colorado Supreme Court upheld the termination of a customer service representative who tested positively for THC during a random drug screening because of his state-certified use of medical marijuana. 350 P.3d 849 (Colo. 2015). However, the recent trend has been in favor of certified marijuana users and against employers, especially with respect to the enforcement of zero-tolerance drug testing policies. For example, in *Whitmire v. Wal-Mart Stores, Inc.*, the U.S. District Court for Arizona found an employer liable for damages for terminating a certified medical marijuana user after she tested positively for THC. 359 F. Supp. 3d 761 (D. Ariz. 2019).

While there have been several lawsuits filed for alleged violations of the MMA against employers in Pennsylvania, there is no binding legal authority from a Pennsylvania appellate court governing the use of medical marijuana in the employment arena. Employers should be on the lookout for developing cases in Pennsylvania, including:

• *Palmiter v. Commonwealth Health Systems, Inc.*, Lackawanna County C.C.P. Docket No. 19-CV-1315: The Court of Common Pleas in Lackawanna County overruled an employer's argument that an employee terminated for failing a drug test because of state-certified medical marijuana use had no private cause of action under the MMA. The court, acknowledging the issue is ripe for appeal, granted the employer's motion to

amend the prior order for the purpose of taking an interlocutory appeal. *Palmiter* may be the test case that further defines and clarifies employer and employee rights under the MMA.

• *Gesell v. Starline Holdings, LLC*, U.S. District Court for the Western District of Pennsylvania at Civil Action No.: 2:19-cv-01486 (CB): A job applicant filed a lawsuit against a company for rescinding a job offer after he tested positively for THC in a pre-employment drug screening. The plaintiff claims his job would not be a "safety-sensitive" position as outlined in the MMA.

It is also worth mentioning that Pennsylvania may be on the verge of legalizing recreational use of marijuana. In a much-publicized listening tour that visited all 67 counties, Lieutenant Governor John Fetterman, at the request of Governor Tom Wolf, sought to better understand Pennsylvanians' opinions on the matter. In the final report released in July 2019, one key takeaway was that 65-70 percent of tour attendees approved of legalizing recreational marijuana use in the Commonwealth.

U.S. DOT drug testing

The issue of whether a positive drug test is indicative of impairment is virtually neutralized for the approximately 12.1 million transportation employees performing safety-sensitive functions under the jurisdiction of the U.S. Department of Transportation (DOT). Mandatory DOT drug testing with specified testing rates occurs in a multitude of sectors for employees in safety-sensitive positions, including those employees who perform operations, maintenance, or emergency-response functions on pipelines or liquified natural gas facilities that are subject to the Pipeline and Hazardous Materials Safety Administration (PHMSA). Under PHMSA, 50 percent of employees performing safety-sensitive functions must be randomly drug tested each calendar year.

Importantly, an employee is working in a DOT safety-sensitive position based upon the tasks performed and not the job title. An employee working in a DOT safety-sensitive position who tests positively for THC must immediately be removed from performing safety-sensitive functions. The employer may terminate the employee from such a position or require the employee to follow a course of action governed by DOT regulations before returning to a safety-sensitive position.

Best practices

Applicant and employee use of medical marijuana represents risk for employers. Employers should assess their risk tolerance and ensure a plan is in place before an applicant or employee fails a drug test and presents a duly issued medical marijuana identification card. Employers should consider:

- Updating and revising drug policies to comprehensively define prohibited substances, including addressing medical and recreational use of marijuana;
- Updating and revising drug testing procedures and staying current on available drug testing methods;
- Ensuring that drug and drug testing policies are uniformly applied;
- Preparing for and engaging in an interactive process if a certified medical marijuana user fails a drug test; and
- Identifying those employees performing safety-sensitive functions so that the DOT's unique drug testing policies are correctly applied.

The legal landscape of marijuana in the employment law arena is fast-paced and subject to rapid change. Employers should be vigilant in staying up-to-date on these developing laws. ■

These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.

Pennsylvania's Donated or Dedicated Property Act: A potential hurdle for your gas development project

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A recent case in the Orphans' Court Division of the Allegheny County Court of Common Pleas highlights the significant implications that Pennsylvania's Donated or Dedicated Property Act (DDPA), 53 P.S. §§ 3381-3386, can have for projects in or underneath parks or other property that has been donated or dedicated to a political subdivision for use by the public.

Background

Olympus Energy LLC (formerly Huntley & Huntley Energy Exploration LLC) obtained permits to drill unconventional gas wells in Elizabeth Township. Transporting the millions of gallons of water necessary to operate these wells would have required significant truck traffic on township roads. In an effort to alleviate traffic, Olympus approached the township to discuss the installation of a freshwater withdrawal system known as the Galene System. The Galene System consists of a water intake system (in this case from the Youghiogheny River) that allows fresh water to flow into a wet well located inside a 20-foot by 32-foot structure. That structure houses two electric pumps that move the water from the wet well through underground pipes to a holding tank located near the gas wells.

Due to topography, the presence of utility rights-of-way and various safety concerns, Olympus and the township determined the only viable location for the Galene System was in Blythedale Park, a 20-acre municipal park located in the township. The township acquired the land comprising Blythedale Park by deeds specifying that the property was acquired for public recreation use. The portion of Blythedale Park that ultimately was chosen as the location for the Galene System is 0.037 acres, heavily wooded and prone to severe flooding.

After a public hearing, and with unanimous approval by the Elizabeth Township Board of Commissioners, the township and Olympus entered into a 15-year easement agreement allowing for the installation of the Galene System. Pursuant to the easement agreement, the township permitted Olympus to temporarily utilize the 0.037-acre portion of the part for the Galene System in exchange for the permanent conveyance to the township of a one-half acre parcel of land adjacent to Blythedale Park. Olympus also agreed to pay the township $1,000 per month, to be used exclusively for the benefit of Blythedale Park, for the duration of the easement agreement. The easement agreement gave the township complete control over the aesthetics of the building housing the electric pumps, and upon the expiration of the easement agreement, the township has the option to keep the structure housing the pumps or direct Olympus to return the land to its prior condition. After consulting with, and obtaining approval from, various governmental agencies and organizations, Olympus proceeded with the installation of the Galene System.

Following the start of construction of the Galene System, Protect Elizabeth Township, a local environmental group, informed the township that it believed the

township's act of entering into the easement agreement violated the DDPA.

The Donated or Dedicated Property Act

The DDPA provides that all lands or buildings donated to a political subdivision or dedicated to the public use as a public facility shall be used for the purpose or purposes for which they are originally dedicated or donated. The statute broadly defines "public facility" as "any park, theatre, open air theatre, square, museum, library, concert hall, recreation facility or other public use."

