

PENNSSTATE



The Dickinson  
School of Law

Agricultural Law Resource and Reference Center  
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# MARCELLUS SHALE IN YOUR PRESENT AND FUTURE:

*Legal Issues for Landowners*

A close-up photograph of a fountain pen with a marbled barrel and silver accents, writing on a document. The background is a blurred image of legal papers.



- **The Agricultural Law Resource and Reference Center** is a collaboration between:
  - Penn State Law
  - Pennsylvania Department of Agriculture
  - Penn State College of Agricultural Sciences





## **Who Needs Legal Information Regarding Natural Gas Issues**

- Owners of Natural Gas Rights
- Surface Owners
- Private Attorneys
- Local Government Officials
- State Legislators
- Industry / Industry Attorneys
- General Public



# Role of Agricultural Law Center

- **Presentations**
  - Use of technology
- **Educational Programs**
  - Pennsylvania Natural Gas Summit – November 16 to 18
  - Continuing Legal Education
- **Publications**
  - Fact sheets
  - Case summaries
  - Legislative summaries
- **Web site – Natural Gas Exploration Resource Area**
- **The Agricultural Law Brief**



## **Overview of Presentation**

- **The Oil and Gas Lease**
- **Post-Execution Leasing Issues**
- **Pennsylvania Statutory / Regulatory Framework**
- **Legislative Issues**
- **Recent Court Opinions**



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## **The Leasing Process**

- Energy company presents landowner with **STANDARD** lease agreement.
- Landowner negotiates additional terms to be included as addenda to lease agreement.
- Lease agreement will govern nearly all aspects of relationship between landowner and energy company.



# Terms of Lease Agreement

- Parties to lease agreement
- Property description
- Length of lease agreement
- Payment terms
- Rights granted by landowner to energy company & limitations on those rights





## Parties to Lease Agreement

- **Lessor – Owner of natural gas rights**
- **Lessee**
  - Lessee could be an independent landman, an energy company, a drilling company, or other.
  - Lessee will change if lease agreement is later assigned.



## **Property Description**

- **Property will be described by one or more of the following:**
  - **County and township**
  - **Metes and bounds**
  - **Acreage**
  - **Tax assessment parcel number**
  - **Neighboring properties**
- **It is possible to limit exploration to a specific strata.**



## **Length of Lease Agreement**

- **Primary term**
  - **Primary term is the number of years defined in lease agreement.**
  - **Lease agreement ends if production activities do not begin by expiration of primary term.**
  - **If production activities begin, lease agreement is converted to secondary term.**



## **Extension of Primary Term**

- **Renewal at option of lessee**
  - **Terms of current lease agreement will continue.**
- **Right of first refusal**
  - **Lessee has opportunity to match contract offers from other companies.**



# **Length of Lease Agreement**

- **Secondary term**
  - **Secondary term begins upon the initiation of production activities.**
  - **Subject to the specific provisions in lease agreement, secondary term can extend far into the future.**



## Payment Terms

- **Bonus Payment**
  - This is a one-time payment to landowner.
  - It is paid at execution of lease agreement or within a short time thereafter.
  - The amount is negotiable.



## Payment Terms (continued)

- **Delay Rental Payments**
  - These are payments to landowner at times specified in lease agreement.
  - The obligation to make scheduled payments terminates when a well is drilled.
  - The amount and number of payments is negotiable.



## Payment Terms (continued)

- **Royalty Payments**
  - These are paid to landowner when natural gas is removed from the land.
  - Pennsylvania law requires that landowner be paid royalties of at least 1/8.
  - Landowner can negotiate for a higher royalty rate.





## **Payment Terms (continued)**

- **Shut-In Royalty Payments**
  - These are payments made to landowner when a well is drilled, but gas is not yet marketed.
  - The amount and circumstances under which payments are made is negotiable.



## Payment Terms (continued)

- **Free Natural Gas**
  - Lease agreement may provide for landowner to receive a specified amount of extracted natural gas at no cost.
  - Landowner is generally responsible for transportation of gas from wellhead to residence.
  - Landowner can negotiate to receive a payment in lieu of free natural gas.



