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Ohio Oil and Gas Update

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OHIO OIL AND GAS UPDATE

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I. INTRODUCTION

Over the last twelve months, oil and gas law in Ohio has undergone legislative change, formalized regulation, and judicial scrutiny. As

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Utica Shale development begins its rise, the legislators, administrators, and judges of Ohio have all taken steps to ensure the responsible development of Ohio's natural resources.

II. STATUTORY LAW

A. *Senate Bill 315*

On June 11, 2012, Ohio Governor John R. Kasich signed into law Senate Bill 315 ("SB 315"), which provides comprehensive legislation covering an array of energy-related issues, including what he called "the most aggressive, clearest, fairest and strongest fracturing standards you can find anywhere in the country."[2] Although the bill does go further than regulations in other shale states, such as Pennsylvania and West Virginia, it is not as stringent as the governor's original proposal, and the Ohio Petroleum Council welcomed it as "vetted through a thorough process [that] included compromises by both the industry and legislators."[3] The Ohio Petroleum Council even noted that "the new regulations partially reflect industry best practices developed by the American Petroleum Institute."[4] Ultimately, the bill is less about restricting hydraulic fracturing and more about making the process certain for producers and transparent for the public.

1. Midstream Pipelines

Prior to passage of the bill, it was unclear whether natural gas gathering and transmission pipelines were subject to regulation. The Ohio Power Siting Board ("OPSB") issues certificates of environmental compatibility and public need for the construction, operation, and maintenance of any "major utility facility."[5] Under the old code, "major utility facility" was defined to exclude "natural gas gathering lines," but neither the code nor any associated regulations defined "gathering line."[6] SB 315 not only defines "gathering lines" (which were already exempt), but goes on to explicitly exempt any midstream facility from OPSB oversight, including the following:

- gas processing plants;
- natural gas liquid pipelines;
- fractionation plants;
- pipelines from processing plants to transmission lines; and

2. Bob Downing, *Kasich Signs Ohio's New Gas Drilling Rules in Akron*, OHIO.COM (June 12, 2012, 1:27 PM), http://www.ohio.com/news/local-news/kasich-signs-ohio-s-new-gas-drilling-rules-in-akron-1.313248.

3. Bob Downing, *Ohio Utica Shale*, OHIO.COM (June 12, 2012), http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/reactions-to-s-b-315-signing-by-gov-kasich-1.313535.

4. *Id.*

5. OHIO REV. CODE ANN. § 4906.10(A) (West) (effective 2012).

6. OHIO REV. CODE ANN. § 4906.01(B)(2)(a) (West) (amended 2012).

- any production operation upstream of a gathering line.[7]

This clear blanket exemption for gathering lines also addresses another potential issue under the previous law. The old regulations defined a "natural gas transmission line" (which is a "major utility facility" and subject to OPSB oversight) as any line that is greater than nine inches in outside diameter, as well as capable of transporting gas at pressures in excess of 125 psi.[8] Historically, gathering lines in Ohio have operated well under these thresholds. With the higher volume and pressure of gas in the Marcellus and Utica Shales, however, gathering lines will likely be much larger. As a result, they might have come under OPSB oversight, but for the clarifications in SB 315 exempting gathering lines, regardless of size.

The Public Utility Commission of Ohio ("PUCO") is another agency whose jurisdiction over midstream pipelines was unclear. PUCO regulates any "public utility," including any "natural gas company" or "pipe-line company."[9] Nevertheless, the old code allowed any natural gas company that was a "producer or gatherer" of natural gas to petition for relief from compliance obligations, provided it was not "affiliated with or under the control of . . . a natural gas company engaged in the transportation or distribution of natural gas."[10] Unfortunately, the old code did not make a similar allowance for pipeline companies.[11]

By contrast, SB 315 does more than allow petitions for relief; it makes a standing statutory exception to compliance for pipe-line companies if they are "engaged in the business of the transport associated with gathering lines, [and] raw . . . or finished product natural gas liquids."[12]

Gathering lines are still subject to PUCO pipeline safety requirements, as well as any applicable federal gas or hazardous liquid safety requirements. Indeed, lines moving gas from the Point Pleasant, Utica, or Marcellus Shales are now also subject to a federal regulation that requires operators to do the following:

- control corrosion;
- prevent damage;
- educate the public;
- establish maximum allowable operating pressures ('MAOP');
- install pipeline markers; and