If a political subdivision wishes to utilize donated or dedicated property for a purpose other than the purpose for which the property was originally donated or dedicated, the political subdivision must obtain approval from the orphans' court of the county in which the property is located. Such application may be made if the political subdivision determines that the continuation of the original use of the property at issue "is no longer practicable or possible and has ceased to serve the public interest."

Prior to the filing of a petition with the local orphans' court, the Pennsylvania Attorney General's Office–Charitable Trusts and Organization Division must be given at least 10 days advance notice.

Once the petition is filed, the orphans' court, after a public notice period and a public hearing, may permit the political subdivision to substitute other property of at least equal size and value for the donated or dedicated property, sell the property and apply the proceeds to carry out its original purposes, or apply the property or the proceeds therefrom to a different public purpose if the original purpose is no longer possible or practicable.

Orphans' court hearing on Elizabeth Township's petition

After receiving notice from Protect Elizabeth Township, the township filed a petition with the Orphans' Court Division of the Allegheny County Court of Common Pleas seeking approval of the easement agreement. Protect Elizabeth Township and Olympus intervened, and a public hearing was held.

At the hearing, Protect Elizabeth Township argued that it was possible to continue utilizing the 0.037-acre area subject to the easement agreement for park purposes and, thus, the easement agreement was not permissible under the DDPA. The township and Olympus presented evidence and testimony that the continued use of the 0.037-acre portion of Blythedale Park subject to the easement agreement for park purposes was no longer practicable and ceased to serve the public interest due to flooding issues, among other reasons. The township and Olympus also introduced evidence that the township would permanently receive land of at least equal size and value, as well as monthly payments to be used for the benefit of Blythedale Park, in exchange for the temporary use of the 0.037-acre easement area. Following the hearing, the court found that the township satisfied the DDPA's requirements and, accordingly, granted the township's petition. However, because the court has not yet issued an opinion supporting the order, the exact basis on which it approved the petition is not clear.

Companies engaging in development on or under property that has been dedicated or donated to a political subdivision for a specific purpose should be cognizant of the DDPA and its requirement for orphans' court approval. Determining the applicability of this law, however, can be a challenge. Although the DDPA was enacted in 1959, there are relatively few reported cases discussing the statute and numerous unresolved issues regarding its applicability. Failure to consider this relatively obscure "legal hoop" could delay or impede the success of the project. ■

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Save a tree or save PIOGA a buck: You can choose to opt out of receiving the newsletter by mail

As you probably know, *The PIOGA Press* is available both in printed form and electronically. We mail the printed copy every month to the primary contact of PIOGA member companies and notify all member contacts when the electronic version is available online.

In the interest of preserving natural resources, or saving PIOGA the cost of printing and mailing the newsletter, you can choose to opt out of receiving the hard copy if you now receive the publication by mail. You still will receive an email when the electronic version is available—as much as two weeks before the print copy arrives on your desk.

There are advantages to receiving the print edition. Some people—your newsletter editor included—prefer reading from a printed page rather than on a screen. Additionally, a copy of *The PIOGA Press* displayed in your reception area or your office can serve as an effective recruitment tool. (We are happy replace any issues you give away to a prospective member!)

If you decide you just want to read *The PIOGA Press* electronically, simply send an email to Deana McMahan at deana@pioga.org asking to opt out. And don't forget that current and archive issues are always available at pioga.org/news-resources/newsletter.

Revised DEP policy would expand the scope of projects requiring PHMC review

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On December 28, the Pennsylvania Department of Environmental Protection published notice of a substantive revision to the *Policy for Pennsylvania Historical and Museum Commission (PHMC) and DEP Coordination During Permit Application Review and Evaluation of Historic Resources* (012-0700-001). The draft policy, if finalized, would replace *Implementation of the Pennsylvania State History Code: Policy and Procedures for Applicants for DEP Permits and Plan Approvals*, finalized in 2002 and amended in 2006, and establishes the framework DEP would implement for its plan approvals and permit application reviews to comply with Pennsylvania's History Code, 37 Pa. C.S. §§ 101 *et seq*.

The History Code and its application to oil and gas operations

Under Section 507 of the History Code, Commonwealth agencies must notify PHMC before undertaking any Commonwealth or Commonwealth-assisted permitted or contracted project that affects or may affect archaeological sites and provide PHMC with information concerning the project or activity. DEP requires applicants to submit the State Historic Preservation Office (SHPO) Project Review Form to PHMC if their project potentially affects an archaeological site. After receiving the form from the applicant, PHMC must then determine whether the project may adversely affect an archaeological site.

Oil and gas operations potentially fall within the History Code's consultation and survey requirements as "Commonwealth-assisted permitted projects." Activities that require state permits, such as construction of well pads, pipelines, compressor stations and underground injection control wells, could have the potential to affect historic resources that come within the purview of the PHMC coordination requirements in the History Code.

Neither the History Code nor the draft policy mandates outcomes for known or discovered historic resources identified during the review process or during a survey or field investigation. If PHMC identifies potential adverse effects to archaeological resources that may result from the permitted activity, it will notify DEP and work to mitigate or minimize adverse effects.

Changes from the current policy

Under the History Code, Commonwealth agencies, including DEP, are required to institute procedures and policies to ensure their actions contribute to the preservation of historic resources. The History Code is procedural in nature and has a limited scope with respect to private properties and entities. Several of these limitations, provided in the current policy, have been removed from the draft policy.

For example, if PHMC determines a project may adversely affect a significant archaeological site—defined as "an area of land which contains extensive evidence of previous prehistoric or historic human habitation or stratified deposits of animal or plant remains or man-made artifacts or human burials"—PHMC may conduct or cause to be conducted an archaeological survey of the site. However, PHMC cannot require archaeological surveys or investigations on private property without the consent of the property owner and must pay for any surveys or investigations conducted on private property, unless the survey is required under federal law. For oil and gas operations, consent to conduct a survey or investigation may depend on the surface landowner because the operator's property interests are often in the subsurface by lease or fee rather than the surface. Permittees, however, may not interfere with a survey or investigation that is conducted within the time limits set by the History Code.

Increasing scope of and uncertainty in PHMC review

Both the draft policy and the current policy include a list of projects and activities exempt from completing the SHPO Project Review Form and, therefore, PHMC review. However, the two exemption lists are constructed very differently and new defined (and undefined) terms introduced in the draft policy make it unclear when and to whom the exemptions apply, likely resulting in more applicants submitting SHPO Project Review Forms and being subject to PHMC review for their projects.

