

# The PIOGA Press

The monthly newsletter of the  
Pennsylvania Independent Oil & Gas Association  
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## Governor's CO2 cap-and-trade plan moves forward under extended timeline

**T**he Wolf administration on June 22 announced a six-week extension for the Department of Environmental Protection to develop a proposed rulemaking to allow Pennsylvania to participate in the Regional Greenhouse Gas Initiative (RGGI) carbon dioxide cap-and-trade program.

Initially, the governor instructed DEP to develop a plan to present to the Environmental Quality Board (EQB) by July 31. Under the amended executive order, however, the deadline has been extended to September 15 to deliver the proposal to the EQB to begin the formal rulemaking process.

Prior to the extension, DEP's Air Quality Technical Advisory Committee and Citizens Advisory Council both failed to approve motions recommending that EQB formally proceed with the rulemaking. Additionally, many lawmakers objected that the governor was continuing to move forward with this unilateral action during the COVID-19 crisis (*May PIOGA Press, page 1*). DEP's referenced both of these factors in announcing the extension.

"Given the feedback from members of our advisory committees and the general public comments, and the disruption caused by the COVID-19 pandemic, we plan to continue our conversations and outreach among the environmental justice community, affected communities, and general public throughout this summer," said DEP Secretary Patrick McDonnell. "Gathering additional feedback prior to promulgation will allow us to strengthen the regulation and work with affected communities and will not affect the ultimate timeline for the regulation go into effect."

DEP expects the regulation, which would apply to all fossil fuel-fired electricity generators of greater than 25

*Continues on page 20*

## Attorney general blasts DEP for allegedly lax oversight of oil and gas industry

**P**ennsylvania Attorney General Josh Shapiro on June 25 released a 243-page grand jury report slamming the Department of Environmental Protection, and to a lesser extent the Department of Health, for allegedly lax oversight of the shale-gas industry. The report comes in the wake of criminal charges filed against two operators by the attorney general's office.

"When it comes to fracking, Pennsylvania failed. Now it's time to face the facts, and do what we can to protect



*Attorney General Josh Shapiro with prop at a June 25 news conference.*

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## Attorney general report *Continued from page 1*

the people of this commonwealth by encouraging the Department of Environmental Protection to partner with us and by passing the grand jurors' common-sense reforms," Shapiro said in a news release.

The report makes eight recommendations (*see the "conclusions" below*), most of which would require legislative action.

The administration quickly issued a statement in response to the report, putting the blame for any shortcomings on Governor Tom Wolf's predecessor, Tom Corbett: "The Wolf administration inherited a flawed ideological approach to regulation of unconventional oil and gas development that was forced on the departments of Environmental Protection and Health by the Corbett Administration, which promoted the rapid expansion of natural gas development and profit above these other priorities."

### PIOGA response

In conducting what was clearly a politically motivated and closed-door effort to vilify natural gas development in Pennsylvania, the state's attorney general, by means of a grand jury report, reached many erroneous conclusions that ignore what has taken place in Pennsylvania over the past several years, as well as the efforts of hundreds of regulators, researchers and other professionals to develop and update the state's laws and regulations during decades of oil and gas production. Here are a few examples:

**Conclusion:** Expand no-drill zones in Pennsylvania from the required 500 feet to 2,500 feet.

**The Facts:** Act 13, the comprehensive oil and gas law enacted in 2012 in response to the advent of unconventional natural gas development in Pennsylvania, doubled the setback standard from 250 feet to 500 feet—a distance that aligns with the majority of other oil and gas-producing states. Municipalities also have the flexibility to adjust the setback through local zoning based on local conditions, and have done so in recent years.

**Conclusion:** Require fracking companies to publicly disclose all chemicals used in drilling and hydraulic fracturing before they are used on-site.

**The Facts:** Act 13 requires the disclosure of chemicals used in the hydraulic fracturing process, and producers in Pennsylvania have also made that information broadly available for years through the FracFocus website.

**Conclusion:** Require the regulation of gathering lines, used to transport unconventional gas hundreds of miles.

**The Facts:** The safe construction and operation of gathering lines are essential to every natural gas producer's goal of transporting their product from the wellhead to the consumer. Gathering lines are tested frequently for integrity, and producers take safety in their operation very seriously. This is best reflected in the excellent safety record compiled by producers over the



past several years in the operation of their gathering lines as well as the unconventional industry's initiative to be included in the PA One Call law even when not required under federal pipeline safety laws.

**Conclusion:** Add up all sources of air pollution in a given area to accurately assess air quality.

**The Facts:** Multiple studies have been undertaken by the Department of Environmental Protection and by natural gas producers using independent engineering companies to collect ambient air samples – the “real air” that people breathe – around oil and gas wells, compressor stations, and other infrastructure. Those studies have reached the same conclusion: that there is no evidence of impaired air quality from any of those sources.

**Conclusion:** Require safer transport of the contaminated waste created from fracking sites.

**The Facts:** Natural gas producers have been successful in recycling huge amounts of water used in hydraulic fracturing, reducing the volume of water requiring transport and disposal. The state's regulation requires that every gallon of water used by producers is accounted for, from collection to disposal. Trucks are placarded according to federal Department of Transportation regulations, and background checks are conducted on drivers to certify their record of safe driving. Additionally, companies that transport these materials have an excellent safety record.

**Conclusion:** Conduct a comprehensive health response to the effects of living near unconventional drilling sites.

**The Facts:** The state is in the process of doing this via a two-year, \$3-million study, and the natural gas industry supports a scientific and objective examination.

**Conclusion:** Limit the ability of Pennsylvania Department of Environmental Protection employees to be employed in the private sector immediately after leaving the department.

**The Facts:** Experienced personnel in all areas of government logically have the potential to seek employment in their fields of expertise. Individuals working in the state Insurance Commission often go to work for insurance companies. Those in the Department of Transportation go to work for highway contractors, and people in the Public Utility Commission often work for regulated utilities. Legislators frequently seek employment in areas in which they have developed expertise. Employees from the Department of Environmental Protection should be treated no differently than these other professionals. The recommendation to do otherwise impugns the integrity of these hardworking professionals.

**Conclusion:** Allow the Pennsylvania Office of Attorney General original criminal jurisdiction over unconventional oil and gas companies.

**The Facts:** Pennsylvania has one of the most rigorous and comprehensive regulatory programs in the nation. The Department of Environmental Protection conducts thousands of inspections of drilling locations every year, and should retain the primary responsibility for enforcing the environmental laws and regulations of

the Commonwealth of Pennsylvania so that these prosecutorial decisions are not influenced by political considerations.

Pennsylvania's oil and natural gas producers, along with the companies that support their operations, are committed to protecting their workers, neighbors, and the natural resources of the communities where they work and live by adhering to these laws and regulations. The Commonwealth's long history of oil and natural gas development includes the first successful oil well, drilled by Col. Edwin Drake near Titusville in 1859, and the pioneering Haymaker Well, a natural gas well drilled in Westmoreland County in 1878 and harnessed to power gas lights via a pipeline to the City of Pittsburgh, 15 miles west. Today, Pennsylvania's natural gas meets one-third of our nation's total demand for energy. PIOGA's members and the thousands of other Pennsylvanians responsible for producing that energy are proud to operate safely and in compliance with the Commonwealth's environmental laws. ■

*Former DEP Secretary Mike Krancer has written a more comprehensive response to the attorney general's report. A link to it can be found in the News section at [pioga.org](http://pioga.org) if you would like to read the perspective of a top agency official who led the department between 2011-2013.*

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# PIOGA tries to help conventional producer retain farm out acreage

*Express lease provisions should have been enforced rather than so-called 'doctrine of abandonment'*

**O**n August 23, 2019, the Pennsylvania Superior Court issued an opinion affirming the determination of the Warren County Court of Common Pleas that Mitch-Well Energy, Inc. had abandoned two oil and natural gas leases by (i) defaulting on its commitments to drill 30 wells under one lease (McLaughlin) and 20 wells under the other lease (SLT); (ii) not paying either minimum annual payments or royalties in excess of the minimum payments during a 16-year period when each well drilled under each lease did not produce in marketable quantities; and (iii) breaching the implied covenant of development and production "that is read into oil and gas leases." *SLT Holdings, LLC, Jack E. McLaughlin, and Zureya McLaughlin v. Mitch-Well Energy, Inc., and William E. Mitchell, Jr.*, No. 542 WDA 2018, 2019 PA Super 258 (Pa. Superior 2019).

The leases expressly stated that they would terminate if the producer failed to perform these drilling commitments, but the producer would retain the 20 acres surrounding each well drilled which was capable of producing oil and/or natural gas. Because of the abandonment determination, the producer lost its rights to these two farm outs.

The Superior Court and common pleas court relied upon a federal court decision, *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759 (W.D. Pa. 2004), and the Pennsylvania Supreme Court decision in *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 A. 555 (1899) for their abandonment determination.

On April 14, 2020, the Pennsylvania Supreme Court granted the producer's request to hear its appeal, stating the following issues:

Did the Superior Court err in the grant of

summary judgement against [Producer]...on a "drill or pay oil and gas lease" where a well on each parcel was drilled by [Producer] and pursuant to each lease the wells were productive, and no testimony was taken as to the [Producer's] good faith production decision pursuant to the Supreme Court decision in the case of *T. W. Phillips Gas and Oil Co. v. Jedlicka*, 42 A.3d 261 (2012)?

The Supreme Court also directed the parties "to address *Jacobs v. CNG Transmission Corp.*, 332 F. Supp. 2d 759 (W.D. Pa. 2004), *Aye v. Philadelphia Co.*, 193 Pa. 451 (Pa. 1899), and the doctrine of abandonment." The appeal is docketed at 6 WAP 2020.

On June 12, PIOGA submitted an *amicus* brief in support of producer Mitch-Well's appeal because PIOGA believes the two lower courts erred in determining that the producer abandoned its leases and thereby lost its farm out acreage. PIOGA argues that longstanding Pennsylvania law requires that the express lease provisions must be applied rather than some general notion of abandonment that is not grounded in the lease provisions and, in this case, that means if the producer defaulted on the leases, by their express provisions the leases terminate and producer retains its farm out acreage.