7. *Id.* § 4906.01(B)(2)(e)-(j).
8. OHIO ADMIN. CODE 4906-1-01(Q) (2012).
9. OHIO REV. CODE ANN. § 4905.03(E)-(F) (West) (amended 2012).
10. *Id.* § 4905.03(A)(5).
11. *Id.* § 4905.03.
12. OHIO REV. CODE ANN. § 4905.03(A)(6) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

- conduct and retain leakage surveys.[13]

SB 315 also raises the penalty for violating any safety requirement from 500,000 to 1 million dollars.[14]

Finally, the new law requires anyone who plans to build a new pipeline to provide PUCO with proposed route and specification information at least twenty-one days before commencing construction.[15] The operator must then follow-up with an "as built" explanation no later than sixty days after completing construction.[16]

None of the new pipeline legislation will apply to pipelines whose construction was begun prior to September 9, 2012.

2. Fluids

Although they are not as comprehensive as those originally advocated by Governor Kasich, the fluid disclosure requirements imposed by SB 315 do go beyond the laws of nearby states. Well operators must disclose the name, volume, purpose, and maximum concentration of individual chemicals or solutions they use to "facilitate drilling" or "stimulate [a] well"—including recycled fluids—through the time "until the well is plugged."[17] (Importantly, the language of these provisions encompasses not just hydraulic fracturing, but also other kinds of stimulation techniques.) Operators must make these disclosures within sixty days, and they may do so in one of three ways: using a designated form, through the FracFocus registry, or by any other means approved by the Ohio Department of Natural Resources ("ODNR").[18] Operators will be considered to be in "substantial compliance," as long as they have made "reasonable efforts" to obtain the relevant information from the supplier of the various chemicals or solutions.[19]

The disclosure requirement is subject to one major exception: operators generally do not have to disclose substances that they designate as trade secrets.[20] Operators must only do so if a medical professional requests the information in order to diagnose or treat an exposed individual, or if the Chief of ODNR requires the information to "respond

13. OHIO REV. CODE ANN. § 4905.911(A)(2) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

14. OHIO REV. CODE ANN. § 4905.95(B)(1)(b) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

15. § 4905.911(B)(1).

16. *Id.* § 4905.911(B)(2).

17. OHIO REV. CODE ANN. § 1509.10(A)(9)(a)–(b), 10(b), (B)(3) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

18. § 4905.911(F)(1)–(3).

19. *Id.* § 4905.911(K)(1).

20. *Id.* § 4905.911(I)(1).

to a spill, release, or investigation."[21] Even then, the recipient may not disclose the protected information to others.[22] However, a trade secret designation may be challenged by a property owner, an adjacent property owner, or any "adversely affected" party.[23] If a designation is challenged, the judge is to conduct an *in camera* review of the information to decide if it is protected.[24]

3. Well Pads

Under SB 315, the site of a new well pad is subject to review, both before permit issuance and before construction.[25] If the site is within a floodplain or a public drinking water supply, it may be subject to site-specific conditions, although the trigger for and nature of these conditions has not been specified.[26] A driller must also provide at least twenty-four hours' notice before beginning construction of a well pad.[27]

4. Water

SB 315 brings Ohio in line with other states (including Pennsylvania and West Virginia) that require well operators to plan for and monitor the water they use. Accordingly, operators must identify how much water they will use and where it will be coming from,[28] and they must test water wells near proposed drilling sites; for sites in the Point Pleasant, Utica, or Marcellus Shales, the prescribed radius is now 1,500—rather than 500—feet.[29] (Unlike other states, however, the law does not presume that a well operator is responsible for any subsequent pollution.)[30] ODNR has also been authorized to specify "[r]equirements governing the location and construction of fresh water impoundments that are part of a production operation."[31]

5. Other Provisions

SB 315 encourages well operators to negotiate road use and maintenance agreements with local communities, requiring at the very least an affidavit of their "good faith" attempt before a permit will be is-

21. *Id.* § 4905.911(H)(1)–(2), (J)(2).
22. *Id.*
23. *Id.* § 4905.911(I)(2).
24. *Id.*
25. OHIO REV. CODE ANN. § 1509.06(H)(1) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).
26. *Id.* § 1509.06(H)(2).
27. *Id.* § 1509.06(K).
28. *Id.* § 1509.06(A)(8)(a).
29. *Id.* § 1509.06(A)(8)(c).
30. *E.g.*, 58 PA. CONS. STAT. ANN. § 3218(c) (West 2012).
31. OHIO REV. CODE ANN. § 1509.23(A)(6) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

sued.[32] SB 315 also requires that owners of horizontal wells obtain $5 million of liability insurance, as well as a "reasonable level of coverage available for an environmental endorsement."[33]

6. Future Developments

Noticeably absent from the bill is a revision of the severance tax on oil and gas production, but the governor will likely continue to pursue this change as a part of his strategy to reduce personal income taxes.[34] The measures that did make it into the bill will all go into effect on September 9, 2012, with rule-making to proceed over the ensuing months.