The current policy exempts specific activities and permits by bureau, listing most by permit name (i.e. "individual well permit," "Chapter 105 General Permit"). Many of the exemptions are conditioned on a 10-acre exemption; the permits are exempt from PHMC coordination if they involve no more than 10 acres of earth disturbance. Many permits or approvals required for oil and gas related activities, including well permits and waste management permits, are either categorically exempt or exempt under the current policy's 10-acre exemption. However, any permitted activities that may affect an historic resource on the National Register of Historic Places are not exempt from coordination, regardless of size.

In contrast, the draft policy exemptions are listed by descriptions of the activity rather than by bureau and specific permit types, creating potential confusion regarding which activities require review. For example, activity exempt from PHMC coordination under the draft policy includes permits or approvals for ground disturbance within areas where documented prior ground disturbance occurred and permits or approvals where proposed activity will not affect above ground historic resources or archaeological resources 50 years of age or older. This exemption may be difficult to apply in practice.

The draft policy clearly expands reviews by removing the 10-acre exemptions and including all activities that may affect "significant above ground resources or significant archaeological resources listed on *or eligible to be listed on* the National Register of Historic Places" rather than those that might affect resources already listed on the National Register of Historic Places.

Early coordination and PHMC response categories

The draft policy adds a new section that encourages early coordination between PHMC and project applicants. The draft policy recommends that before completing the SHPO Project Review Form and submitting a DEP permit application, project applicants should review four sources of information on historic and archaeological resources: Pennsylvania's Cultural Resources Geographic Information System, county historical societies, historic mapping, and county planning commissions and offices. While these resources are not necessarily new to project applicants, the emphasis on urging applicants to consult these resources during the planning stages of a permitted project is new. It is not clear if the use of early coordination will be an effective way to receive timely permitting decisions.

Thanks for your involvement!

Our thanks go out to two long-serving individuals who have left the PIOGA Board of Directors: Bill Murray of American Refining Group (above left) has been replaced by Dan Palmer, and Carl Carlson of Range Resources – Appalachia (right) has ended his stint on the board. We appreciate all that Bill and Carl have done for PIOGA, and we welcome Dan aboard as a director.

The draft policy also provides a new list of PHMC's potential responses to a permittee's SHPO Project Review Form. The list contains seven different responses, ranging from "no historic properties in the area of potential effect" to "the project may affect significant archaeological resources and it is the opinion of the SHPO that an archaeological survey should be conducted." The draft policy provides a brief explanation of the circumstances under which a permittee would receive each type of response. Including these potential response types and the guidance on when each one will be issued further informs the review procedure for permittees but also increases the complexity of the response outcomes.

Looking forward

Public comments were accepted on DEP's eComment website through January 27. Following public comment, DEP could move forward with finalizing the draft policy, issue a new draft or do nothing, leaving the current policy in place. ■

Babst Calland will continue to track developments related to the draft policy, as well as other regulatory developments regarding historic resources as they relate to the oil and gas industry. For further information, contact Jean Mosites at 412-394-6468 or jmosites@babstcalland.com; Hannah L. Baldwin, 412-394-6962 or hbaldwin@babstcalland.com; or Casey J. Snyder, 412-394-5438 or csnyder@babstcalland.com.

Federal actions:

New WOTUS definition finalized, new challenges expected

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On January 23, the U. S. Environmental Protection Agency and the U. S. Army Corps of Engineers pre-published the final Navigable Waters Protection (NWP) Rule, which (yet again) redefines the scope of waters regulated under the Clean Water Act (CWA). In particular, the final NWP Rule revises the definition of "waters of the United States" (WOTUS) in 12 federal regulations and will become effective 60 days after publication in the *Federal Register*.

Once effective, the NWP Rule will almost certainly be challenged in the courts by NGOs and other interested parties. These challenges could result in the courts staying the NWP Rule in some, or all, states while the lawsuits are litigated.

The NWP Rule is the final step in fulfilling the Trump administration's promise to repeal and replace the Obama administration's 2015 Clean Water Rule (CWR), which many believe improperly expanded the scope of waters regulated under the CWA. Effective December 23, 2019, EPA and the Corps repealed the CWR and restored the WOTUS definition that existed before 2015. Prior to the repeal, the pre-2015 rule's WOTUS definition applied in approximately half of the states, while the CWR's WOTUS definition applied in the remainder (including Pennsylvania), resulting in certain states having more federally regulated waters than other states.

The stated intent of the NWP Rule is to provide "clarity, predictability and consistency" regarding CWA jurisdiction. Consistent with President Trump's February 28, 2017, Executive Order, the NWP Rule heavily reflects and relies upon Supreme Court Justice Antonin Scalia's interpretation of the pre-2015 rule's definition of WOTUS, as expressed in his plurality opinion in the seminal case, *Rapanos v. United States* (547 U.S. 715 (2006)). Missing from the NWP Rule is any reference to the significant nexus test discussed in Justice Anthony Kennedy's concurring opinion in *Rapanos*. As background, Justice Scalia opined that relatively permanent, standing or continuously flowing waters and wetlands with a continuous surface connection to such relatively permanent waters should be regulated under the CWA, while Justice Kennedy advocated for CWA jurisdiction for wetlands with a significant nexus to a navigable water (i.e., a significant effect on the chemical, physical and biological integrity of traditional navigable waters).

Scope of NWP Rule is narrower and clearer than previous rules

The NWP Rule consolidates jurisdictional waters into four categories: (1) territorial seas and navigable-in-fact waters; (2) tributaries; (3) lakes, ponds and impoundments of jurisdictional waters; and (4) adjacent wetlands. As expected, the WOTUS definition in the NWP Rule is much narrower and will federally regulate less waters than would have been regulated under the CWR. The NWP Rule also provides more clarity as to the scope of WOTUS than the pre-2015 rule. The NWP Rule includes 16 definitions and 12 exclusions, as compared to the five definitions and two exclusions in the pre-2015 rule, including, for the first time, definitions to clarify the prior converted cropland and waste treatment system exclusions. The NWP Rule also categorically excludes, among other things, ephemeral streams and ditches without perennial or intermittent flow.

We note that despite attempts to provide clarity, the NWP Rule still contains terms that may be subjectively interpreted. For example, the rule relies on conditions in a "typical year" to determine whether a water meets the definition of an "adjacent wetland," "lakes and ponds, and impoundments," or a "tributary." These determinations can be subjective because a "typical year" is determined by the "normal periodic range" of climatic conditions in a geographic area on a rolling 30-year basis.