However, because the lessors failed to provide the producer with notice of the default(s) and an opportunity to cure the default(s), as expressly required by both leases, PIOGA also asked the Supreme Court to dismiss the lawsuit and restore the parties to the *status quo ante*, meaning their relationship before the lawsuit was filed.

The lower courts' abandonment determination has other significant adverse legal consequences to the producer and its sole owner, shareholder, officer and employee, William E. Mitchell, Jr., including liability for

conversion of oil produced from one of the wells and extinguishment of the producer's right to enter upon either leased property. PIOGA did not brief these issues because their disposition is governed by the abandonment determination.

The lessors' brief is due August 14. The Supreme Court will then decide whether to hear oral argument on the issues before rendering its decision.

Copies of all briefs filed in this appeal will be available on PIOGA's members'-only website. ■



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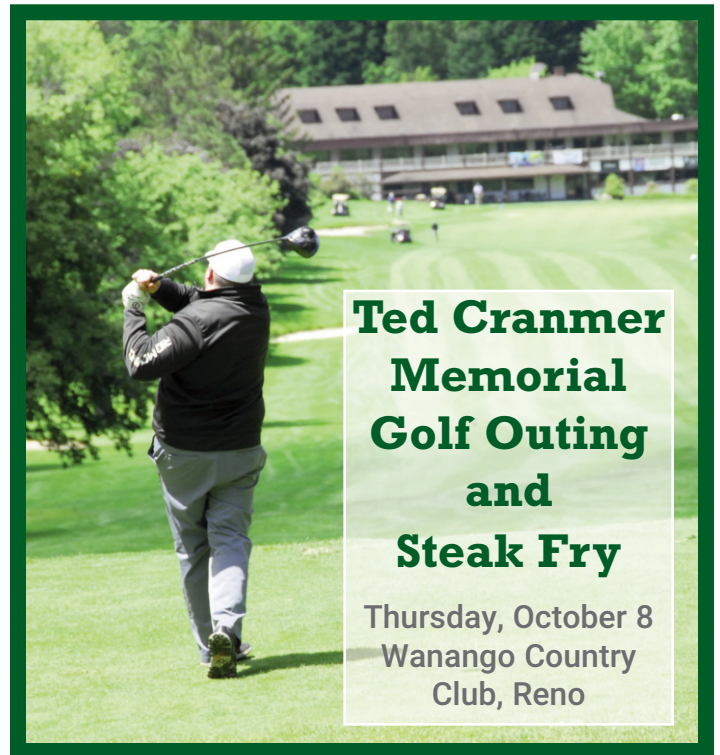
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**Water and Waste Management Update**

Wednesday, August 19  
The Chadwick, Wexford

**23rd Annual Divot Diggers Golf Outing**

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**Ted Cranmer Memorial Golf Outing and Steak Fry**

Thursday, October 8  
Wanango Country Club, Reno



**Marcellus to Manufacturing**

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Thursday, November 12



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# PIOGA connects to members virtually

By Joyce Turkaly,  
Director of Natural Gas Market Development

Shortly after the pandemic stay-at-home orders began, members showed interest in online webinars to stay connected. Recognizing the need and the available technology to make it happen, PIOGA hosted a four-part webinar series that launched on April 30 entitled “Creating Sustainable Energy Pathways” and highlighting natural gas market projects in various stages of development. Thank you to the guest presenters who willingly shared their knowledge and insight of the market with us!

While environmental policies in transportation have tended to follow passenger vehicles, the case for mitigating GHG for freight in high-horsepower applications like rail, for example, were highlighted by William Sapon, Clean Transportation Advisor, Peoples. William talked us through the Norfolk Southern CNG demonstration project, noting that the heaviest rail volume runs from Chicago to New York via Pittsburgh to Allentown. With slightly more than 4,000 locomotives, the Norfolk Southern line runs parallel for the most part to the Peoples system. Having refueling infrastructure along this route will hope to save NS a portion of their overall fuel cost, which is currently 14 percent of their total operating expenses, or \$1.1 billion annually.

Following William was Rick Price, Executive Director of Pittsburgh Region Clean Cities. Rick spoke of the environmental benefits of natural gas as a transportation fuel, reducing GHG in heavy-duty and light-duty 20–29 percent, respectively. The cleanest heavy-duty truck engine, the Cummins Ultra Low NOx engine which currently exceeds EPA standards (CARB certified), was included in the presentation. Rick also highlighted current trends in refuse, transit busses, light-, and medium-duty vehicles in the western half of Pennsylvania and provided updates on the P-3 (PennDOT) projects as well as some private projects. Rick noted that all of Pennsylvania’s interstates are now designated or soon to be designated alternative fuel corridors.

Following Rick was John Doyle, Chief Project Officer, Primus Green Energy. John talked about the gas-to-liquids plant (GTL) in Hillsborough, New Jersey. For two years starting in 2009, Primus piloted the GTL plant to produce SGT+\* (SynGas to gasoline) and switched to natural gas as a feedstock versus biomass. For five years afterward, they ran it as a demonstration project and had interest in to scale for a methanol facility before reverting back. John commented that the technology has performed very well stating that the team was suc-

cessful in natural gas to gasoline runs, producing on spec RBOB gasoline and IMPCA spec methanol. We wrapped the series mid-June with a review of the 2020 U.S. Energy and Employment Report hosted by key author David Foster, Distinguished Associate, Energy Futures Initiative. David spoke to five key sectors: Fuels; Electric Power Generation (EPG); Transmission, Distribution and Storage (TDS); Energy Efficiency (EE); and Motor Vehicles. Key findings from the report:

1. Traditional Energy and Energy Efficiency added 120,000 jobs in 2019, outperforming the economy for the fifth year, in a row by 0.6 percentage point, 1.8 percent to 1.2 percent.
2. Energy Efficiency again led the way with 54,000 new jobs, almost 330,000 new jobs in the last four years.
3. Fuels production added 26,000 new jobs—18,000 in oil and natural gas—while coal mining held firm.
4. Solar jobs bounced back, adding 5,700 jobs after declining for two years in a row, while low emissions natural gas, wind, CHP, and geothermal all continued to grow.
5. Coal generation dropped by almost 8,000 jobs while coal mining increased slightly.
6. Motor vehicles added 20,000 jobs, while alternative fuel vehicles declined slightly.
7. Overall hiring difficulty continued to rise to more than 84 percent, an increase of 7 percentage points.
8. Overall surveyed employers predicted 3.1 percent growth rate for 2019.

Realizing the current state of the U.S. economy, David shared the pandemic data available at the time and compared today to the 2008-09 recession by industry sector.

- COVID-19 has disproportionately affected leisure and hospitality, retail, air transportation, and some health care sectors.
- March-May 2020 BLS data showed leisure and hospitality had reduced employment by 39 percent or 6.3 million jobs despite adding 1.23 million jobs in May. Oil and gas extraction was at 6 percent.
- Based on job loss in the Great Recession, we see the following risks in the energy sectors:

Energy Employment	Job Loss by Sector, March - May, 2020 vs. 2009	Risk Assessment
37% construction	(33K) + (975K) + 464K= 7% vs. 33%	High
17% professional services	(80K)+ (2,165K) +127K= 8.7% vs. 2%	Low
13% manufacturing	(34K) + (1,330K) + 225K = 8.6% vs. 18%	High
11% utilities	300 + (3.3K) +(2.3K) = 1% vs. 0%	Low
11% wholesale trade	(2.9K)+ (363K) +21K= 6.1% vs. 10%	Medium
9% mining and extraction	(7K) + (50K) + (19.9K)= 10.6% vs. 15-45%	High/Sectoral
1% agriculture and forestry	N.A.	N.A.

High = 15-30%, Medium = 5-14%, Low = 0-5%  
\*Does not include retail gas stations

## IPAA, PIOGA comment on proposed PHMSA farm tap FAQs

As we reported in the May *PIOGA Press*, the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) in April published a request for comments on proposed frequently asked questions (FAQs) for the regulation of farm taps. The proposed FAQs came nearly two years after the agency posted and then withdrew an earlier set of farm tap FAQs. Last month, PIOGA joined with the Independent Petroleum Association of America (IPAA) in providing PHMSA with input on the FAQs.

In its comments, the IPAA explained that while production does not fall under the jurisdiction of PHMSA, many of the agency's actions affect producers through regulation of gathering and efforts to move the point of regulation upstream toward the wellhead. These FAQs, as proposed, would regulate thousands of natural gas wells. IPAA urged PHMSA, first, to reconsider these FAQs as they pertain to gas connections originating from non-jurisdictional production and rural gathering facilities. Second, at the very least, PHMSA should hold off on finalizing these FAQs following completion of the Pipeline Safety: Gas Pipeline Regulatory Reform notice of proposed rulemaking published in the June 9 *Federal Register*.

The gist of the comments the IPAA submitted along with PIOGA and six other state oil and gas associations was this:

For producers, farm taps have granted access

to drill or lay low-pressure gathering lines on a homeowner's property by an oil and gas lease or for a right-of-way to lay piping. The homeowner usually would contract with a plumber to install the necessary equipment to take the producer's or gatherer's gas off the tap. The gas is often "free," or the homeowner would reserve a specific volume of "free" gas, then pay for volumes taken above that amount. These were viewed as contractual arrangements that did not fall within federal jurisdiction covering taps off transmission or distribution lines. Importantly, the homeowner—and not the producer—owns and operates the pipeline, the meter, the regulator, and all equipment. The producer allows the homeowner access to the supply point but does not control nor own any of the farm tap owner's equipment. As such, producers cannot enter onto a homeowner's property (trespass) and be required to inspect facilities they do not own (trespass and liability).

Production pipeline is unregulated by PHMSA.

Farm taps should be unregulated as well.

IPAA also urged PHMSA to recognize the potential enormity of its undertaking, pointing out that Ohio producers have installed about 30,000 free gas taps and estimates put the number in West Virginia at 20,000. The level of regulation detailed in the FAQs may require the farm tap provider to submit a gas distribution annual report, obtain an Operator Identification Number, use only qualified individuals under PHMSA regulations to perform certain tasks on farm tap lines, as well as prepare and follow an operations and maintenance manual in accordance with PHMSA regulations.