B. *House Bill 473*

House Bill 473 ("HB 473") is not as sweeping as SB 315, nor is it targeted specifically at natural gas producers. Yet HB 473, signed into law by Governor Kasich on June 4, 2012, may impact drilling operations significantly. HB 473 imposes limits on the amount of water businesses may divert from the Lake Erie watershed without first obtaining a withdrawal and consumptive use permit from the Chief of the Division of Soil and Water Resources.[35] HB 473 was passed in accordance with the December 2013 deadline prescribed in the Great Lakes–St. Lawrence River Basin Water Resources Compact ("Compact").

How much water may be used without a permit depends on its source and quality: for water from Lake Erie or a recognized navigation channel, the threshold is 2.5 million gallons per day.[36] For "high quality" water from any river or stream in the Lake Erie watershed, the threshold is 100,000 gallons per day.[37] For ground water or lesser quality water from any river or stream, the threshold is 1 million gallons per day.[38] A facility may be exempt even if the actual daily withdrawal exceeds these thresholds, if the withdrawal amount falls below the applicable threshold when averaged over any ninety-day period.[39]

32. § 1509.06(A)(11)(b).

33. OHIO REV. CODE ANN. § 1509.07(A)(2) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

34. Downing, *supra* note 2.

35. OHIO REV. CODE ANN. § 1522.11(A) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

36. OHIO REV. CODE ANN. § 1522.12(A)(1) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

37. § 1522.12(A)(3)(a).

38. *Id.* § 1522.12(A)(2).

39. OHIO REV. CODE ANN. § 1522.14(B)(1) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

HB 473 requires permit applicants to submit "a facility water conservation plan that incorporates environmentally sound and economically feasible water conservation measures" in accordance with the Compact.[40] In doing so, applicants may request that any "trade secrets" be kept confidential, if they provide supporting documentation and describe their efforts to safeguard such information.[41]

Permits will cost $1,000, and will be good for the life of the facility.[42]

III. ADMINISTRATIVE LAW

In addition to newly amended statutes that will eventually spawn their own concomitant regulations, legal developments over the last year included new regulations and permit conditions to help implement prior statutes and to bring oil and gas oversight in line with the latest practice. The changes focused on the environmental and safety effects of production and disposal wells.

A. *Regulations for Construction and Monitoring of Production Wells*

Gas producers must comply with new regulations that impose standards for the construction and monitoring of new wells in the Marcellus and Utica Shales. The Joint Committee on Agency Rule Review approved the Oil and Gas Well Construction Rule package on May 7, 2012, as a means to protect ground water resources. While some of the new rules merely codify current industry standards, others are more prescriptive. All of the new rules became effective on August 1, 2012.

Statutory law in Ohio already required wells to be constructed "using materials that comply with industry standards for the type and depth of the well and the anticipated fluid pressures that are associated with the well."[43] The law also provided ODNR with the authority to "establish standards for constructing a well, for evaluating the quality of well construction materials, and for completing remedial cementing."[44] Under section 1509.17 and the previous regulations, companies operating in Ohio were required to comply with a number of broad construction-related requirements scattered throughout the oil and gas law, and those operating in urbanized areas were also required to follow ODNR's Best Management Practices for Well Site

40. OHIO REV. CODE ANN. § 1522.17(A) (West, Westlaw current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th Gen. Assemb. (2011–2012)).

41. *Id.* § 1522.17(C)(1).

42. § 1522.12(C)(4), (D).

43. OHIO REV. CODE ANN. § 1509.17(A) (West 2011).

44. *Id.* § 1509.17(B).

Construction.[45] Until this year, however, Ohio had not adopted a detailed set of enforceable well construction rules.