Practical impact to Pennsylvania expected to be small

While the NWP Rule is intended to clarify the scope of federally regulated waters, the practical impact of the rule on the regulation of waters in Pennsylvania is expected to be small. Under Pennsylvania's Clean Streams Law, "waters of the Commonwealth" broadly include "any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth." Pennsylvania's definition of "waters of the Commonwealth" is more expansive (i.e., includes more types of waters) than the NWP Rule's WOTUS definition. Therefore, projects that are expected to impact, or discharge into, a water of the Commonwealth will still (typically) require state permitting, even though federal permitting by EPA or the Corps may not be required. There may also be implications in limited circumstances as to whether Spill Prevention, Control and Countermeasure (SPCC) plans would be needed for certain facilities.

In states with less expansive definitions of state waters, the NWP Rule is expected to be a more signifi-

cant consideration for permitting and spill planning/response.

Controversy continues and challenges anticipated

While many in industry and agriculture have supported the NWP Rule, a number of NGOs and other interested parties have signaled that they will challenge the NWP Rule on procedural and substantive grounds. In addition, the EPA's own Science Advisory Board and other scientific organizations have criticized the NWP Rule as being in conflict with established science and the objectives of the CWA. With legal challenges looming, the NWP Rule may be stayed in some or all states, with the pre-2015 rule remaining the definition of WOTUS nationwide or in select states. ■

Babst Calland will continue to actively monitor this controversial regulatory issue. If you have questions about the NWP Rule or other water-related matters, contact Lisa M. Bruderly at 412-394-6495 or lbruderly@babstcalland.com.

White House proposes modification to NEPA regulations

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—
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The White House Council on Environmental Quality (CEQ) issued proposed regulations on January 10 to modify the regulatory program for the National Environmental Policy Act (NEPA) that requires federal agencies to consider the environmental consequences of their actions when they are in the decision-making process. This rulemaking is noteworthy because it represents a comprehensive update that has not occurred since the initial promulgation in 1978. The regulated community has generally embraced revision to the NEPA program to allow more timely processing of appropriate studies and assessments, while ensuring the protection of the environment.

Dan Naatz, Senior VP of Government Relations and Political Affairs for the Independent Petroleum Association of America (IPAA) issued a statement on January 9:

> IPAA is pleased that the Administration continues to tackle substantial projects, such as their effort to return the NEPA process to the original intent and scope of the law. Although IPAA and our members recognize the important role NEPA plays in public land policy, for many years we have seen the law being abused by environmentalists with extreme agendas to delay and halt various multiple-use activities on federal lands, including oil and gas production. The NEPA process was established over forty years ago to ensure an appropriate level of environmental protection is achieved, however, there are many projects that can move forward with the flexibility granted through an Environmental Assessment (EA) and Environmental Impact Statement (EIS) process. Just as the geology, hydrology, and topography of our federal lands differ from state to state, so too should the NEPA process become more project-based rather than one-size-fits-all.

Mike Sommers, American Petroleum Institute President and CEO, offered the following statement on January 9:

> Endless and repetitive reviews for infrastructure, renewable energy, natural gas and oil projects have been misused to delay and derail development, which hurts job creation, reduces tax revenue and saps investments in communities across the country. Reforming the NEPA process is a critical step toward meeting growing demand for cleaner energy and unlocking job-creating infrastructure projects currently stuck in a maze of red tape.

As evidence of the level of interest in this proposal, comments submitted to the docket thus far exceed 3,600. The comment period closes on February 25.

In this proposed rule, CEQ would revise and modernize its NEPA regulations to facilitate more efficient, effective and timely NEPA reviews by federal agencies. The proposed updates and clarifications to its regulations are based on CEQ's record evaluating the implementation of its NEPA regulations and on comments provided in response to the Advanced Notice of Proposed Rulemaking.

The following is a summary of the CEQ proposal found at 85 Fed. Reg 1684, (January 10, 2020).

Procedural Emphasis. CEQ specifically proposes revisions to align the regulations with the text of the NEPA statute, emphasizing the procedural nature of section 102(2) of NEPA. The proposed changes ensure that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience.

Resource Management. CEQ proposes revisions to ensure that environmental documents prepared are concise and serve their purpose of informing decision makers regarding the significant potential environmental effects of proposed major federal actions and the public of the environmental issues in the pending decision-making process. CEQ proposes revisions to ensure the regulations reflect changes in technology, increase public participation in the process, and facilitate the use of existing studies, analyses and environmental docu-

ments prepared by states, tribes and local governments.

Optimal Interagency Coordination and Timing. CEQ proposes revisions for multi-agency review and related permitting and other authorization decisions. The revisions promote interagency coordination and more timely and efficient reviews. CEQ proposes to codify and make generally applicable a number of key elements from expedited procedures, including development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single environmental impact statement (EIS) and joint record of decision to the extent practicable, and a two-year goal for completion of environmental reviews.

Documentation, Scoping and Timing. CEQ proposes to clarify the process and documentation required for complying with NEPA by adding sections on threshold considerations and determining the appropriate level of review; add a section on categorical exclusions; and revise sections on environmental assessments, findings of no significant impact, and EISs. CEQ further proposes a number of revisions to promote more efficient and timely environmental reviews, including revisions to promote interagency coordination relating to lead, cooperating agencies, timing of agency action, scoping, and agency NEPA procedures. CEQ proposes additional revisions to promote a more efficient and timelier NEPA process relating to applying NEPA early in the process, scoping, tiering, adoption, use of current technologies, and avoiding duplication of state, tribal, and local environmental reviews; revisions provide for presumptive time and page limits.

Public Participation. CEQ includes provisions to promote informed decision making and to inform the public about the decision-making process. CEQ proposes amendments to ensure agencies solicit and consider relevant information early in the development of the draft EIS. In particular, CEQ proposes to direct agencies in the notice of intent to request public comment on potential alternatives and impacts, and identification of any relevant information and analyses concerning impacts affecting the quality of the human environment.

Agency Record. CEQ proposes to direct agencies to include a new section in the draft and final EIS summarizing all alternatives, information, and analyses submitted by the public and to request comment on the completeness of the summary included in the draft EIS. CEQ further proposes to revise ensure that comments are timely submitted on the draft EIS and on the completeness of the summary of information submitted by the public, and that comments are as specific as possible. Additionally, CEQ proposes a provision to require that, based on the summary of the alternatives, information, and analyses section, the decision maker for the lead agency certify that the agency has considered such information. This will ensure that EISs are supported by evidence that agencies have made the necessary environmental analyses. Upon certification, the proposed provisions would establish a conclusive presumption that the agency has considered such information. In conjunction with the certification requirement, this presumption is consistent with the longstanding presumption of regularity that government officials have properly discharged their official duties.