## Rights Granted by Landowner

- Mineral Estate
- Surface Estate



## Mineral Estate

- Lease agreement will specify what products within mineral estate are subject to grant.
- **Dunham's Rule:** Reservation of mineral estate may not include reservation of right to natural gas.



## **Mineral Estate vs. Surface Estate**

- **Mineral estate is severable from surface estate.**
- **Mineral estate is dominant over surface estate.**
  - **Owner of mineral estate is entitled to reasonable use of surface estate.**



## **Mineral Estate vs. Surface Estate**

- **What is reasonable use?**
  - How does the ability to horizontally drill affect reasonable use?
- **How can landowner enforce reasonable use?**
  - Surface use agreement
  - Litigation



## **Notification Requirement**

- **Gas company must send permit application to owner of surface estate.**
- **Surface owner has 15 days after receipt of application to object to grant of permit.**
- **Objection can be based upon:**
  - **Location of the well; or**
  - **Inaccurate information contained in the permit application.**



## Surface Estate

- **Energy company will seek broad use of surface estate.**
- **Landowner may want to limit energy company's use of surface estate.**





# **Surface Estate Limitations**

- **Landowner may limit use of surface estate by:**
  - **Requiring that landowner approve well sites and access roads**
  - **Specifying the conditions under which the land will be reclaimed**
  - **Defining the permitted activities and structures**
  - **Requiring the installation of fencing or gates**



## **No Surface Rights Lease**

- Landowner may be able to negotiate lease agreement that does not permit use of surface estate.
- Landowner may or may not receive lower payment terms in exchange for a no surface rights lease.



# **Property Damage Provisions**

- **Lease agreement should address potential damage to:**
  - **soils, crops, trees, buildings, roads, water, etc.**
- **Lease agreement should provide method of valuing damages.**
- **Landowner should consider inclusion of arbitration clause.**



# **Indemnification Provisions**

- **Landowner should require indemnity provision in lease agreement.**
- **Indemnity provision should include all costs of litigation.**
- **Indemnity provision should encompass environmental harms.**



## Farmland Preservation Provisions

- **Participation in Clean and Green or other farmland preservation program may limit drilling activities or result in imposition of penalties.**
- **Landowner should seek to shift all potential financial liabilities to lessee.**



## **Storage Rights**

- **Landowner should avoid granting storage rights in lease agreement.**
- **The grant of storage rights can effectively extend the lease term.**
- **The grant of storage rights should be separately negotiated for additional compensation.**



## **Transportation of Foreign Gas**

- **Landowner should avoid granting transportation rights (installation of pipelines) in lease agreement.**
- **The grant of transportation rights should be separately negotiated for additional compensation.**



## **Additional Considerations**

- **Well siting fee can provide additional compensation for land upon which well is located.**
- **Horizontal severance clause can limit gas development to a specific strata.**





## **Additional Considerations**

- **Inclusion of Pugh Clause can prevent one well from tying up entire acreage.**
- **Pugh Clause can release land vertically or horizontally.**



## **Considerations** **in Hiring an Attorney**

- Landowner should inquire about attorney's experience with gas leasing.
- Landowner should understand the basis of all fees charged by attorney.
- Landowner should receive a written fee agreement from attorney.



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## **Rule of Capture**

- **Rule of Capture is generally applicable in Pennsylvania.**
- **“The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that parts of such oil and gas migrated from adjoining lands.”**
  - **Robert E. Hardwicke (1935)**



## Pooling / Unitization

- Royalties are paid on a proportional basis within drilling unit.