The key rule in the package prescribes detailed standards on the following aspects of well construction: drilling fluids, casings, liners, mouse and rat holes, wellbores, cementing, centralizers, and annular pressure.[46] The rule also requires the operator to notify the inspector twenty-four hours prior to "setting any casing or liner string and before commencing any casing cementing operation . . . to enable the inspector to participate in the prejob safety and procedures meeting, independently test mix water, evaluate casing condition, and observe and document the execution of the cementing operation."[47] In addition, the rule provides ODNR with broad authority to impose additional requirements in permit conditions.[48]

The rule package also amends the permitting rule by requiring well owners to submit a casing and cementing plan as part of their application.[49] The plan must indicate how the owner proposes to drill and construct the well in accordance with the new well construction rule, and it must include information addressing the proposed casing type, outside diameter and setting depth, as well as proposed cement volumes for each casing string.[50] In addition, the owner must indicate whether hydraulic fracturing will be used to stimulate production.[51]

B. *EPA Permit for Production Wells*

On February 1, 2012, the Ohio Environmental Protection Agency ("OEPA") ended a months-long public comment process and issued a final general air permit for oil and natural gas production well sites. The general permit covers a variety of emissions sources found at most shale gas well sites, including internal combustion engines, generators, dehydration systems, storage tanks, and flares.[52] The permit also contains emissions limits, operating restrictions, as well as monitoring, testing, and reporting requirements.[53] However, the permit only covers operations associated with production; drilling, fracturing,

45. *Id.* § 1509.17.

46. *See generally* OHIO ADMIN. CODE 1501:9-1-08 (2012).

47. *Id.* at 1501:9-1-08(L).

48. *Id.* at 1501:9-1-08(B).

49. OHIO ADMIN. CODE 1501:9-1-02(A)(6) (2012).

50. *Id.*

51. *Id.* at 1501:9-1-02(A)(6)(F).

52. *Air General Permit for Shale Gas Well Sites,* OHIO ENVTL. PROT. AGENCY, 1 (Feb. 2012), http://www.epa.ohio.gov/portals/47/nr/2012/february/airgp2-1-12.pdf [hereinafter *Air Permit*].

53. *Questions and Answers Concerning Air Pollution Permitting Requirements for Shale Oil & Gas Well Sites,* OHIO ENVTL. PROT. AGENCY, 3 (Jan. 2012), http://www.epa.ohio.gov/portals/27/genpermit/NG.WellGP.Q&AFinal.docx [hereinafter *Questions & Answers*].

midstream operations, and processing facilities are not regulated by the permit and are exempt.[54]

OEPA has made several significant changes to the final permit requirements, based on comments it received on the draft permit proposed in fall 2011.[55] OEPA decided against including roadways as a regulated source of emissions within the oil and gas general permit because separate general permits for unpaved roadways and parking areas already exist; well owners–operators seeking an oil and gas general permit will need to apply for these separately, as necessary.[56] OEPA also dropped a proposed requirement to reduce Total Organic Compound ("TOC") or Hazardous Air Pollutant ("HAP") emissions from glycol dehydration units by 95%; instead, the final permit imposes a general five-ton-per-year limit on Volatile Organic Compound ("VOC") emissions from dehydration units.[57] Additionally, rather than limit the number of storage tanks that can be operated at a facility, OEPA decided to limit the total volume of material stored in tanks.[58] The final permit will also allow facilities to operate two glycol dehydration units, as opposed to only one.[59] Finally, OEPA has added a restriction on loading rack emissions, which the agency says it inadvertently omitted from the draft permit.[60]

OEPA's general permit process is designed to speed up and simplify air permitting. Well owners or operators who meet the qualifying criteria for the general permit can either accept general permit terms and conditions or they can pursue a traditional permit, which undergoes a case-by-case review.[61] In any case, an air permit must be obtained before any regulated equipment may be operated and before any utilities, piping, or ductwork can be hooked up to the regulated equipment.[62] OEPA estimates that most general permits will be issued within a few weeks of application, whereas traditional permits typically take up to six months.[63] The fee for the general permit will be $2,300, due after the permit issues; a roadway general permit, if needed, is an additional $200.[64]

54. *Air Permit*, *supra* note 52, at 1.

55. *Response to Comments*, OHIO ENVTL. PROT. AGENCY (Jan. 30, 2012), http://www.epa.ohio.gov/portals/27/genpermit/ResponseToComments4final.docx.

56. *Id.* at 7.

57. *Id.* at 2.

58. *Id.* at 4–5.

59. *Id.* at 3.

60. *Id.* at 9.

61. *Questions & Answers*, *supra* note 53, at 6.

62. *See id.* at 2.

63. *Air Permit*, *supra* note 52, at 2.

64. *Questions & Answers*, *supra* note 53, at 4.

