

McGuireWoods



OIL & GAS YEAR IN REVIEW 2023



MCGUIREWOODS' OIL & GAS YEAR IN REVIEW 2023

McGuireWoods' multidisciplinary oil and gas sector team published legal insights for companies operating in the oil and gas industry. This "Oil & Gas Year in Review 2023" summarizes key developments and practice points over the past year, from pivotal court decisions to proactive guidance for corporate counsel, investors and project stakeholders.



1. Texas Supreme Court Hears Oral Argument in Major Winter Storm Uri Case

In February 2021, winter storm Uri hit Texas, causing a sharp spike in electricity demand that could not be satisfied by available generation resources, resulting in statewide blackouts. Commercial, industrial and residential retail customers across Texas sued hundreds of entities involved in the Texas electricity market for damages sustained due to the resulting electrical outages, including wholesale power generators.

On Sept. 29, 2023, the Supreme Court of Texas announced it would review a lower court's reversal of two winter storm Uri orders by the Public Utility Commission of Texas (PUCT), which date back to 2021. During the historic winter storm that caused roughly [\\$195 billion](#) in damages, the PUCT's orders raised power prices in the Electric Reliability Council of Texas to \$9,000/MWh, impacting countless companies and consumers.

2. Federal Court Upholds Pennsylvania Act 85, Says Cross-Unit Well Didn't Breach Lease Agreement

The Pennsylvania Act 85 of 2019 amended the Pennsylvania Oil and Gas Lease Act to add a section permitting cross-unit drilling. On Jan. 24, 2023, the U.S. District Court for the Middle District of Pennsylvania upheld Act 85 as constitutional, and held that SWN Production Co. LLC and Repsol Oil & Gas USA, LLC did *not* breach their 2006 lease agreement with Warner Valley Farm LLC by drilling a cross-unit well.

Lessor Warner Valley sued lessees SWN and Repsol, claiming they breached the terms of a 2006 lease agreement that permitted them to drill for oil and gas on Warner Valley's land. Warner Valley alleged that SWN and Repsol breached the lease agreement by drilling a well that crossed the boundary of Warner Valley's unit and extracted gas from properties contained in an adjacent drilling unit. Warner Valley also sought a declaration that Act 85 was unconstitutional under the contract clause of the U.S. and Pennsylvania constitutions. But in *Warner Valley Farm, LLC v. SWN Production Co., LLC*, the court rejected Warner Valley's claims and granted SWN and Repsol's motion for summary judgment.



[3. Texas Appellate Court: Water Created During Fracking Is Oil and Gas Waste, Not Water](#)

In July 2023, the El Paso Court of Appeals held that produced water created in the fracking process is considered an oil and gas waste rather than water — meaning it belonged to the mineral lessee, not the surface owners.

COG Operating LLC leased minerals from two surface owners on the land at issue pursuant to four leases. COG's mineral leases gave it the exclusive right to explore and produce oil and gas on the leased lands. The leases also provided that COG had no right to use water that was on or under the land. Cactus Water Services, on the other hand, retained all the surface estates' water rights, including ownership and right to sell all water "produced from oil and gas wells and formations on or under the [covered properties]," which it proposed to do pursuant to new leases. Cactus informed COG of these new water rights leases in March 2020, and COG sued, seeking a declaratory judgment that it had the sole right to the produced water through its mineral leases, agreements and at common law.

[4. Federal Court Denies Attempt to Enjoin Appeal Before Pennsylvania Environmental Hearing Board](#)

On June 5, 2023, the U.S. District Court for the Middle District of Pennsylvania denied Transcontinental Gas Pipeline Co. LLC's (Transco) attempt to enjoin an administrative appeal proceeding before the Pennsylvania Environmental Hearing Board (PAEHB). In *Transcontinental Gas Pipeline Co., LLC, v. Pennsylvania Environmental Hearing Board, et al.*, Transco claimed the 3rd U.S. Circuit Court of Appeals has original and exclusive jurisdiction to review pipeline-related permits such as those at issue in the PAEHB appeal, and argued that the Natural Gas Act (NGA) preempts PAEHB's review of those permits.

Under 15 U.S.C. § 717 et seq., the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate the construction and operation of interstate natural gas sales and transportation under the NGA. The 3rd Circuit wrote in 2016's *Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot.* that natural gas companies cannot construct or operate facilities that transport natural gas without obtaining a "certificate of public convenience and necessity" from FERC. The natural gas company must receive various state and federal authorizations for the project to have a FERC certificate issued.



5. Ownership of Pore Space and Its Relation to Surface Estate

Land rights and interests continue to be a prominent fixture in the legal landscape. Among other things, the ownership of highly sought-after pore space has been at the center of multiple property rights cases and legislation in recent years.

“Pore space” refers to emptied underground geological formations that can be used as storage reservoirs for natural gas or other minerals. The law remains unclear concerning who has the right to use — and be compensated for the usage of — pore space.

6. Compliance Deadlines Approaching: Pipeline Safety Mega Rule

Regulators are looking at a ticking time clock for covered entities in the gas transmission industry to ensure their compliance with the Pipeline and Hazardous Materials Safety Administration’s “Mega Rule”— a rulemaking trilogy intended to improve the safety of onshore gas transmission pipelines.

The Mega Rule addresses safety recommendations and congressional directives following the Sept. 9, 2010, Pacific Gas and Electric Company pipeline rupture and fire in San Bruno, California. In doing so, the Mega Rule revises the pipeline safety regulations that PHMSA issued under Title 49 of the Code of Federal Regulations, Part 192.



7. TSA Strengthens Cybersecurity Monitoring for “Critical” Pipelines and LNG Facilities

Regulatory interest in securing the nation’s energy infrastructure continued in 2023. On July 26, 2023, the Transportation Security Administration (TSA) [announced](#) significant updates to its security directive aimed at enhancing and testing cybersecurity for certain pipelines and liquefied natural gas (LNG) facilities. This move underscored the TSA’s continued focus on fortifying the nation’s critical infrastructure against cyber threats.

TSA’s new security directive, [SD Pipeline-2021-02D](#), is titled “Pipeline Cybersecurity Mitigation Actions, Contingency Planning, and Testing.” Developed with industry stakeholders, the Cybersecurity and Infrastructure Security Agency and the Department of Transportation, the revised directive seeks to not only bolster, but also test, the cybersecurity preparedness and resilience of critical infrastructure. In support for the revised directive, TSA Administrator David Pekoske emphasized the importance of testing cybersecurity readiness.

8. 11 Key Elements of New EPA Rule Regulating Methane and VOC Emissions

On Dec. 2, 2023, the Environmental Protection Agency issued its final rule titled “Standards of Performance for New, Reconstructed, and Modified Sources and Emission Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review.” This rule involves the regulation of methane and volatile organic compound emissions from sources in the crude oil and natural gas source category and revises the New Source Performance Standards for new, modified and reconstructed sources in that source category. The final rule also establishes for the first time emission guidelines that govern how states should regulate methane emissions from existing sources in the source category. Although states are responsible for establishing the performance standards for existing sources, the EPA expects that the same requirements applicable to new sources should also apply to existing sources.

CONCLUSION

McGuireWoods reported on significant legal developments, emerging trends and practical guidance for companies operating in the oil and gas industry. McGuireWoods' oil and gas sector team looks forward to continuing this journey in 2024.

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