## **After the Lease Has Been Signed**

- **My neighbor received a higher bonus payment than I did. Should I join a lawsuit to terminate my lease?**
  - **What are your goals in lawsuit?**
  - **What can and cannot be accomplished through litigation?**



## **After the Lease Has Been Signed**

- **I have not received my bonus payment. How can I get paid?**
  - **Does gas company have a legal obligation to make the payment?**
  - **Is it necessary for landowner to take some action to terminate the lease agreement?**



## **After the Lease Has Been Signed**

- **A different gas company now holds my lease. Can I stop them from drilling?**
  - Is the lease agreement freely assignable?
  - **The assignment of a lease does not change the terms of the lease.**





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# **Pennsylvania Oil and Gas Laws**

- **58 P.S. §§ 1-701.7**
  - Chapter 1: Oil and Gas Wells
  - Chapter 2: Test of Illuminating Oil
  - Chapter 5: Interstate Conservation Compact
  - **Chapter 7: Oil and Gas Conservation Law**
  - Chapter 8: Underground Storage Act
  - Chapter 9: Pennsylvania Used Oil Recycling Act
  - Chapter 10: Coal and Gas Resource Coordination Act
  - **Chapter 11: Oil and Gas Act**
  - Chapter 12: Dormant Oil and Gas Act



# **Pennsylvania Oil and Gas Act**

- **Organization of Oil and Gas Act**
  - **Chapter 1: Preliminary Provisions**
  - **Chapter 2: General Requirements**
  - **Chapter 3: Underground Gas Storage**
  - **Chapter 4: Eminent Domain**
  - **Chapter 5: Enforcement and Remedies**
  - **Chapter 6: Miscellaneous Provisions**



## **Preliminary Provisions**

- **Declaration of Purpose – Section 102**
  - **Permit optimal development . . . consistent with protection of health, safety, environment, and property;**
  - **Protect safety of employees and facilities;**
  - **Protect safety and property of those near development; and**
  - **Protect natural resources**



## **General Requirements**

- **Permitting Requirements – Section 201**
  - **DEP permit is required prior to drilling.**
  - **Notice must be provided to:**
    - **Surface owner;**
    - **Surface landowner or water purveyors who have water supply within 1000 feet of proposed well location; and**
    - **Owner / operator of underlying coal seams.**



## **General Requirements**

- **Permitting Objections – Section 202**
  - **Surface owner has right to object to permit.**
  - **Objection must be filed with DEP within 15 days of receipt of notice and plat.**
    - **Objection can be based upon improper location of well or inaccurate information in permit application.**



## **General Requirements**

- **Well Location Restrictions – Section 205**
  - **Wells cannot be drilled:**
    - **Within 200 feet from building or water well**
    - **Within 100 feet from spring, stream, body of water, or wetland larger than one acre**
  - **Waiver from location restrictions can be granted.**
    - **DEP may impose conditions to protect people, property, and waters.**



## **General Requirements**

- **Ground Water Protection – Section 207**
  - **Casing is required when:**
    - **Drilling through fresh water strata;**
    - **Certain coal seams;**
  - **Brines must be disposed of in compliance with Clean Streams Law.**





## **General Requirements**

- **Protection of Water Supplies – Section 208**
  - Well operator must restore or replace a water supply that is polluted or diminished.
  - **Presumption of liability**
    - Well is presumed to have caused pollution of water supply located within 1000 feet of well.
    - Presumption can be rebutted by performing a predrill test of water supply.
    - Presumption also is rebutted if landowner refuses permission to perform a predrill test.



## **General Requirements**

- **Well Site Restoration – Section 206**
  - **Surface estate must be restored from disturbances caused by drilling activities.**
  - **Well operator must follow erosion and sediment control plan at all times during drilling.**
  - **Equipment must be removed and well site restored within nine months of completion of activity.**
    - **Time period can be extended for six months.**
    - **Equipment can be stored on-site with landowner permission.**



## **General Requirements**

- **Reporting Requirements – Section 212**
  - **Completion report must be filed with 30 days of the completion of drilling.**
  - **Annual report containing production data must be filed with DEP.**
    - **Report is kept confidential for five years.**
    - **DEP has authority to request industry logs and other information.**



## General Requirements

- **Well Plugging – Section 210**
- **Bonding – Section 215**
- **Registration – Section 203**



# **Oil and Gas Conservation Law**

- **Declaration of Purpose**
  - “[F]oster, encourage, and promote the development, production, and utilization” of Pennsylvania’s oil and gas resources;
  - Prevent the waste of oil and natural gas;
  - Permit the Commonwealth to “realize and enjoy the maximum benefit of these natural resources.”