C. *Reforms for Brine Disposal Wells*

Production-well operators are not the only ones facing new government mandates; brine-well operators will now have to consider any seismic side-effects of their disposal operations after a series of earthquakes in the Youngstown area prompted the ODNR action.[65] In March 2011, twelve earthquakes occurred within one mile of a Class II deep injection well.[66] The earthquakes prompted new measures aimed at preventing similar occurrences by prohibiting operators from drilling new wells into the Precambrian basement rock formation.[67] The new reforms also require that brine-well operators submit extensive geological data before drilling. In addition, the reforms require that operators install state-of-the-art pressure and volume monitoring devices (including automatic shut-off switches), as well as electronic data recorders for all shipments received by brine haulers.[68]

The reforms will apply to all new (and potentially some existing) Class II disposal wells and will be implemented as supplemental permit conditions until they are either codified in law in section 1509 of the Ohio Revised Code or written into administrative rule in section 1501:9-03 of the Ohio Administrative Code.[69]

The state of Ohio will maintain primacy in administering its Class II disposal well programs, as it does with all programs regulated by the federal Safe Drinking Water Act, because Ohio's standards meet or exceed those of the federal government.[70]

IV. COMMON LAW

The Ohio Supreme Court did not decide any oil and gas cases over the last year. Nonetheless, several common pleas court and court of appeals decisions involved interpretation of clauses in mineral leases, and all were decided against the companies that drafted them.

A. *Judicial Ascertainment Clauses*

After *Conny Farms, Ltd. v. Ball Resources, Inc.*,[71] oil and gas companies cannot rely on the courts of Ohio to give them advance warning of a potential lease breach. In *Conny Farms*, an Ohio court of

65. OHIO DEP'T OF NATURAL RES., EXECUTIVE SUMMARY, PRELIMINARY REPORT ON THE NORTHSTAR 1 CLASS II INJECTION WELL AND THE SEISMIC EVENTS IN THE YOUNGSTOWN, OHIO, AREA, at 4 (2012), *available at* http://ohiodnr.com/downloads/northstar/UICExecSummary.pdf.

66. *Id.* at 2.

67. *Class II Disposal Well Reforms/Youngstown Seismic Activity Questions and Answers*, OHIO DEP'T OF NATURAL RES., 2 http://ohiodnr.com/downloads/northstar/YoungstownFAQ.pdf (last visited Nov. 1, 2012).

68. *Id.* at 3–4.

69. *Id.* at 4.

70. *Id.* at 2.

71. Conny Farms, Ltd. v. Ball Res., Inc., No. 09 CO 36, 2011 WL 5053625 (Ohio Ct. App. Sept. 27, 2011).

appeals held, as a matter of first impression in the state, that a judicial ascertainment clause in an oil and gas lease is unenforceable as against public policy.[72] Plaintiff–appellants Michael and Jennifer Conny had purchased a tract of land in Columbiana County in 2005,[73] subject to two oil and gas leases that had been in existence since 1950. Both leases contained judicial ascertainment clauses, which stated the following: "It is agreed that this lease shall never be forfeited or cancelled for failure to perform, in whole or in part, any of its covenants, conditions or stipulations, until it shall have been first finally judicially determined that such failure exists, and after such final determination, lessee is given a reasonable time therefrom to comply with any such covenants, conditions or stipulations."[74] The leases were not used for production; rather, the property had only been used for gas storage purposes.[75]

In 2008, the Connys sent a letter to two of the several lessees stating that the leases had terminated because no payments had been made since the 2005 transfer of ownership; on that basis, the Connys demanded that the leases be cancelled.[76] The lessees argued that rental payments for storage of the gas tanks had been suspended because the Connys had not notified the lessees of the new ownership but that the suspended funds would now be provided.[77] The Connys then filed a complaint alleging that the leases had either been breached or had expired on their own terms, after which both sides filed cross-motions for summary judgment.[78] The trial court granted the lessees' motion, upholding the judicial ascertainment clauses.[79]

In reversing and remanding, the court of appeals adopted the rationale in a West Virginia decision and declared that judicial ascertainment clauses in oil and gas leases are invalid in the state of Ohio.[80] Although the court acknowledged that oil and gas leases are to be treated like any other contract, their terms altered only with the greatest caution,[81] the court found that judicial ascertainment clauses violate public policy in two ways. First, "Ohio values judicial economy, which protects its citizens from repeated litigation over the same matter."[82] Judicial ascertainment clauses, in contrast, could require multi-