Clarification of Regulatory Language. CEQ proposes changes to make the regulations easier to understand and apply. ■

Kathy G. Beckett is an environmental member of the law firm of Steptoe & Johnson PLLC located in the Charleston, West Virginia.

New/returning PIOGA members
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Mourer Foster Inc.
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517-371-2300 • www.mourerfoster.com
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Talen Energy Marketing, LLC
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Former IOGA-PA leader Bruce Wolf passes

We are sad to report that Bruce Wolf of Shadyside, a long-time leader of one of PIOGA's predecessor associations, died on January 4 after a lengthy fight with pancreatic cancer. He was 71.

Bruce was a graduate of Washington and Jefferson College and the University of Pittsburgh Law School. He worked in the oil and gas business more than 30 years, including as general counsel for Atlas Energy and as an officer and director of the Atlas public companies. In

the latter role, he had the honor of ringing the bell on two occasions at the opening of the New York Stock Exchange. Atlas Energy was sold to Chevron in 2012.

"Bruce was an important cog in the Independent Oil & Gas Association of Pennsylvania board and some of the early battles and victories we had," recalled retired PIOGA President & Executive Director Lou D'Amico. "He was chairman when I was hired by IOGA. I really enjoyed working with him."

Bruce loved Pittsburgh and its history, and one of his goals was to locate art of Pittsburgh that had left the city and find a way to get it back to Pittsburgh. Many of these works found their way into Bruce's art collection. These were primarily by artists who were visitors to Western Pennsylvania and captured the beauty of the region.

Bruce was proud of his most recent successful effort to fund a suitable home for the Alfred East painting from 1907 of Pittsburgh's Junction Hollow, which is now part of the collection at the Duquesne Club. He was also proud to champion the recognition and restoration of the mammoth 1859 lithograph of Pittsburgh by James Palmatary on display near the entrance of the Duquesne Club.

Bruce was chairman of the Duquesne Club's Art and Library Committee for 10 years; during that time, the club purchased a number of Pittsburgh pictures that are in the club's collection. He was long-term board member of the Westmoreland Museum of American Art and a board member at the Heinz History Center and on its collections committee.

He is survived by his wife, Sheryl Kendal Wolf, and two sons, J. Kendal Wolf and Oliver Jared Wolf. ■

Harrisburg update *Continued from page 1*

up for consideration. At this writing, it's not clear when a vote might occur.

"There is bipartisan support for the bill, with the goal of reasonable, responsible regulations for the conventional producers," said Representative Martin Causer (R-McKean), a member of the Environmental Resources and Energy Committee and sponsor of a slightly different companion House bill.

If approved by the House, the Senate would have to vote to concur with the amendments adopted in the other chamber before going to Governor Tom Wolf. The bill, however, continues to be opposed by the administration and could face a veto by the governor. A Wolf spokesman claimed SB 790 still contains provisions that "undermine core environmental protection principles" and the "poses an undeniable risk to the health and safety of our citizens, the environment, and our public resources."

PIOGA and other associations representing Pennsylvania's conventional operators continue to do all we can to ensure the much-needed legislation becomes law. Members are encouraged to contact their state representative in support of SB 790.

Veto threat for Energize PA bill

Governor Wolf also has indicated he would veto HB 1100, a bill offering tax credits for construction of new petrochemical or fertilizer production plants in Northeastern Pennsylvania. The governor's threat came in the face of strong support in the legislature—the Senate approved the bill on a 39-11 vote on February 4 and the House followed up the same day with a concurrence vote of 157-35.

A spokesman for the governor told the news site Pennsylvania Capital-Star that Wolf "believes such projects should be evaluated on a specific case-by-case basis."

HB 1100 was amended on February 3 in the Senate to require recipients of the tax credit to pay workers prevailing wage and to make "a good faith effort" to employ local contractors during construction. The amendment also lowered the amount of money firms are required to invest in construction from $1 billion to $450 million.

The bill originated as part of the Republican-sponsored Energize PA package last year *(May PIOGA Press, page 1)*.

Another push for Restore PA and severance tax

In the week ahead of the February 4 release of his FY 2020-2021 budget proposal, Governor Wolf again went on the offensive for his Restore Pennsylvania, a proposal to borrow $4.5 billion to fund a wide variety of infrastructure and other projects, paid for by a severance tax on unconventional natural gas production.

Companion bills—HB 1585 and SB 725—were introduced last June, each with a considerable number of cosponsors. The legislation would impose a severance tax ranging from $0.091 to $0.157 per mcf, depending on the annual average price of natural gas, and it would bar producers from sharing the cost of the tax with royalty owners.

The legislation would authorize borrowing to pay for high-speed Internet access, flood control infrastructure, disaster response, green infrastructure, blight demolition and redevelopment, storm water infrastructure, brownfield cleanup, contaminant remediation, business development and site selection, energy efficiency, and transportation infrastructure—in essence, something for everyone.

"Restore Pennsylvania would make $4.5 billion in critical infrastructure investments. It would repair rural roads, clean up brownfields, remove blight, increase broadband access, reduce flood risk, and so much more," Wolf at a January 28 event touting his plan. "There's been a lot of talk over the last year about how much we need infrastructure funding, but no viable plan has emerged—except Restore Pennsylvania."

He continued: "One year ago, I unveiled my Restore Pennsylvania proposal. Since then, we've talked a lot about how desperately communities need infrastructure funding, but the proposal to create Restore Pennsylvania has not moved in the legislature."

Indeed, neither bill has received a committee vote, and many cosponsors have backed away after criticism from environmentalists that supporting the plan would also mean at least 20 years of supporting continued natural gas development in Pennsylvania in order to pay for the blitz of spending.

Whether Restore PA gets any traction in 2020 remains to be seen. Even though the plan has been separate from the budget process, many things get traded and negotiated at budget time, and it will be necessary to be particularly vigilant over the next few months. One thing is clear: If a severance tax was a bad idea previously, given market conditions it's an industry-killing idea now.

On the day the governor unveiled his FY2020-2021 budget, PIOGA issued this statement:

"Governor Wolf today stated that his proposed budget 'does not ask any of you to vote for any new taxes,' a wholly disingenuous claim, given his failure, once again, to mention the natural gas severance tax he is seeking to fund his 'Restoring Pennsylvania' initiative. Omitting his plan for this devastating tax from today's speech, for the second consecutive year, flies in the face of the need for transparency and honest dialogue in government that people of the commonwealth deserve.