"Such regulation defies logic and certainly is not warranted from a risk standpoint. It could not withstand a cost-benefit analysis," IPAA wrote.

PIOGA's own comments, submitted separately, amplified those of the IPAA, pointing out that decisions by the Pennsylvania Public Utility Commission confirm that recipients of gas from farm taps off independent producers' production and rural gathering lines are neither utility service "customers" nor the producers' "customers." On the contrary, the right of recipients to gas from farm taps off independent producers' production and rural gathering lines is derived entirely from private contracts; the traditional provider-customer business relationship, the basis for PHMSA's treating farm taps as "distribution service lines," does not exist in these circumstances.

Further, PIOGA asserted it is clear that these farm taps are not in the same category as farm taps off regulated utility pipelines and should not be treated as if they are. In addition, PHMSA has not shown that there is any safety benefit in requiring these producers to take responsibility for farm taps when they do not have legal access to these facilities. ■



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# Land use regulations and validity challenges to zoning ordinances persist

*This article is an excerpt of **The 2020 Babst Calland Report**, which represents the collective legal perspective of Babst Calland's energy attorneys addressing the most current business and regulatory issues facing the oil and natural gas industry. A full copy of the Report is available by writing [info@babstcalland.com](mailto:info@babstcalland.com).*

Increasing industry headwinds have resulted in a slowdown of new permitting activity and an increase in ordinance restrictions on oil and gas development. Substantive validity challenges to zoning ordinances seeking to limit development to industrial areas have continued despite Pennsylvania Commonwealth Court's clear pronouncements that local considerations control legislative decisions as to the location of development. Pennsylvania courts have also dealt with issues such as the legal standing and the timing of ordinance challenges.

Of course, industry activity has been upended by the COVID-19 pandemic even though oil and gas extraction was permitted to proceed in Pennsylvania as a life-sustaining business. Municipal meetings were cancelled or curtailed throughout March and April. The General Assembly responded to the challenges facing municipalities by enacting Act 15. This legislation loosened the requirements for public meetings and hearings by allowing them to be conducted via telecommunications devices during the pendency of the governor's emergency declaration. Act 15 also tolled the statutory time limits placed upon local governments to hear and act upon land use applications between March 6 through May 20, 2020.

Cooperation between operators and local government will become even more essential in the coming months given that municipal finances, dependent on property and income taxes, are now in a precarious state.

## **Frederick's aftermath: Commonwealth Court continues to deny challenges to zoning ordinances permitting oil and gas drilling**

As we discussed in detail in last year's *Report*, in *Frederick v. Allegheny Township Zoning Hearing Board* the Commonwealth Court upheld the validity of a zoning ordinance permitting natural gas development in all zoning districts as a use permitted by right. Significantly, the Pennsylvania Supreme Court declined to accept an appeal of that case, and the *Frederick* ruling continues to provide the legal basis for the denial of similar challenges.

In June 2019, the Commonwealth Court affirmed the Middlesex Township, Butler County, zoning hearing board's denial of an ordinance validity challenge



brought by several residents and non-governmental organizations. The challenged ordinance permitted oil and gas wells as either a use by-right or a conditional use in designated rural, residential and commercial districts, but not in all districts.

In its decision, the board noted the history of oil and gas production in the township, found that the ordinance credibly balanced residential and oil and gas interests, and deter-

mined that acceptance of challengers' arguments would render the zoning ordinance exclusionary. On appeal, the Commonwealth Court, relying on *Frederick*, rejected the objectors' arguments that the zoning ordinance violated substantive due process and the Pennsylvania Constitution's Environmental Right Amendment (ERA). The Pennsylvania Supreme Court declined to hear an appeal of the case.

Since last year's *Report*, Protect PT has continued its substantive validity challenge to the Penn Township, Westmoreland County, zoning ordinance, appealing the Court of Common Pleas' denial of the challenge to the Commonwealth Court. The challenged ordinance permits oil and gas operations in the township's mineral extraction overlay (MEO) district, which encompasses portions of the rural resource and industrial/commercial zoning districts. In November 2019, the Commonwealth Court affirmed the lower court's denial of the challenge, relying heavily on its decisions in *Frederick* and *Middlesex*. The court rejected Protect PT's contention that oil and gas drilling was incompatible with the purpose of the underlying zoning district and that the township's MEO district was inconsistent with the township's comprehensive plan and the expectations of the district's residents. The court likewise dismissed the objectors' ERA and substantive due process arguments, concluding that they had failed to establish that natural gas development posed any substantial risk to the environment or health of township residents. The Supreme Court also declined to hear the appeal of this case.

## **ERA-based challenges to zoning ordinances continue**

In 2011, the Municipality of Murrysville, Westmoreland County, amended its zoning ordinance to create an Oil and Gas Overlay district in which industry development was authorized as a conditional use. In 2017, Murrysville again amended the ordinance to increase setback requirements within the district to 750 feet from the edge of the well pad to protected structures. The overlay district comprises 37 percent of the municipality's land mass, and, with application of the setback requirements, less than 5 percent of the municipality is available for oil and gas development.

Despite the restrictive nature of the ordinance, a

## 2020 Babst Calland Report highlights legal and regulatory challenges

### *Oversupply and pandemic bring on need to adapt to a changing market*

**B**abst Calland has published its 10th annual energy industry report: *The 2020 Babst Calland Report – The U.S. Oil & Gas Industry: Federal, State, Local Challenges & Opportunities; Legal and Regulatory Perspective for Producers and Midstream Operators*.

*The Babst Calland Report* is an annual review of the issues and trends at the federal, state and local level in the oil and gas industry over the past year. In this *Report* more than 50 energy attorneys provide perspective on the current state of the U.S. natural gas and oil production industry and its growth to historic highs due to more than a decade of advances in on-shore horizontal drilling and high-volume hydraulic fracturing. It asserts that despite current challenges, a maturing shale industry is poised for future growth as natural gas and oil producers have driven down the costs of production. Transportation options for moving these natural resources from growing areas of production to customers continue to be built, even with new hurdles from regulators and other stakeholders.

The 102-page interactive *Report* covers a range of topics from the industry's business outlook, regulatory enforcement and rulemaking to developments in pipeline safety and litigation trends. The firm's collective legal experience and perspectives on these and related business developments are highlighted in this *Report*, including those summarized below:

- Long-term, U.S. energy production appears poised to continue to outstrip domestic consumption due in some measure to increased consumption efficiency, along with the obvious ramifications from the natural gas revolution.
- The regulatory environment is focused on climate change, reducing emissions, water quality developments and enforcement. Increased volumes of written agency guidance, enforcement and penalties continue to challenge the industry.
- Citizens groups continue to actively challenge federal and state initiatives designed to expand natural gas and oil development, creating delays and uncertainties.
- Land use and zoning challenges continue at the local level. Increasing industry headwinds have resulted in a slowdown of new permitting activity amid ongoing challenges and ordinance restrictions.
- Public interest in pipeline safety has grown amid opposition

and new rules from the Pipeline and Hazardous Materials Safety Administration in response to increased public and congressional pressure to initiate and finalize new or revised pipeline safety regulations. Operators seek to install new or replace existing pipelines throughout the U.S. while advocacy groups aggressively oppose many pipeline projects.

- Title legislation and court decisions vary by state and basin. In Pennsylvania, for example, Act 85 took effect in January 2020 and defines the conditions in which oil and gas producers may drill a lateral wellbore that crosses between two or more pooled units.

- Although 2019 saw renewed claims of adverse health effects allegedly related to oil and gas development, support for such claims continues to be limited, as now noted by numerous publications.

- Unmanned aircraft systems (UAS) take hold in the energy sector. Despite the pandemic and its impacts, UAS have emerged as essential tools for the energy industry for conducting complex inspection and monitoring of difficult to access infrastructure and locations.

- From a workforce standpoint, COVID-19 conditions and other wage and hour regulations, amendments to the Family Medical Leave Act, and expanded unemployment benefits under the CARES Act have had an impact on companies across the country.

The natural gas and oil industry continues to expand its reach and impact on U.S. energy supply and independence. Each company has its own set of opportunities and challenges to navigate based on its financing, debt, shareholder goals, and operations and infrastructure footprint. Nonetheless, the United States' plentiful supply of natural gas and oil is expected to continue to fuel the country's economic future and support national security.

**Request a copy of the *Report*.** Babst Calland's Energy and Natural Resources attorneys support oil and gas companies operating in multiple locations throughout the nation. To request a copy of the *Report*, contact [info@babstcalland.com](mailto:info@babstcalland.com).

*The Babst Calland Report is provided for informational purposes and is not intended to constitute legal advice.*

community organization filed a substantive validity challenge. The Murrysville appeal asserted the same types of legal theories espoused in the cases discussed previously. The municipality's zoning hearing board dismissed the challenge in August 2019, finding an appropriate balance existed between the public health, welfare, safety and the environment with the unconventional oil and gas use, and that the objector failed to prove that the development was incompatible with existing or permitted uses. The Court of Common Pleas of Westmoreland County denied the objector's appeal in May 2020.

#### **Operator's ordinance validity challenge denied**

Historically most challenges to the substantive validity

of Pennsylvania zoning ordinances have been asserted by property owners claiming that those ordinances illegally restrict the uses they wish to undertake. A recent challenge to the City of Saint Marys, Elk County's zoning ordinance by an oil and gas operator falls in this traditional category.

In 2016, the city adopted an amendment to its zoning ordinance imposing setbacks for well pads and setting noise standards. An oil and gas operator filed a substantive validity challenge to the ordinance, asserting that the ordinance illegally restricted its development activities. That challenge was dismissed by the city zoning hearing board in February 2017. Almost three years later, the Court of Common Pleas of Elk County dismissed the operator's appeal, rejecting a number of



arguments including that the ordinance exceeds the City's authority under the state Municipalities Planning Code (MPC), is preempted by the Oil and Gas Act, results in a de facto taking, violates due process rights, is exclusionary, fails to allow for reasonable development of oil and gas, is unduly restrictive, results in disparate treatment, is otherwise unreasonable and arbitrary, and creates an unlawful floating zone. The operator appealed the decision to Commonwealth Court, where it is pending.