# **Oil and Gas Conservation Law**

- **Application – Section 3**
  - **OGC Law applies to all land within Pennsylvania.**
  - **The following wells are excluded from OGC Law:**
    - **Those that do not penetrate the Onondaga horizon;**
    - **Those that are less than 3,800 feet where the Onondaga horizon is closer than 3,800 feet from the surface;**
    - **Those drilled prior to OGC Law; and**
    - **Those for use in storage reservoir.**



# OGC Law and Marcellus Shale

System	Western Pennsylvania	Northwestern New York	
Middle Devonian	Harrell Shale	Genesee Fm.	
	Tully Limestone	Tully Limestone	
	Mahantango Formation	Moscow Shale	Hamilton Group
		Ludlowville Shale	
		Skaneateles Shale	
	Marcellus Shale	Marcellus Shale Tioga ✓ bentonite	
Selinsgrove Limestone	Onondaga Limestone		
Lower Dev.	Needmore Shale	Bois Blanc Fm.	

The Oil and Gas Conservation Law does not apply to wells that *do not* penetrate the Onondaga horizon, meaning *wells drilled into the Marcellus Shale are not covered by this law.*

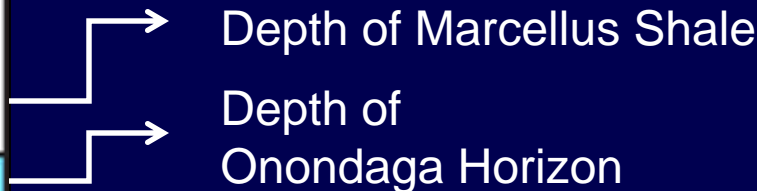


Image by: Robert Milici and Christopher Swezey, 2006, Assessment of Appalachian Basin Oil and Gas Resources: Devonian Shale–Middle and Upper Paleozoic Total Petroleum System. Open-File Report Series 2006-1237. United States Geological Survey.



# **Oil and Gas Conservation Law**

- **Prohibition of Waste – Section 4**
  - **Physical Waste**
    - Allowing gas, oil, or water to migrate to a different stratum
    - Drowning a stratum
    - Unnecessary loss or oil or gas at the surface
  - **Inefficient spacing of wells**
    - “drilling of more wells than are reasonably required to recover, efficiently and economically, the maximum amount of oil and gas from a pool.”





# **Oil and Gas Conservation Law**

- **Well Spacing – Section 7**
  - **Definition of pool:**
    - **“an underground reservoir containing a common accumulation of oil and gas, or both, not in communication laterally or vertically with any other accumulation of oil or gas.”**



## Well Spacing

- **When a well is drilled into, or below, the Onondaga horizon, those “directly and immediately affected by the drilling” of the well can apply to DEP for a well spacing order.**



## Well Spacing

- **Process to Establish Spacing Order**
  - Notice of hearing
  - DEP holds public hearing
  - DEP will render determination within 45 days.



## **Well Spacing**

- **Spacing Order**
  - **DEP will establish a “unit” representing the area in which a well can efficiently and economically extract natural gas.**
  - **The units within a pool generally will have uniform sizes and shapes.**
  - **The order will cover all land believed to be in the pool up to a size of 10 square miles.**



## Well Spacing

- **Spacing Order**
  - **DEP will consider the following factors:**
    - **Surface topography and individual property lines;**
    - **Proposed well spacing plans;**
    - **Depth of production;**
    - **Characteristics of the producing formation;**
    - **Other geologic and scientific data.**



## Well Spacing

- **Spacing Order**
  - **DEP will set a minimum distance that a well must be located from a unit boundary.**
  - **Under some circumstances, an operator may be permitted to drill a well outside prescribed distance, but production of well may be limited.**