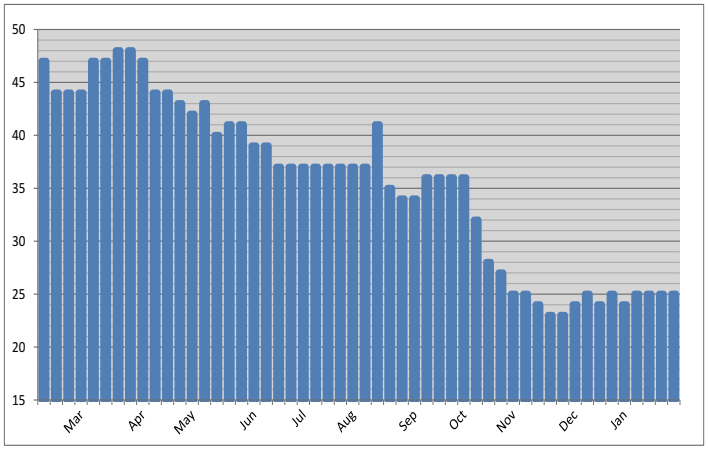
"This tax, combined with the existing Impact Tax, would rank Pennsylvania's severance tax structure as the highest in the nation, and do so during a time of extremely low commodity prices, cutbacks in drilling budgets by many producers in the state and a steady exodus of other producers to states with better climates for investment.

"'Restoring Pennsylvania' is what natural gas developers have been doing here for the past decade. The Impact Tax, which no other segment of Pennsylvania's economy pays and no other gas-producing state has, is restoring public assets and funding development projects in communities in all 67 of the state's counties.

"Lawmakers must see through the governor's efforts to put this tax scheme in a proposal accompanying the budget, rather than in the budget itself, and vote against any efforts to enact it. Pennsylvania must draw the line against additional taxes on natural gas production and work instead on improving the competitiveness of its business climate." ■

Oil & Gas Dashboard

Pennsylvania Rig Count



Penn Grade Crude Oil Prices

Natural Gas Futures Closing Prices

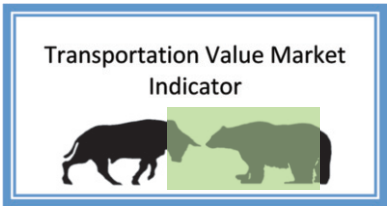
Month	Price
March	$1.876
April	1.900
May	1.951
June	2.010
July	2.079
August	2.110
September	2.068
October	2.144
November	2.254
December	2.447
January 2021	2.515
February	2.537

Prices as of February 7

Sources
American Refining Group: www.amref.com/Crude-Prices-New.aspx
Ergon Oil Purchasing: www.ergon.com/prices.php
Gas futures: quotes.ino.com/exchanges/?r=NYMEX_NG
Baker Hughes rig count: phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reportsother
NYMEX strip chart: Nucomer Energy, LLC, emkeyenergy.com

Northeast Pricing Report – February 2020

The warmer than normal winter has taken its toll on the natural gas market. Prices through 2021 are facing significant headwinds. It will take a while to overcome gas-on-gas competition, LNG glut and depressed coal prices. Pricing for the front-month term has taken a significant hit in the Northeastern demand markets. Algonquin and Transco Z6 dropped the largest amounts of $3.20 and $1.68 per MMBtu. Even Dominion South and Transco Leidy, which typically strengthen in the winter period, could only muster a $0.01 and $0.02 per MMBtu increase. For the one-year term, Dominion South actually decreased $0.01 per MMBtu. Both Algonquin and Transco Z6 decreased for the one-year term of $0.47 and $0.10 per MMBtu respectively. Following that trend, both trading points dropped the most in long-germ trading at $0.24 and $0.19 per MMBtu.