### **Commonwealth Court denies citizen standing due to lack of substantial, direct and immediate interest**

In *Worthington v. Mount Pleasant Township*, the Commonwealth Court addressed the standards for determining whether an individual possesses the requisite legal standing to challenge a land use application. In that case, an individual requested party status at a hearing before the Mount Pleasant Township, Washington County, Board of Supervisors on an operator's well pad conditional use application. The individual asserted that she had standing because her granddaughter attended a school approximately 3,840 feet from the well pad. The board denied the grandmother party status. After the hearing closed, the board granted the conditional use application. The grandmother appealed to the Court of Common Pleas of Washington County, which affirmed the board's decision, including its determination as to her standing.

On further appeal, the Commonwealth Court affirmed. The court applied the long-recognized test enunciated by the Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh* as to whether a person is "aggrieved"—does the person have a "substantial, direct and immediate interest in the claim sought to be litigated."

The court first addressed whether the grandmother had a substantial interest, defined as "one in which there is some discernable adverse effect to some interest other than an abstract interest that all citizens have." As grandparent standing is not automatic, and without proof of her legal guardianship or other responsibility for the child, the court found that her interest was not substantial. The court also concluded that she did not establish that her interest was direct, as she failed to show a causal connection between her alleged benzene exposure concerns and adjudication of the conditional use application. For similar reasons, the court also found that her interest was not immediate.

### **Robinson Township remains the epicenter of challenges to local regulation of natural gas development**

Robinson Township, a rural community in Washington County, has been at the epicenter of the debate over the scope of local control of oil and natural gas development in Pennsylvania since 2012, when it became the lead

party in the Act 13 litigation bearing its name—*Robinson II*. Although the township and the other petitioners asserted that Act 13 improperly attempted to impose a "one size fits all" approach to zoning, anti-industry advocates have turned the *Robinson II* ruling on its head and challenged local ordinances permitting oil and gas development, asserting that industry activity must be limited to industrial zoning districts. As discussed in this and previous *Reports*, this argument has been repeatedly rejected by local zoning hearing boards, trial courts and the Commonwealth Court.

Ironically, Robinson Township has not been immune from these same challenges. Opponents of the oil and gas industry, with the backing of the Washington, D.C.-based Environmental Integrity Project (EIP), have filed a series of challenges to the township's zoning ordinance. That ordinance authorizes oil and gas development as a permitted use in some zoning districts and as a conditional use in others. It also prohibits oil and gas development in certain other zoning districts. To date, these cases have been litigated solely on procedural issues.

**Lodge.** Shortly after its most recent amendment in 2014, a group of residents filed a procedural validity challenge to the township zoning ordinance in the Court of Common Pleas of Washington County and a substantive validity challenge before the township's zoning hearing board.

In their initial substantive validity challenge filing, the objectors failed to identify any pending oil and gas development application. They later filed a second challenge and identified a well site that had been approved under the ordinance. The zoning hearing board denied the first challenge because it was not ripe (as no application was pending when it was filed) and the second challenge because the MPC prohibits multiple challenges at the same time. The objectors appealed both decisions to the Court of Common Pleas. However, they took no action to pursue these appeals or the procedural validity challenge for three years.

Eventually, in mid-2019, the court addressed all three appeals. It dismissed the procedural validity challenge, ruling that the township was not required to provide personal notice of the proposed ordinance to every property owner. The court also denied the second sub-



stantive validity challenge based on the MPC prohibition. With respect to the first substantive validity challenge, the court held that the case was still proceeding when the objectors identified a specific well site application, and thus that appeal was “ripe.” However, the court concluded that the record was unclear as to whether any of the named objectors were in close enough proximity to the well site in order to possess the necessary standing to challenge the ordinance. Rather than remand the case back to the zoning hearing board, the court conducted a hearing on the issue of standing in January 2020. A decision on the standing issue was pending at the time of publication of this *Report*.

**Brockman.** In 2017, a different set of objectors, represented by the same legal counsel as those in *Lodge*, filed yet another challenge to the Robinson Township zoning ordinance, generally averring that oil and gas operations are incompatible with several township zoning districts where the use is permitted by right or by conditional use. At the time the new objectors filed their challenge, no permits for oil and gas uses were pending or had been recently issued under the challenged ordinance. Consequently, the township zoning hearing board dismissed the challenge for lack of ripeness and lack of standing.

The objectors appealed the board’s decision to the Court of Common Pleas. The court affirmed, rejecting the objectors’ argument that the township’s past approvals of oil and gas development were sufficient to ripen the challenge. The court held that the challenge to the validity of the zoning ordinance was not ripe because of the absence of any pending land use applications. Likewise, the court rejected the objectors’ contention that their mere proximity to or residence in zoning districts where oil and gas operations were permitted by right or conditional use, without more, was sufficient to constitute “aggrieved status” to confer standing.

The objectors appealed the lower court’s decision to the Commonwealth Court. After the parties filed their briefs, the objectors filed an application to discontinue the appeal, which the Court granted on May 6, 2020.

### Trends in local ordinances

Since last year’s *Report*, municipalities in Pennsylvania continue to adopt ordinances impacting oil and gas activities. While most are zoning ordinances, others, including road weight, noise or street opening ordinances, may also impact industry operations to varying degrees. Many of the more aggressive ordinances have originated with or are supported by anti-industry groups.

Increased well bore and well pad setbacks, often of 1,000 feet or more have recently been proposed or implemented in municipalities in Allegheny, Washington, Bradford and Schuylkill counties. In addition, anti-industry and environmental groups have become increasingly involved in the ordinance review process. For example, in Cecil Township, Washington County, the Center for Coalfield Justice and the EIP both advocated for increased restrictions on oil and gas operations, includ-

ing suggested minimum setbacks of 1,700 and 3,281 feet, respectively. In recent years, Food and Water Watch has been involved with ordinances in Oakmont Borough and the Municipality of Monroeville in Allegheny County.

Increased application requirements involving environmental testing have also become more prevalent, particularly in Allegheny County. For example, Aleppo Township has advertised its intent to adopt an oil and gas zoning amendment which would require submission of a traffic impact study, noise management plan, water withdrawal plan, disposal plan, and a community and environmental impact analysis, as well as pre- and post-drilling testing of private freshwater wells within 2,000 feet of the drilling site. The ordinance also would mandate environmental impairment and control of well insurance coverage.

Other notable trends include the establishment of multi-municipal zoning, and the creation of oil and gas overlay districts. In Schuylkill County, the Eastern Schuylkill Regional Planning Commission (including Rush, Walker and Schuylkill townships and Tamaqua Borough) was established to jointly zone the participating municipalities. Oil and gas overlay districts intended to provide for oil and gas development while avoiding densely populated residential areas have been established in Penn Township and Murrysville in Westmoreland County, as well as in Cecil Township, Washington County. As discussed earlier in this *Report*, the Murrysville ordinance is currently the subject of a citizen group’s substantive validity challenge.

### West Virginia: Legislature requires consent by targets of municipal annexation

In response to concerns of those affected by municipal expansion through “minor boundary adjustments,” the West Virginia Legislature modified the statutory provisions appearing in West Virginia Code §§8-6-4a and 8-6-5 through passage of SB 209. The bill became law on March 5, 2020. Prior to 2020, the consent or objection of persons located in territory proposed for municipal annexation was among several factors considered by county commissions when evaluating applications for minor boundary adjustments, but commissions could approve an adjustment even over the objection of persons in the area to be annexed. The current law now requires applications to include either an affidavit from each person or business in the area proposed for annexation reflecting their consent, or proof that sufficient efforts were made to contact them and no response was received. The revised statute also mandates denial of applications if the county commission determines that annexation could be accomplished in a





cost-effective and efficient manner through other authorized annexation methods, such as a petition by landowners or an election. If a county commission denies an application, the municipality must wait at least two years before re-applying unless denial of the application is overturned through an appeal by the municipality.

### Ohio: Federal court finds Lake Erie Bill Of Rights unconstitutional

As discussed in last year's *Report*, in February 2019, pursuant to a special election ballot initiative, the City of Toledo, Ohio, amended its charter to include the Lake Erie Bill of Rights (LEBOR), establishing certain rights within the city's charter for the Lake Erie Ecosystem "to

exist, flourish and naturally evolve" as well as mechanisms for enforcing those rights, and stated that "[n]o permit, license, privilege...issued to a corporation, by any state or federal entity, that would violate...this law..., shall be deemed valid...." LEBOR also provided that the city or any resident has the right to enforce its provisions and "[g]overnments and corporations engaged in activities that violate the rights of the Lake Erie Ecosystem... shall be strictly liable for all harms and rights violations resulting from those activities." The constitutionality of LEBOR was challenged one day after its passage in the U.S. District Court for the Northern District of Ohio by a family-owned farm located in the Lake Erie watershed. The plaintiff alleged that LEBOR was invalid as it violated its constitutional rights,

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attempted to preempt federal and state law, unlawfully created private causes of action, and usurped Ohio state court jurisdiction. The State of Ohio intervened and filed a complaint for declaratory judgment and injunctive relief.

On February 27, 2020, the court struck down LEBOR, finding that its environmental and “self-government” rights clauses were unconstitutionally vague and violative of the Fourteenth Amendment right to due process. The court questioned how any prosecutor, judge or jury could determine what conduct infringes on the right of the lake to “exist, flourish, and naturally evolve” or the right of Toledo residents to a “clean and healthy environment,” and held that the language was void for vagueness. In addition, the right to “local self-government” was found to be unconstitutionally vague and “an aspirational statement, not a rule of law.” Furthermore, the court found that, despite the inclusion of a severability clause, the remainder of the LEBOR could not be saved because once the three vague rights were stripped away, the “remainder is meaningless.” Finally, the court noted that several other provisions failed on their own merits, and that “LEBOR’s attempt to invalidate Ohio law in the name of environmental protection is a textbook example of what municipal government cannot do.” The court concluded by stating that the authors of the LEBOR “ignored basic legal principles and constitutional limitations, and its invalidation should come as no surprise.” An appeal to the Sixth Circuit Court of Appeals was filed on March 27, 2020, but sub-

sequently voluntarily dismissed on April 14, 2020.