## **State Agencies**

- **Department of Environmental Protection (DEP)**
  - **Bureau of Oil and Gas Management**
- **Department of Conservation and Natural Resources (DCNR)**



## **Federal Agencies**

- **Susquehanna River Basin Commission (SRBC)**
- **Delaware River Basin Commission (DRBC)**
- **Federal Energy Regulatory Commission (FERC)**
- **Environmental Protection Agency (EPA)**





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## **Legislative Issues**

- **Amendment of Clean and Green**
  - **Goal: Establish uniformity statewide**
  - **Issues:**
    - **Extent of land affected by roll-back**
    - **Timing of roll-back**
    - **Severance of surface estate**
    - **Well sited on adjacent property**



# **Clean and Green Amendments**

- **House Bill 1394 (Houghton)**
  - **Roll-back taxes assessed on portions of land devoted to natural gas activities.**
  - **Roll-back taxes due when well site restoration report is filed.**
  - **No roll-back taxes for prior activity.**
  - **Passed by 193-0 vote on June 23, 2009.**



## **Clean and Green Amendments**

- **House Bill 984 (Kessler)**
  - Wind power generation system permitted for enrolled land.
  - Roll-back taxes assessed on portion of land affected by wind power generation system.
  - Passed by 193-0 vote on June 23, 2009.



# **Clean and Green Amendments**

- **Senate Bill 298 (Yaw)**
  - **Roll-back taxes assessed on restored well site.**
  - **Roll-back taxes due when well site restoration report is filed.**
  - **Bill is currently under consideration.**



## Legislative Issues

- Severance tax
- Increased leasing of state forest land
- County Assessment Law
- Surface owners rights
- Include Marcellus Shale formation within Oil and Gas Conservation Law
- Reporting requirements
- FRAC Act (Federal legislation)



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## **Minimum Royalty Act Litigation**

- **Hundreds, possibly thousands, of landowners seek to terminate their lease agreement.**
- **General issue: Does reduction of royalty for post-production costs violate Pennsylvania minimum royalty statute?**





## 58 P.S. § 33 –

# Guarantee of Minimum Royalties

- A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of other designation from lessor to lessee shall not be valid if such lease does not guarantee the lessor at least one-eighth **royalty** of all oil, natural gas or gas of other designations removed or recovered from the subject real property.



## Definition of Royalty

- **Royalty is undefined in minimum royalty statute.**
- **“Royalty Owner” is defined in Oil and Gas Conservation Law.**
- **“Royalty Interest” is defined in Dormant Oil and Gas Act.**
- **Industry practice**



## **Lease Termination Cases**

- **Middle District of Pennsylvania**
  - *Kropa v. Cabot Oil & Gas Corp.* (3/25/08)
  - *Lauschle v. The Keeton Group* (10/9/08)
- **Western District of Pennsylvania**
  - *Frederick v. Range Resources* (10/17/08)
- **Susquehanna County Court of Common Pleas**
  - *Kilmer v. Elexco Land Services, Inc., and Southwestern Energy Production Co.*



## **Kropa v. Cabot Oil & Gas Corp.**

- **Facts**

- Five year lease for \$25 per acre executed on March 7, 2006.
- Assertion that company would “never pay more than \$25 per acre.”



## ***Kropa v. Cabot Oil & Gas Corp.***

- **Issues**
  - **Fraudulent inducement**
  - **Violation of minimum royalty statute**



## ***Kropa v. Cabot Oil & Gas Corp.***

- **Procedural History**
  - **Complaint filed in Susquehanna County Court of Common Pleas.**
  - **Case removed to federal court.**
  - **Opinion on Motion to Dismiss issued by U.S. District Court on April 17, 2009.**



## **Kropa v. Cabot Oil & Gas Corp.**

- **Judge Munley opinion**
  - **Motion to Dismiss granted for some aspects of fraudulent inducement claim.**
  - **Motion to Dismiss denied for minimum royalty act violation claim.**
    - **“To make a final determination on this issue we have to examine documents outside of the pleadings.”**



## **Lauschle v. The Keeton Group**

- Case filed by over 100 plaintiffs who own 18,200 acres in Sullivan and Lycoming Counties.
- Lease agreements were executed in 2005 and 2006.
- Motion to Dismiss was filed on November 24, 2008.
- Oral argument was conducted on May 29, 2009.
- Case is on hold pending resolution of *Kilmer* case.