Provided by Bertison-George, LLC
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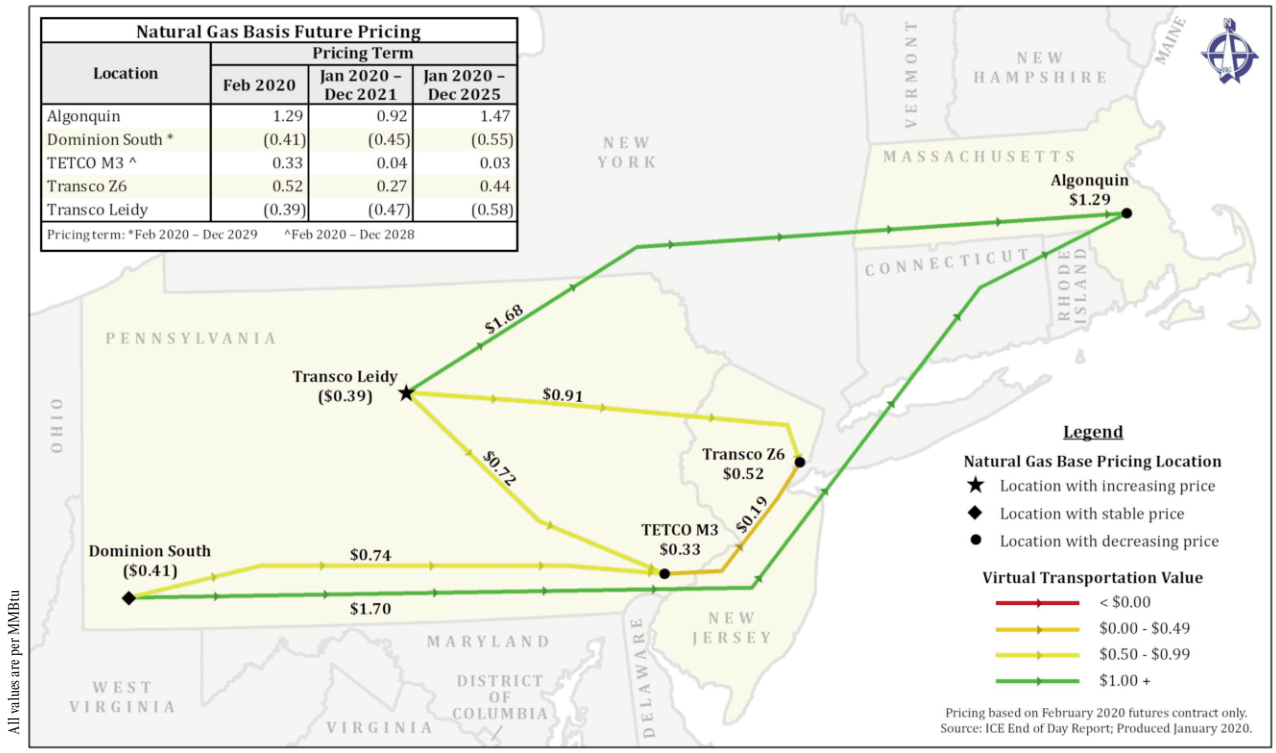
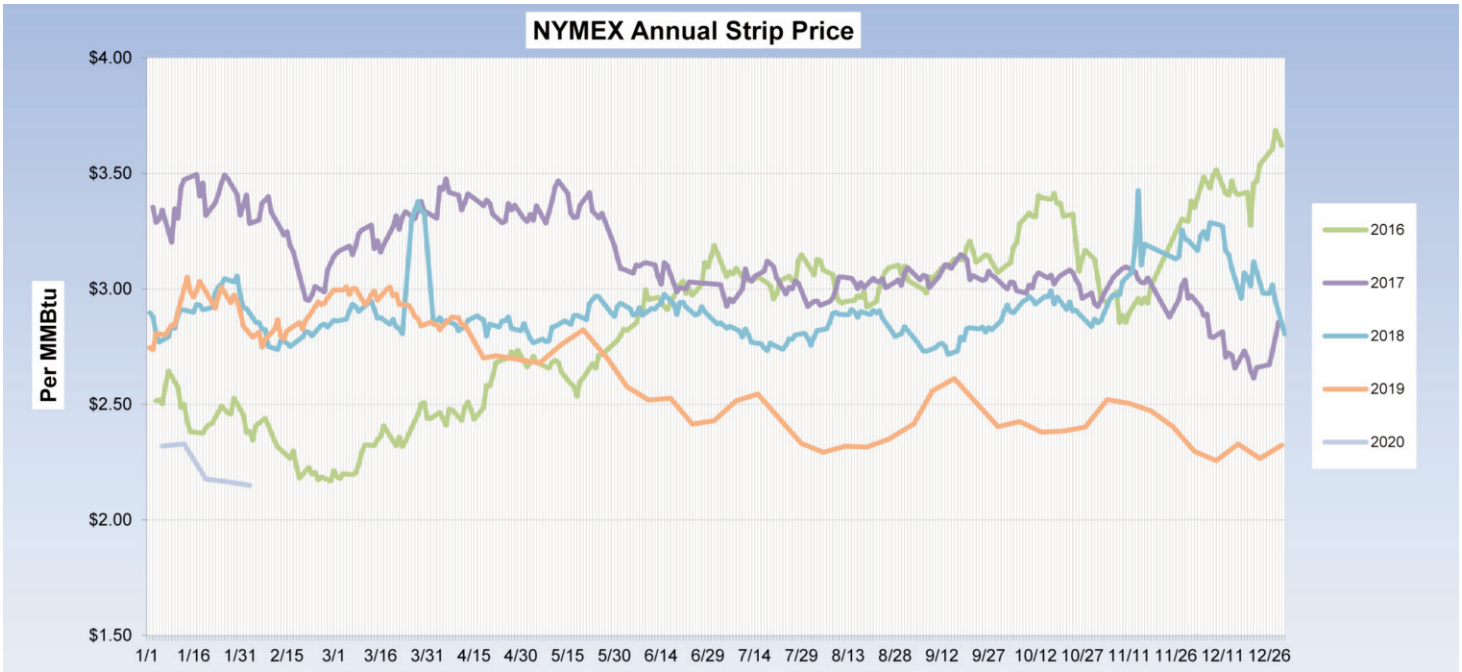
Transportation values changed dramatically. Dominion South and Transco Leidy to Algonquin decreased in value by $3.21 and $3.22 respectively. Transco Leidy to Transco Z6 also had a healthy decline of $1.60 per MMBtu. Dominion South to TETCO M3 decreased the least at $0.86 per MMBtu.

Natural Gas Basis Future Pricing

Location	Pricing Term		
	Feb 2020	Jan 2020 – Dec 2021	Jan 2020 – Dec 2025
Algonquin	1.29	0.92	1.47
Dominion South *	(0.41)	(0.45)	(0.55)
TETCO M3 ^	0.33	0.04	0.03
Transco Z6	0.52	0.27	0.44
Transco Leidy	(0.39)	(0.47)	(0.58)

Pricing term: *Feb 2020 – Dec 2029 ^Feb 2020 – Dec 2028





Spud Report: January 2020

The data show below comes from the Department of Environmental Protection. A variety of interactive reports are available at www.dep.pa.gov/DataandTools/Reports/Oil and Gas Reports.

The table is sorted by operator and lists the total wells reported as drilled last month. **Spud** is the date drilling began at a well site. The **API number** is the drilling permit number issued to the well operator. An asterisk (*) after the API number indicates a conventional well.