### **Federal case law: First Circuit holds Massachusetts ordinance to be preempted by the Natural Gas Act**

In *Algonquin Gas Transmission, LLC v. Town of Weymouth*, a natural gas operator challenged local wetlands and zoning ordinances preventing the installation of a compressor station. After obtaining a certificate of public convenience and necessity from the Federal Energy Regulatory Commission, the operator sought and was approved for a Chapter 91 license from the Massachusetts Department of Environmental Protection to construct the compressor station. The municipality appealed the state’s decision, asserting that the state approval was prematurely issued because the operator had not received approval under the town’s wetlands and zoning ordinances, and further that it would not receive such approval because the proposed compressor station violated the ordinances. The operator filed a declaratory judgment action in the United States District Court for the District of Massachusetts, seeking a declaration that the local ordinances were preempted by the federal Natural Gas Act. The court granted the operator’s motion for summary judgment, holding that the local ordinances were federally preempted. On appeal, the United States Court of Appeals for the First Circuit affirmed the district court’s grant of summary judgment. ■



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**Joyce Turkaly,**  
**Director of Natural Gas Market Development**

**A**t PIOGA we are optimistic about entering into the pandemic recovery period. While we cannot predict the exact timing, our members continue to plan and strategize for full economic recovery, recognizing that together we can achieve far more. With that in mind, at a closed meeting on June 30 we heard from U.S. Department of Energy (DOE) Secretary Dan Brouillette, who announced the department's newly released report, *The Appalachian Energy and Petrochemical Renaissance; An Examination of Economic Progress and Opportunities*.

Secretary Brouillette reassured that post-pandemic, the nation will be powered by energy dominance. He commented that the Trump administration and the department's efforts will continue to forge ahead in the Appalachian Region—Pennsylvania, Ohio, West Virginia and Kentucky—where according to him, “we need to shine a light on the importance of the domestic supply chain including rare earth and critical minerals.” He asserted that Appalachia could expect to grow via energy resource production, next generation manufacturing, and petrochemical industry development and expansion.

Joining the call was Deputy Secretary Mark Menezes, who spoke about advancements in technology and the importance of research at the National Energy Technology Laboratory (NETL), with facilities in both Pittsburgh and Morgantown, West Virginia. The deputy secretary highlighted NETL because of its role in spurring innovation in carbon capture, coal to products, rare earth elements and the burgeoning chemical sector. Speaking to numerous export opportunities, he said, “Coal does have a place in our energy future.” Recognizing that coal's role has diminished for power generation, it has a critical role in the construction sector.

The Annual Energy Outlook (AEO) 2020 projects that production in the U.S. Energy Information Administration's Mid-Atlantic and Ohio region will continue to be a major exporter of natural gas to other regions of the United States, doubling shipments to the Northeast, Southeast and Midwest from 10 Bcf/d to 20 Bcf/d by 2035. As we know, all of the ethane produced in the Marcellus/Utica region is not being used regionally. Referencing Shell, PTT and other similar prospective projects, Assistant Secretary Steve Winberg talked about state-of-the-art manufacturing and lowest-emitting crackers that will be supported by scalable storage.

With exponential growth in production capability

comes significant opportunities for Appalachia in manufacturing. Anytime natural gas and electricity costs are low, energy-intensive manufacturing sectors benefit. Furthermore, as basic petrochemicals become more abundant, the region has an opportunity to expand downstream manufacturing. Downstream manufacturers have an opportunity to convert basic petrochemicals into derivative chemicals and products for use by other downstream manufacturers, as well as finished end-use products.

Let us jump to the good news for full economic recovery as well as projected growth in specific sectors. Energy intensive sectors are glass, fabricated materials, cement and data centers. Each sector touches consumer goods: Glass includes the construction, automotive and electronics industries; fabricated materials (i.e., machine shops) includes both metal and plastics; cement; and, of course, with the “Internet of Things,” data centers.

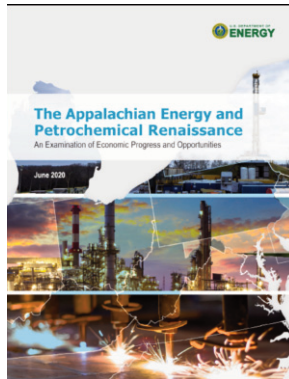
### Did you know?

- Pennsylvania is the fourth largest U.S. supplier of cement.
- Large data centers are industrial-scale operations that can use as much electricity as a small town.
- Since 2017 both thermal and metallurgical coal have witnessed upticks in export markets.
- Over 80 percent of the PPE used by firefighters are derived from petrochemicals.
- Appalachian ethane production is estimated at 640,000 Bbl/d by 2025.

The Trump administration recognizes Appalachia's economic viability during this recovery will serve as a key indicator of the prospects for, and overall health of, the United States' economic recovery. The opportunities for economic growth discussed in the report are especially timely and relevant, and signal to many stakeholders the importance of a clear path on next steps. The report can be accessed at [www.energy.gov/downloads/appalachian-energy-and-petrochemical-renaissance](http://www.energy.gov/downloads/appalachian-energy-and-petrochemical-renaissance).

Outlined within the DOE report:

1. Continue to develop a pro-growth business environment that is supported by pro-growth tax policy, increased regulatory certainty, efficient permitting processes, and timely government actions.
2. Invest in public infrastructure such as roads, rail, locks, ports and broadband, which enables commerce.
3. Support workforce development which enables businesses, families, and communities to grow and thrive.
4. Support innovation that can be commercialized, particularly with respect to early-stage R&D and public-private partnerships that advance technol-





ogy to the point where the private sector can carry it forward to the marketplace.

If the public sector adheres to the outline provided in the report and regularly engages the many stakeholders, this will allow the private sector and capital to move into the region. Given the divisive political platforms on energy, there is a short window in which targeted public sector action can fundamentally accelerate the pace of economic development in northern to central Appalachia. As noted in the report, without this action abundant natural gas and natural gas resources will disproportionately leave the region and in significant measure be exported to international markets. Much the associated economic benefit will be exported with them.

Please communicate the opportunity for Appalachian economic development in the energy, petrochemical and manufacturing sectors often and to those who work outside of the industry. As you already know, the importance of energy elevates our lives. ■

**"The world cannot do without plastics."**

**—Steve Winberg, DOE Assistant Secretary for Fossil Fuels**

"(T)he lessons learned from this pandemic experience underscore the importance of the United States petrochemical industry. The personal protective equipment (PPE) that protects first responders and health care workers are largely constructed from petrochemical feedstocks. From latex gloves to N95 masks and plastic face shields, petrochemicals play a key role. Life-saving medical equipment, vital communication equipment, home building materials, clothing, and transportation equipment all have components derived from petrochemicals. Increasing United States production capacity of these products via an Appalachian petrochemical and manufacturing renaissance will ensure that adequate supplies of these products exist, not just for emergencies like COVID-19, but enable a productive economy and increase the quality of livelihoods."

**—The Appalachian Energy and Petrochemical Renaissance; An Examination of Economic Progress and Opportunities**

## DOT issues final rule for transporting LNG by rail tank car

The Pipeline and Hazardous Materials Safety Administration (PHMSA), in consultation with the Federal Railroad Administration (FRA), on June 19 issued a final rule authorizing the bulk transportation of liquefied natural gas (LNG) by rail.

The rule will permit the bulk transportation of LNG in DOT-113C120W9 (DOT-113) specification tank cars with enhanced outer tank requirements and additional operational controls.

The rule's publication complies with an executive order President Trump signed in April 2019 that called for the U.S. Department of Transportation to prepare a rule regarding the transportation of LNG by rail in tank cars.

"The department's new rule carefully lays out key operational safeguards to provide for the safe transportation of LNG by rail to more parts of the country where this energy source is needed," said U.S. Transportation Secretary Elaine Chao in a news release.

With FRA approval, LNG had been authorized for transport by rail in a portable tank. Federal hazardous materials regulations also have authorized the transportation of other flammable cryogenic materials for many years in DOT-113 tank cars. This final rule also incorporates newly designated additional safety requirements, such as an enhanced thicker carbon steel outer tank.

Additionally, the rule requires remote monitoring of the pressure and location of LNG tank cars. To improve braking, the rule requires a two-way end of train or distributed power system when a train is transporting 20

or more tank cars loaded with LNG in a continuous block, or 35 or more such tank cars of LNG anywhere in the train consist. The rule also requires railroads to conduct route risk assessments to evaluate safety and security.

Attorneys general from Pennsylvania and 14 other states and the District of Columbia filed comments in opposition of the proposal, claiming PHMSA failed to consider adequately the "greater risk of catastrophic accidents" as well as the "environmental and climate impacts of allowing LNG to be shipped in rail tank cars." The National Transportation Safety Board also weighed in with comments urging PHMSA to adopt sufficient "operational controls" (similar to those imposed in special permits issued by PHMSA) and require additional data on the safety of the proposed DOT-113 tank cars prior to proceeding. All of these comments are addressed in the final rule package, and PHMSA made changes to the proposal in response including adding requirements for tank car construction and operational controls. In addition, PHMSA relied upon recent studies performed by the FRA related to fire performance and impact tests of the specialty rail cars to support its decision.

In formal comments during the rulemaking process, PIOGA strongly supported the proposed change, which will provide natural gas producers with expanded opportunities to market their product.

The final rule can be found at [www.phmsa.dot.gov/news/usdot-final-rule-safe-transportation-lng-rail-tank-car](http://www.phmsa.dot.gov/news/usdot-final-rule-safe-transportation-lng-rail-tank-car). ■

# Climate change litigation update

By Adam Birch and Britt Freund  
Steptoe & Johnson PLLC

Climate change will likely be an important issue in the 2020 election, as presumptive Democratic nominee Joe Biden has stated his plans include revocation of the Keystone XL pipeline permit and recommitment to the Paris climate agreement.