## **Frederick v. Range Resources**

- **Plaintiffs have received and continue to receive royalties from lease agreements in question.**
- **If plaintiffs are successful, what is appropriate remedy?**



## **Kilmer v. Elexco Land Services**

- **Susquehanna Co. Court of Common Pleas**
  - March 3, 2009 – Order ruled in favor of gas company
  - March 16, 2009 – Opinion
- **Notice of Appeal filed with Superior Court on March 13, 2009.**
- **Petition for Extraordinary Relief filed with Supreme Court on April 6, 2009.**



## **Kilmer v. Elexco Land Services**

- ***Kropa* opinion**
  - “We respectfully disagree with the *Kilmer* analysis. The issue presented is whether the mandatory one-eighth royalty is achieved if post-production costs are deducted before payment. To make such a determination, it is necessary to construe the term ‘royalty’ as used in the statute.”



## **Kilmer v. Elexco Land Services**

- Supreme Court granted Petition for Extraordinary Relief.
- Argument was heard on September 16, 2009.
  - Issue: “Whether 58 P.S. § 33 precludes parties from contracting that post-production costs be factored into the determination of the amount of royalty payable under an oil or natural gas lease.”



# Municipal Regulation of Natural Gas Drilling Operations

- **Supreme Court opinions**
  - **Borough of Oakmont**
    - **Restriction on oil and gas wells in R-1 zoning district was not preempted by Oil and Gas Act.**
  - **Salem Township**
    - **SALDO was preempted by Oil and Gas Act.**



## Oil and Gas Act § 602

- “Except with respect to ordinances adopted pursuant to the . . . Municipalities Planning Code, and the . . . Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same **features** of oil and gas well operations regulated by this act or that accomplish the same **purposes** as set forth in this act.”



## Oil and Gas Act § 602

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# **Huntley & Huntley v.** **Borough of Oakmont**

- **Features**

- Pertains to technical aspects of well functioning and ancillary matters rather than location

- **Purposes**

- Zoning considers “the community’s development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community.’”





## **Huntley & Huntley v.** **Borough of Oakmont**

- “Overall restriction on oil and gas wells in R-1 districts [was] not preempted” by Oil and Gas Act.



# *Range Resources v. Salem Township*

- **Features**
  - Various requirements overlapped with Oil and Gas Act
- **Purposes**
  - “enabling continuing oil and gas drilling operations . . . while ensuring the orderly development of property”



## **Range Resources v.** **Salem Township**

- “Not only does the Ordinance purport to police many of the same aspects of oil and gas extraction activities that are addressed by the Act, but the comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the Act.”



## **Supreme Court Case Law**

- ***Huntley & Huntley v. Borough of Oakmont***
  - Zoning restrictions permitted in R-1 district.
- ***Range Resources v. Salem Township***
  - Comprehensive regulatory scheme not permitted.



## **Rights of Surface Owners**

- ***Belden & Blake Corp. v. DCNR***
  - DCNR could not require company to execute a surface use agreement.



## **“Produced in Paying Quantities”**

- ***T.W. Phillips v. Jedlicka***
  - Superior Court ruled in favor of gas company that it had appropriately exercised discretion that well was producing in paying quantities.
  - Supreme Court accepted case.
    - Issue: Did the Superior Court misapply the decision of this Court in *Young v. Forest Oil Co.*, by holding that Pennsylvania employs a purely subjective test to determine whether an oil or gas lease has produced “in paying quantities.”



## The Agricultural Law Resource and Reference Center

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