OPERATOR	WELLS	SPUD	API #	COUNTY	MUNICIPALITY
Apex Energy (PA) LLC	2	1/6/20	OGO-39639	Westmoreland	Hempfield Twp
		1/6/20	OGO-39639	Westmoreland	Hempfield Twp
ARD Opr LLC	3	1/7/20	OGO-68942	Lycoming	Cascade Twp
		1/8/20	OGO-68942	Lycoming	Cascade Twp
		1/9/20	OGO-68942	Lycoming	Cascade Twp
Autumn Ridge Energy LLC	1	1/24/20	OGO-68270*	McKean	Corydon Twp
Cabot Oil & Gas Corp	11	1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/10/20	OGO-10897	Susquehanna	Brooklyn Twp
		1/2/20	OGO-10897	Susquehanna	Lathrop Twp
		1/2/20	OGO-10897	Susquehanna	Lathrop Twp
		1/2/20	OGO-10897	Susquehanna	Lathrop Twp
Cameron Energy Co	1	1/7/20	OGO-68490*	Forest	Howe Twp
Chesapeake Appalachia LLC	7	1/10/20	OGO-65420	Susquehanna	Auburn Twp
		1/10/20	OGO-65420	Susquehanna	Auburn Twp
		1/11/20	OGO-65420	Susquehanna	Auburn Twp
		1/31/20	OGO-65420	Susquehanna	Auburn Twp
		1/25/20	OGO-65420	Wyoming	Windham Twp
		1/26/20	OGO-65420	Wyoming	Windham Twp
		1/26/20	OGO-65420	Wyoming	Windham Twp
Chief Oil & Gas LLC	8	1/4/20	OGO-66495	Bradford	Leroy Twp
		1/4/20	OGO-66495	Bradford	Leroy Twp
		1/24/20	OGO-66495	Bradford	Overton Twp
		1/24/20	OGO-66495	Bradford	Overton Twp
		1/24/20	OGO-66495	Bradford	Overton Twp
		1/24/20	OGO-66495	Bradford	Overton Twp
		1/24/20	OGO-66495	Bradford	Overton Twp
Greylock Prod LLC	5	1/8/20	OGO-51008	Greene	Greene Twp
		1/9/20	OGO-51008	Greene	Greene Twp
		1/10/20	OGO-51008	Greene	Greene Twp
		1/10/20	OGO-51008	Greene	Greene Twp
		1/11/20	OGO-51008	Greene	Greene Twp
Inflection Energy (PA) LLC	8	1/6/20	OGO-68657	Lycoming	Gamble Twp
		1/6/20	OGO-68657	Lycoming	Gamble Twp
		1/6/20	OGO-68657	Lycoming	Gamble Twp
		1/15/20	OGO-68657	Lycoming	Gamble Twp
		1/24/20	OGO-68657	Lycoming	Gamble Twp
		1/26/20	OGO-68657	Lycoming	Gamble Twp
		1/10/20	OGO-68657	Lycoming	Hepburn Twp
		1/23/20	OGO-68657	Lycoming	Hepburn Twp
KCS Energy Inc	1	1/2/20	OGO-61220*	Warren	Watson Twp
Laurel Mountain Production	8	1/19/20	OGO-68699	Clarion	Licking Twp
		1/19/20	OGO-68699	Clarion	Licking Twp
		1/19/20	OGO-68699	Clarion	Licking Twp
		1/19/20	OGO-68699	Clarion	Licking Twp
		1/3/20	OGO-68699	Clarion	Perry Twp
		1/3/20	OGO-68699	Clarion	Perry Twp
		1/3/20	OGO-68699	Clarion	Perry Twp
		1/3/20	OGO-68699	Clarion	Perry Twp
Range Resources Appalachia	3	1/13/20	OGO-60915	Washington	Blaine Twp
		1/13/20	OGO-60915	Washington	Blaine Twp
		1/14/20	OGO-60915	Washington	Blaine Twp
Rice Drilling B LLC	11	1/9/20	OGO-39054	Greene	Springhill Twp
		1/9/20	OGO-39054	Greene	Springhill Twp
		1/9/20	OGO-39054	Greene	Springhill Twp
		1/10/20	OGO-39054	Greene	Springhill Twp
		1/10/20	OGO-39054	Greene	Springhill Twp
		1/10/20	OGO-39054	Greene	Springhill Twp
		1/21/20	OGO-39054	Greene	Wayne Twp
		1/21/20	OGO-39054	Greene	Wayne Twp
		1/21/20	OGO-39054	Greene	Wayne Twp
		1/21/20	OGO-39054	Greene	Wayne Twp
		1/21/20	OGO-39054	Greene	Wayne Twp
SWN Prod Co LLC	6	1/25/20	OGO-68698	Susquehanna	New Milford Twp
		1/26/20	OGO-68698	Susquehanna	New Milford Twp
		1/8/20	OGO-68698	Tioga	Liberty Twp
		1/9/20	OGO-68698	Tioga	Liberty Twp
		1/10/20	OGO-68698	Tioga	Liberty Twp
		1/11/20	OGO-68698	Tioga	Liberty Twp
XTO Energy Inc	2	1/8/20	OGO-38958	Indiana	Center Twp
		1/8/20	OGO-38958	Indiana	Center Twp

	January	December	November	October	September	August
Total wells	**77**	**60**	**30**	**57**	**77**	**42**
Unconventional Gas	74	51	23	43	46	21
Conventional Gas	0	0	0	1	0	0
Oil	3	5	6	13	29	20
Combination Oil/Gas	0	4	0	0	2	1

PIOGA Member Profiles

Introduce your company

Introduce your company and tell other members what you offer to Pennsylvania's oil and gas industry. The guidelines for making a PIOGA Member Profile submission are:

• Include a brief history of your company. When and where was it founded, and by whom? Is the company new to the oil and gas industry in general or to Pennsylvania?

• Describe the products and services you offer specifically for the oil and gas industry. Do you have a product in particular that sets your company apart from the competition?

• If applicable, tell how the business been positively impacted by Pennsylvania's oil and gas industry. Have you expanded, added employees or opened new locations?

• Include a website address and/or phone number.

• Your submission may be a maximum of 400-450 words and should be provided as a Word document. Use minimal formatting—bold and italic fonts are OK, as are bulleted or numbered lists. Your submission is subject to editing for length, clarity and appropriateness.

• Include your company logo or a photo. Images must be high-resolution (300 dots/pixels per inch or higher) and in any common graphics format. Please include identifications for any people or products in a photo. Send image files separately, not embedded in your document.

Email material to Matt Benson at matt@pioga.org. This is a free service to our member companies and publishing dates are at the discretion of PIOGA. If you have questions, email Matt or call 814-778-2291.

PIOGA Case knife

To commemorate PIOGA's 100th anniversary, we commissioned this knife from W.R. Case & Sons Cutlery Company in Bradford. The limited edition, collector quality knife and wooden display box feature the Centennial logo. It makes a great gift! Get yours before they're gone at members.pioga.org.

Calendar of Events

PIOGA events

Information: pioga.org > PIOGA Events

Cigar Dinner Networking Event
February 20, BURN by Rocky Patel, Pittsburgh

Axes & Ales Networking Event
March 11, Lumberjaxes, Pittsburgh (Millvale)

PIOGATech: Safety Topic
March 17, TBA

2020 Spring Meeting
April 1, Rivers Casino, Pittsburgh

PIOGA PAC Pittsburgh Pirates Home Opener
April 2, PNC Park, Pittsburgh

PIOGATech: Environmental Topic
April 23, TBA

Sporting Clays Networking Event
May 2, Promised Land Sporting Clays Club, Freeport

Ted Cranmer Memorial Golf Outing & Steak Fry
June 1, Wanango Country Club, Reno

Networking Event
July 10, TBA

PIOGATech: Water and Waste Management
August 19, TBA

23rd Annual Divot Diggers Golf Outing & Steak Fry
August 20, Tam O'Shanter Golf Course, Hermitage

Fall Conference
September 22, Seven Springs Mountain Resort, Champion

Fall Golf Outing and Sporting Clays Shoot
September 23, Seven Springs Mountain Resort, Champion

PIOGATech: Safety Topic
October 22, TBA

Annual Oil & Gas Tax and Accounting Seminar
November 18, Holiday Inn Express, Canonsburg/Southpointe

Marcellus to Manufacturing Conference
November TBA

PIOGATech: Environmental Topic / Holiday Membership Mixer
December 15, The Chadwick, Wexford

Other association & industry events

OOGA 2020 Annual Meeting
March 4, Columbus, OH
www.ooga.org/events

The Great Energy Gathering VII
March 18, Hilton Garden Inn, Southepointe
www.greatgathering2020.com (use PIOGA member discount)

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