Currently, a number of important climate change cases are being litigated in multiple circuits. Cities, counties and states have brought claims seeking to hold oil and gas producers liable for infrastructure damages as a result of climate change under violations of state tort law. While some cases have been successfully removed to federal courts, others have not. The issue of removal has been addressed by the federal appellate courts in the Second, Fourth and Ninth Circuits. To date, there have been no decisions on the merits. The litigation has focused on jurisdictional issues, such as whether state tort claims are preempted by federal laws. While the Third Circuit (the federal appellate court for Pennsylvania federal cases) has not yet addressed this issue, absent a decision from the U.S. Supreme Court, it may have an opportunity to decide the preemption issue.

The U.S. Supreme Court considered the preemption issue in the case of *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011). In *American Electric*, eight states, the City of New York and three land trusts brought suit against five electric power companies, seeking to cap and abate their carbon dioxide emissions under public nuisance law. The U.S. District Court for the Southern District of New York dismissed the claims for lack of subject matter jurisdiction, based on the political question doctrine. The U.S. Court of Appeals for the Second Circuit reversed, holding that the political question doctrine did not apply, and that the Clean Air Act did not displace federal common law when it came to nuisance. The Supreme Court reversed the Second Circuit by unanimous holding, written by Justice Ginsberg, that the Clean Air Act spoke directly to the issue of carbon dioxide release, preempting the federal common law claim. However, the Supreme Court did not address whether the Clean Air Act also displaced potential state law nuisance claims, thus this issue could wind up before the highest court in the event that the circuits have a split of decisions.

Relying upon *American Electric*, oil and gas company defendants in several pending cases alleging violations of state tort law have sought removal to federal court, citing the “federal officer removal” statute, 28 U.S. Code § 1447(a), which states that a:

civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division

embracing the place wherein it is pending: (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Both the Fourth and Ninth Circuits have rejected this argument for removal and remanded cases to state court. In *Mayor and City Council of Baltimore v. BP PLC et al.* 952 F.3d 452 (4th Cir. 2020), defendants argued that certain agreements between individual defendants and the federal government—namely fuel supply agreements between Citgo Petroleum Corp. and the Navy Exchange Service Command, oil and gas leases administered by the Secretary of the Interior under the OSCLA, and a 1944 unit agreement between Standard Oil of California and the U.S. Navy for the joint operation of a strategic petroleum reserve in California—met the nexus required for federal officer removal.

In remanding the case to state court, the U.S. Court of Appeals for the Fourth Circuit agreed with the City of Baltimore and amici by rejecting the companies’ arguments under two of the three prongs as interpreted by the court in *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (citations omitted). The court rejected the argument that commercial relationships between the operators and the federal government were satisfactory for transforming the companies into agents acting on behalf of federal officers for purposes of the first prong. Second, the court rejected that “the charged conduct was carried out for [or] in relation to the asserted official authority” as defined under *Sawyer*, because they were insufficiently related to Baltimore’s specific state law tort claims. The court concluded that it lacked jurisdiction to review the remaining removal claims, which included (i) disputed and substantial issues of federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); and (ii) conduct or injuries that occurred on “federal enclaves.”

On May 26, 2020, the U.S. Court of Appeals for the Ninth Circuit reached the same conclusion in both *City of Oakland, et al. v. BP PLC, et al.* No. 18-16663 (9th Cir. 2020), and *County of San Mateo, et al. v. Chevron Corp., et al.* No. 18-15499 (9th Cir. 2020), holding that removal to federal court was not proper, and that there was no reason that the specific state law tort claims could not proceed in state court. The Ninth Circuit further held that the Clean Air Act did not serve as a blanket preemption against all greenhouse gas-related claims, only those that arose under federal common law.

Across the country, in *City of New York v. BP PLC, et al.* 325 F.Supp.3d 466 (2018), the City of New York sued multiple oil and gas producers under a theory of recovery for payment for both past damages and for future protections from climate change. A lower state court dismissed the suit, holding that the Clean Air Act, and that

it was not a matter for the state courts to decide. The U.S. Court of Appeals for the Second Circuit heard oral arguments in November 2019, however reports have indicated that Justices Richard Sullivan and Michael Park were not swayed by the city's arguments that existing federal common law did not control. Perhaps, more interestingly, Justices Sullivan and Park seemed to find merit in the two issues that the Fourth Circuit in *Mayor* rejected based on lack of jurisdiction, namely that the plaintiff's tort claims (i) raised disputed and substantial issues of federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and (ii) were preempted by the U.S. Clean Air Act, 42 U.S.C. Sec. 7401-7671q.

We found no state law tort cases asserting damages from climate change immediately on the horizon in the Third Circuit. However, Pennsylvania operators may be interested in the following: (i) whether the Second Circuit affirms dismissal based on the application of federal common law, breaking the trend of remand; and (ii) whether the U.S. Supreme Court decides to review the petition by several energy companies of the Fourth Circuit's Order in *Mayor*.

If such cases are ultimately determined to be actionable under state law nuisance claims (and not preempted by federal law), this could open the door to further litigation by state and local government entities. For now, these state law tort claims asserting damages related to climate change against operators have been focused on jurisdictional issues. Issues on the merits will not likely be determined in the immediate future, however the effects of the uncertainties are already being felt, with Dominion Energy and Duke Energy cancelling their Atlantic Coast Pipeline project on July 5, with Thomas Farrell, chairman of Dominion Energy specifically citing that the decision "reflects the increasing legal uncertainty that overhangs large-scale energy and industrial infrastructure development in the United States," ■

## Safety Committee Corner

### Fireworks safety

By Carol Delfino, CIH, CSP  
SE Technologies

Although the Fourth of July will have come and gone by the time you read this, the COVID-19 pandemic has created an odd phenomenon across the nation—people shooting off fireworks as a way of letting off steam after months of sheltering in place. One report described New York City as "The City that Never Sleeps, where no one can get any sleep" because of all the bangs and booms after dark.



We have always warned our kids not to get too close to fireworks because they may get burned. What we may not realize, however, is that there are other health risks associated with setting off fireworks. According to a new study published in the journal *Particle and Fibre Toxicology*, consumer fireworks release toxins that are harmful for both humans and animals.

The study analyzed 12 different retail fireworks and found that once set off, five of them released particle emissions that could damage human cells and animal lungs. These toxins came from metals in the fireworks that make them turn different colors. For example, blue fireworks can be made of copper, red fireworks can contain strontium.

An experiment in the study consisted of setting off a firework in a stainless-steel chamber, filtering the particles with a pump and then exposing human cell and mice to the particles. It was discovered that two of the fireworks emitted lead particles. One of them was 10 times more damaging, compared to the control in the experiment. The firework emitted lead particles at 40,000 parts per million.

According to the American Academy of Pediatrics, it is suggested that children avoid standing where fireworks smoke is blowing, as these particles can affect their respiratory system. Dr. Kristin Van Hook from the Academy expresses that she has seen cases of children with asthma who, after breathing in fumes from fireworks displays, had to go to the emergency room.

For more information, here's a link to the article: [particleandfibretoxicology.biomedcentral.com/track/pdf/10.1186/s12989-020-00360-4](https://particleandfibretoxicology.biomedcentral.com/track/pdf/10.1186/s12989-020-00360-4).

Distance yourself and your children from fireworks to avoid getting burned and breathing in the toxins they emit. Enjoy, but stay safe and healthy! ■

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## Massive unconventional well permit fee increase is approved

All that remained for a huge increase in the application fee for unconventional well permits to take effect was publication in the *Pennsylvania Bulletin* after the Independent Regulatory Review Commission (IRRC) on June 18 voted 5-0 to approve a proposal by the Department of Environmental Protection to set the fee at \$12,500—up from the current \$5,000 for horizontal unconventional wells and \$4,200 for vertical unconventional wells.

DEP's oil and gas program is funded almost entirely from permit fees, fines and penalties. Under the Oil and Gas Act, the department may adjust permit fees from time to time to reflect the cost of running the program. The last time well permit fees were changed was in 2014, when a sliding scale based on well bore length was eliminated. Then, with permit activity declining and program costs increasing, DEP started to develop this latest permit-fee regulation in 2018 and based its revenue projections on 2,000 applications per year. Permitting has not reached that level since, with 1,872 unconventional well permits issued in 2018 and 1,478 in 2019.

In formal comments filed in August 2018, PIOGA pointed out the increase would make Pennsylvania's well permit fee the highest in the nation and that "an objective analysis of the proposed rulemaking and information submitted in the Regulatory Analysis Form (RAF) shows that PADEP's evaluation is inadequate to support the requested fee increases." PIOGA additionally took issue with the department's cost estimates of the economic burden on the state (\$0) and the regulated community (\$100 million annually) and the benefits to the public (immeasurable) due to the increased permit fee.

During the June 18 meeting, IRRC's chairman observed that a one-time application fee that is expected to cover the cost of regulating an oil and gas well for the life of that well is not a good way to fund the program. Scott Perry, DEP Deputy Secretary for Oil and Gas Management, was asked whether the fund used to support the program went into deficit this year as the background materials on the regulation said. According to a report in the Pennsylvania Environment Digest Blog, Perry said it did not, thanks to a \$30.6 million penalty

levied in response to a 2018 pipeline explosion in Beaver County.

The full regulatory package can be found at [www.irrc.state.pa.us/regulations/RegSrchrslts.cfm?ID=3217](http://www.irrc.state.pa.us/regulations/RegSrchrslts.cfm?ID=3217). ■

## PIOGA Member News

### RTC Partners completes investment in Hull & Associates

Round Table Capital (RTC) Partners, a New York based private equity firm, announced it has completed an investment in Hull & Associates. Founded in 1980, Hull is a diversified engineering consulting firm with deep sector expertise in site assessment and remediation, brownfield redevelopment, waste management and beneficial use, water/wastewater, renewable energy, infrastructure design, and other services for commercial and industrial clients, oil and gas companies, public utilities, and municipal and government agencies. The company serves over 500 active clients across eight offices in the United States.

"RTC's partnership with Hull will allow great growth opportunities for our employees," said Craig Kasper, CEO of Hull who will take on the role of Executive Vice President. "The investment in Hull as a platform will allow inorganic and organic growth to serve our clients on a national stage," Kasper added.

### ARG announces two appointments

American Refining Group Inc. (ARG) has announced has been named Alyson King has been named solvents business manager and John Zarroli senior solutions specialist.

Prior to joining ARG, King had worked since 2014 with global chemical manufacturer Evonik Corp. of Allentown, most recently as its strategic key account and market/product manager. As solvents business manager, King is responsible for the performance of ARG's entire solvents line, ensuring it meets or exceeds targets for growth and profitability.

Zarroli's role is the key research and development interface with ARG's sales and marketing team, and its customers. As senior R&D solutions specialist, Zarroli anticipates, identifies and solves a wide array of challenges, often requiring innovation in planning, executing and analyzing data in creative ways. Zarroli comes to ARG from ABITEC Corp. of Columbus, Ohio, where he most recently served as business development manager for industrial specialties. ■

## New PIOGA member — welcome!

### BLS Resource Group, LLC

457 Washington Avenue, Ste 2, Bridgeville, PA 15017  
614-398-1439 • [www.bls-llc.com](http://www.bls-llc.com)

*Allies & Providers—provide oil & gas asset management services including project management, GIS mapping, leasing, right-of-way, curative and genealogy to E&P companies, government agencies, law firms and landowners*

megawatts, to become effective in the first quarter of 2022 (*March PIOGA Press, page 1*).

The absence of economic impact data as part of the package was one reason DEP’s advisory committees failed to recommend that EQB formally initiate a rule-making. In a July 8 news release, the department responded by touting that economic modeling shows that participating in RGGI will lead to a net increase of more than 27,000 jobs and add \$1.9 billion to the Gross State Product in Pennsylvania.

The department promised that the full economic analysis will be presented to the EQB along with the rest of the regulatory analysis, which details the total costs and benefits of participating in RGGI.

“These estimates do not include jobs created as a result of investments of RGGI revenues,” the July 8 release stated. “Pennsylvania is projected to receive more than \$300 million a year in proceeds from RGGI auctions. The Wolf administration intends to use these revenues to fund job creation and retention programs, including new workforce development opportunities, energy efficiency improvements for businesses and homeowners, economic support for communities affected by changing electricity generation and usage, and clean energy sources.”

The DEP news release also said participation in RGGI could save the lives of 639 Pennsylvanians by 2030 due to lower emissions of carbon and other emissions associated with electricity generation. DEP also claimed \$6 billion in health benefits through 2030 from reduced sulfur dioxide and nitrogen oxides, more than 45,000 fewer asthma attacks in children and over 1,000 fewer cases of childhood bronchitis.

“An argument against reducing air pollution through RGGI is an argument for making people sick,” said McDonnell. “The benefits to communities that have fewer Code Orange Air Quality days to worry about, or to parents that won’t have to worry that they may need to take their kid to the emergency room for an asthma attack, cannot be understated.”

**Legislative action**

The Senate Environmental Resources and Energy Committee on June 23 held a virtual hearing on RGGI, with business leaders warning of the harm to Pennsylvania’s economy that would result from participation in the program.

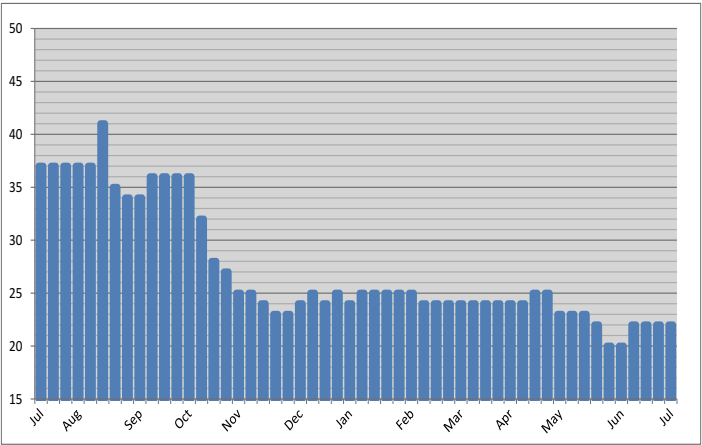
“RGGI is a flawed proposal and is not sound public policy,” said Carl Marrara, vice president of Governmental Affairs for the Pennsylvania Manufacturers’ Association, who added that the move to join RGGI would have “dire economic impacts” for the entire state.

“The issue at hand is whether or not a government program, that will undoubtedly add substantial costs to Pennsylvania’s electricity consumers, is the best mechanism to achieve the cleanest, healthiest and most sus-

*Continues on page 22*

**Oil & Gas Dashboard**

**Pennsylvania Rig Count**



**Penn Grade Crude Oil Prices**



**Natural Gas Futures Closing Prices**

Month	Price
August	\$1.820
September	1.872
October	1.963
November	2.349
December	2.756
January 2021	2.886
February	2.853
March	2.753
April	2.482
May	2.458
June	2.495
July	2.555

*Prices as of July 8*

**Sources**

American Refining Group: [www.amref.com/Crude-Prices-New.aspx](http://www.amref.com/Crude-Prices-New.aspx)  
Ergon Oil Purchasing: [www.ergon.com/crudeoil](http://www.ergon.com/crudeoil)  
Gas futures: [quotes.ino.com/exchanges/?r=NYMEX\\_NG](http://quotes.ino.com/exchanges/?r=NYMEX_NG)  
Baker Hughes rig count: [bakerhughesrigcount.gcs-web.com/na-rig-count](http://bakerhughesrigcount.gcs-web.com/na-rig-count)  
NYMEX strip chart: Nucomer Energy, LLC, [emkeyenergy.com](http://emkeyenergy.com)

## Northeast Pricing Report – July 2020

Basis pricing has increased across the board. For the front month term, Algonquin and Transco Z6 increased the greatest amounts at \$0.34 per MMBtu and \$0.29 per MMBtu, respectively. TETCO M3 had a significant increase of \$0.26 per MMBtu as well. All trading points had their one-year terms increase also. TETCO M3 had the largest increase at \$0.12 per MMBtu and Transco Z6 increased the least at \$0.08 per MMBtu. The full-term trading saw little variability from last month. Algonquin had the largest increase of \$0.05 per MMBtu.

With most of the country, specifically the Northeast, experiencing above-normal temperatures for at least the middle of the month, BG expects prices to strengthen going forward.

Transportation values had the greatest increases since March. Transco Leidy to Algonquin increased the most at \$0.31 per MMBtu, and Dominion South to Algonquin increased \$0.30 per MMBtu. TETCO M3 to Transco Z6 had the smallest increase of only \$0.01 per MMBtu. While none of the values were that significant, the comparison on a percentage difference was considerable. The Dominion South to Algonquin transportation increase was 275% higher than June.

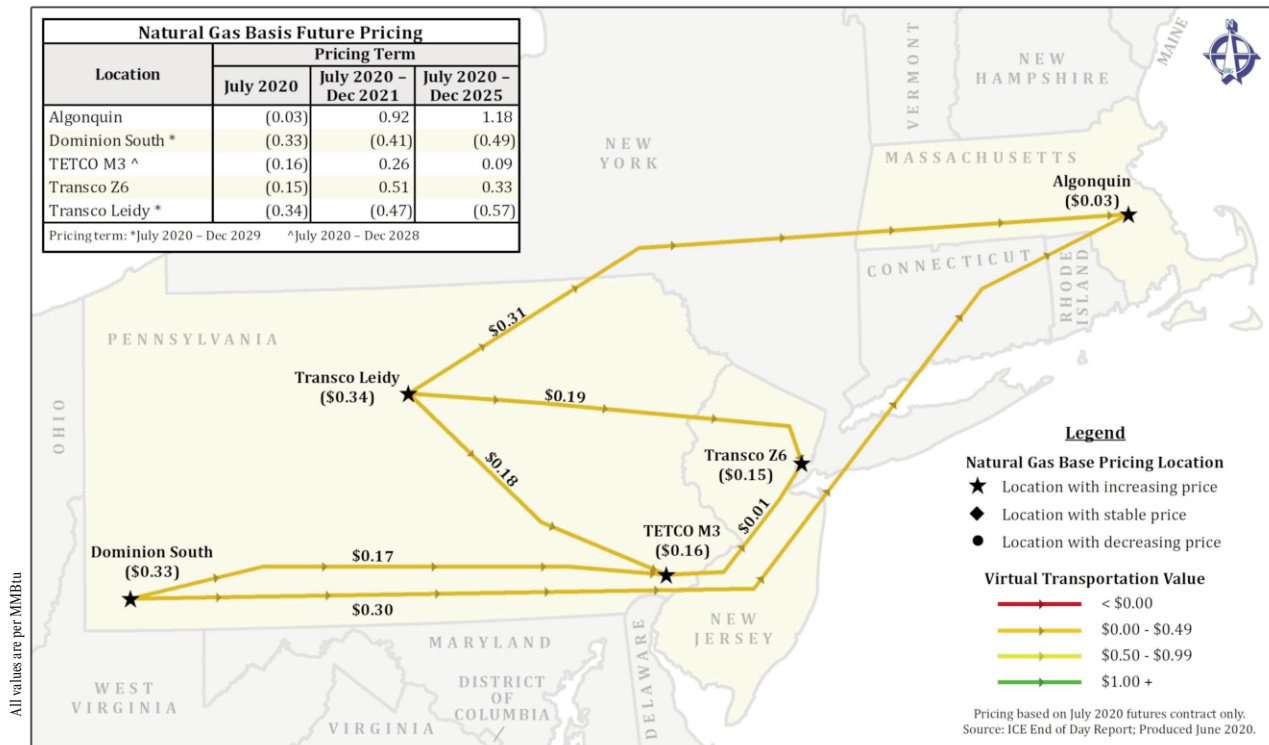
### Transportation Value Market Indicator



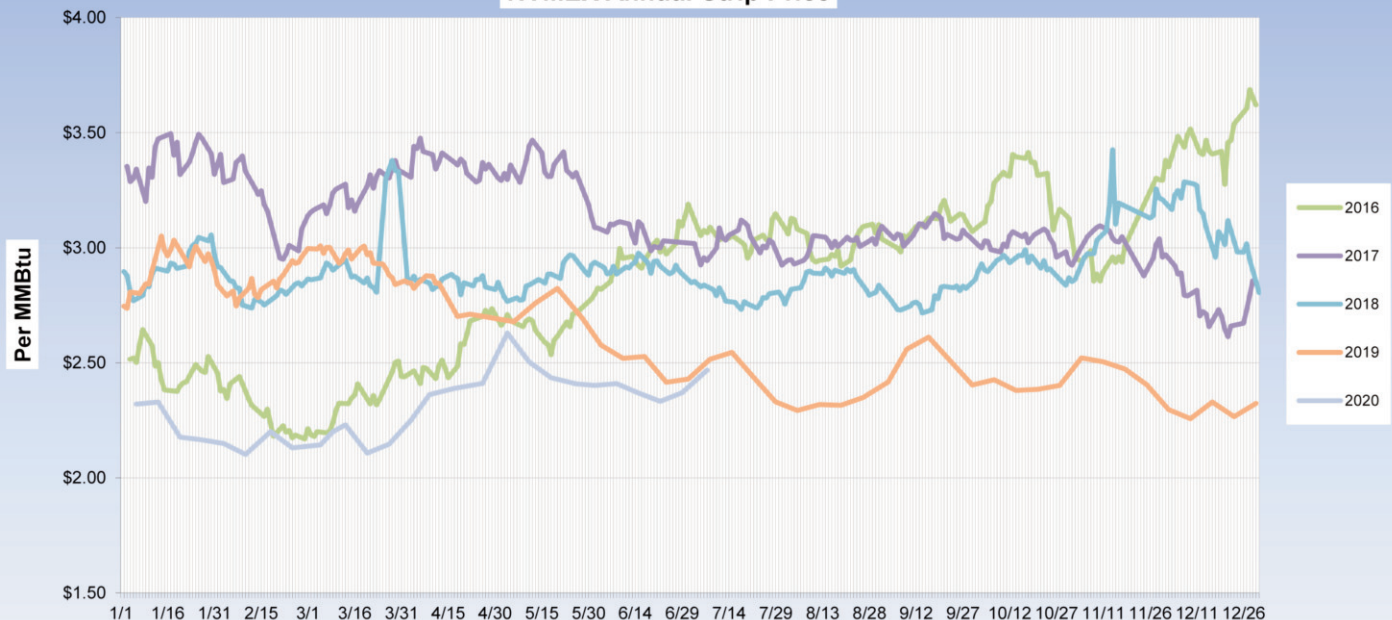
Provided by Bertison-George, LLC  
www.bertison-george.com

Natural Gas Basis Future Pricing			
Location	Pricing Term		
	July 2020	July 2020 – Dec 2021	July 2020 – Dec 2025
Algonquin	(0.03)	0.92	1.18
Dominion South *	(0.33)	(0.41)	(0.49)
TETCO M3 ^	(0.16)	0.26	0.09
Transco Z6	(0.15)	0.51	0.33
Transco Leidy *	(0.34)	(0.47)	(0.57)

Pricing term: \*July 2020 – Dec 2029 ^July 2020 – Dec 2028



### NYMEX Annual Strip Price





## Spud Report: June 2020



The data show below comes from the Department of Environmental Protection. A variety of interactive reports are

OPERATOR	WELLS	SPUD	API #	COUNTY	MUNICIPALITY
Chesapeake Appalachia LLC	10	6/27/20	015-23580	Bradford	Terry Twp
		6/27/20	015-23582	Bradford	Terry Twp
		6/28/20	015-23581	Bradford	Terry Twp
		6/4/20	015-23605	Bradford	Tuscarora Twp
		6/10/20	015-23525	Bradford	Wilmot Twp
		6/10/20	015-23529	Bradford	Wilmot Twp
		6/10/20	015-23526	Bradford	Wilmot Twp
		6/25/20	115-22750	Susquehanna	Auburn Twp
		6/29/20	115-22763	Susquehanna	Auburn Twp
		6/29/20	115-22762	Susquehanna	Auburn Twp
Curtis Oil Inc	1	6/30/20	053-30909*	Forest	Howe Twp
Range Resources Appalachia	11	6/27/20	125-28833	Washington	Jefferson Twp
		6/27/20	125-28834	Washington	Jefferson Twp
		6/27/20	125-28831	Washington	Jefferson Twp
		6/27/20	125-28832	Washington	Jefferson Twp
		6/15/20	125-28824	Washington	N Strabane Twp
		6/15/20	125-28822	Washington	N Strabane Twp
		6/15/20	125-28820	Washington	N Strabane Twp
		6/15/20	125-28823	Washington	N Strabane Twp
		6/16/20	125-28825	Washington	N Strabane Twp
		6/16/20	125-28826	Washington	N Strabane Twp

available at [www.dep.pa.gov/DataandTools/Reports/Oil and Gas Reports](http://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.

<u>OPERATOR</u>	<u>WELLS</u>	<u>SPUD</u>	<u>API #</u>	<u>COUNTY</u>	<u>MUNICIPALITY</u>	
Rice Drilling B LLC	8	6/16/20	125-28821	Washington	N Strabane Twp	
		6/12/20	059-27988	Greene	Wayne Twp	
		6/12/20	059-27985	Greene	Wayne Twp	
		6/12/20	059-27986	Greene	Wayne Twp	
		6/12/20	059-27987	Greene	Wayne Twp	
		6/12/20	059-27981	Greene	Wayne Twp	
		6/12/20	059-27982	Greene	Wayne Twp	
		6/12/20	059-27983	Greene	Wayne Twp	
SWN Prod Co LLC	5	6/12/20	059-27984	Greene	Wayne Twp	
		6/17/20	115-22375	Susquehanna	Middletown Twp	
		6/25/20	125-28836	Washington	West Finley Twp	
		6/25/20	125-28837	Washington	West Finley Twp	
		6/25/20	125-28868	Washington	West Finley Twp	
		6/25/20	125-28835	Washington	West Finley Twp	
June		May	April	March	February	January
Total wells	35	51	39	50	46	77
Unconventional Gas	34	49	36	45	42	74
Conventional Gas	0	0	0	0	0	0
Oil	1	2	3	3	2	3
Combination Oil/Gas	0	0	0	1	2	0

### RGGI update *Continued from page 20*

tainable environment possible," Marrara said. "You'll find that the answer to this question is clearly that RGGI does not accomplish this goal, but will negatively impact Pennsylvania's economy in a punishing way."

The regulation would place a cap on carbon emissions from fossil fuel-fired power plants and require the facilities to purchase allowances equal to the amount of carbon they emit. That cap would then be lowered over time, reducing the level of emissions able to be released by the plants. DEP asserts that the state could see a reduction of 19.9 million tons of carbon emissions through 2030, generating over \$2.3 billion in revenue through the auction of carbon allowances during that time.

For an extensive report on the testimony from the June 23 Senate hearing, visit [paenvironmentdaily.blogspot.com/2020/06/senate-hearing-covers-familiar-ground.html](http://paenvironmentdaily.blogspot.com/2020/06/senate-hearing-covers-familiar-ground.html).

Meanwhile, on July 8, the House of Representatives approved a bill mandating legislative approval in order to participate in RGGI or any other CO2 cap-and-trade program. House Bill 2025 lays out a process that DEP must follow in developing a CO2 regulation and requires that the final proposal be put in the form of legislation that must be approved by the General Assembly.

HB 2025 passed the chamber by a bipartisan majority

of 130-71 and now moves on to the Senate for consideration. If approved by the Senate, a veto by the governor—who has previously rebuffed legislative calls to halt the RGGI process—is certain. ■



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## Calendar of Events

### PIOGA events

Information: [pioga.org](http://pioga.org) > PIOGA Events

*Due to uncertainty surrounding the COVID-19 crisis, please check the event page for any changes to events and event dates.*

#### **PIOGATech: Federal Transportation Safety Regulations Refresher**

July 21, Webinar

#### **PIOGATech: Water and Waste Management**

August 19, The Chadwick, Wexford

#### **23rd Annual Divot Diggers Golf Outing & Steak Fry**

August 20, Tam O'Shanter of PA Golf Course, Hermitage

#### **Fall Conference, Technology Showcase and Sports Outing**

September 22-23, Seven Springs Mountain Resort, Champion

#### **Ted Cranmer Memorial Golf Outing & Steak Fry**

October 8, Wanango Country Club, Reno

#### **Annual Meeting & Reception**

October 14, location TBA

#### **PIOGATech: Safety Topic**

October 22, TBA

#### **Marcellus to Manufacturing Conference**

November 12, Carnegie Science Center, Pittsburgh

#### **Annual Oil & Gas Tax and Accounting Seminar**

November 18, Holiday Inn Express, Canonsburg/Southpointe

#### **PIOGATech: Environmental Topic**

December 15, The Chadwick, Wexford

#### **Holiday Member Mixer**

December 15, The Chadwick, Wexford

### Other association & industry events

#### **Ohio Oil & Gas Association Summer Meeting**

July 14, Glenmoor Country Club, Canton, OH

[www.ooga.org/events](http://www.ooga.org/events)

### Guidelines for member news submissions

We are happy to accept submissions of news items by PIOGA member companies regarding new products or services, new facilities, expansions, open houses, promotions and hirings, and similar developments. The news must apply specifically to the company's Pennsylvania operations and products/services for use in the oil and gas industry. Personnel items must be for Pennsylvania-based employees or whose territory includes Pennsylvania, except in the case of top company officers.

All such items will be used in the newsletter on a space-available basis and are subject to editing for length, clarity and appropriateness. Submissions should be e-mailed to Matt Benson ([matt@pioga.org](mailto:matt@pioga.org)) and the subject line should clearly state that it is PIOGA member news. Material is due by the first of the month to be considered for that month's issue.

If you have an idea for a more in-depth article, particularly on technical issues, or would like to submit a PIOGA Member Profile, please e-mail Benson at the address above.

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