72. *Id.* at *1.
73. *Id.* The actual plaintiff–appellant was Conny Farms Ltd., a business entity of which the Connys were the sole members and to which they transferred the property shortly after acquiring it. *Id.*
74. *Id.* at *3.
75. *Id.* at *1.
76. *Id.*
77. *Id.* at *1–2.
78. *Id.* at *2.
79. *Id.*
80. *Id.* at *3 (citing Wellman v. Energy Res., Inc., 557 S.E.2d 254, 259–60 (W. Va. 2001)).
81. *Id.* at *5.
82. *Id.*

ple rulings on whether a party has failed to perform and additional rulings on the overall contractual dispute.[83] Second, "the purpose of the legal system in Ohio is to provide for the resolution of legal controversies, not to be used as a mechanism to enable one party to grind down another."[84] Here, the court was concerned that oil and gas companies could use these clauses (and their relatively greater resources) to exert undue pressure on individual landowners.[85]

B. *Free Gas Covenants*

Under *Kramer v. PAC Drilling Oil & Gas, L.L.C.*,[86] well operators can likewise not count on surrender clauses to free them from providing free gas to lessors. In *Kramer*, Joseph and Helen Kocsis leased the oil and gas rights to a 149-acre tract of land to McClanahan Oil Company.[87] The lease originally reserved to the Kocsises the right to take an unlimited amount of gas from any producing well for domestic purposes, as long as they made the connection themselves and assumed any concomitant risks.[88] The lease also allowed the lessee (or its assigns) to surrender any part of it at any time, thereby terminating all related payments or liabilities.[89] Following execution of the lease in 1978, McClanahan drilled two wells that fed into a gathering line, and the Kocsises drew their free gas directly from this line, which happened to be closer to their farmhouse than either of the wells.[90]

In the mid-2000s, John and Chris Kramer purchased fourteen of the 149 acres to board and train horses.[91] Although neither of the wells was on this portion of the land, Phillip and Sandra Caldwell, the lessee's successors, agreed to amend the lease and allow the Kramers to use up to 250,000 cubic feet of gas per year for domestic purposes.[92] For several years, the Kramers drew gas without incident from the same gathering line that still supplied the Kocsises' son, but eventually the Kramers began experiencing disruptions.[93] Whenever these disruptions occurred, the Kramers reported the problem to the newest owner of the wells, PAC Drilling Oil & Gas, L.L.C. ("PAC"), and PAC investigated, usually discovering a leak in the line.[94] Eventually, the Kramers grew tired of the disruptions and ran a new gas line directly

83. *Id.* at *3.
84. *Id.* at *5.
85. *Id.*
86. Kramer v. PAC Drilling Oil & Gas, L.L.C., 968 N.E.2d 64 (Ohio Ct. App. 2011).
87. *Id.* at 65.
88. *Id.*
89. *Id.* at 65–66.
90. *Id.*
91. *Id.* at 66.
92. *Id.*
93. *Id.*
94. *Id.*

to one of the wells.[95] The extra connection, however, made it more difficult to produce gas from the well, and so PAC shut in the well and sent the Kramers a notice of cancellation, surrendering the oil and gas lease to the extent of their fourteen acres.[96] In reaction, the Kramers sued PAC, the Caldwells, and the Kocsises, seeking a declaration of their right to 250,000 cubic feet of free gas per year, as well as a share of the royalties of the gas produced on their fourteen acres.[97] The trial court granted summary judgment to PAC and the Caldwells, concluding that surrender of the lease terminated the free-gas covenant.[98]

The court of appeals first clarified that an oil and gas lease conveys a separate estate to the lessee that is distinct from the surface estate.[99] This mineral estate is fee-simple determinable, rather than fee-simple absolute, in that it may revert to the lessor upon the occurrence of specified events.[100] Of these two estates, a free-gas clause is considered to run with the surface estate under Ohio law, unless the parties have explicitly agreed otherwise.[101]

The *Kramer* court held that because the amended lease did not name the Kramers in particular, but instead granted the "[o]ccupants of the [farmhouse]" free gas, this clause created a covenant that ran with the surface estate.[102] Thus, when PAC surrendered the lease, it was only relieved of the "payments and liabilities" related to the mineral estate; liabilities related to the surface—such as the free-gas covenant—remained in force.[103] The court viewed this conclusion as "consistent with the purpose of surrender clauses, which is to avoid paying rents or royalties on unproductive land."[104] In order to be freed from the free-gas covenant, the court observed, PAC would have had to surrender the entire contract, not just the Kramers' fourteen acres.[105]

C. *Use of Surface in Recovery Operations*

Imprecise language may also restrict the scope of a producer's activity. In *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Explora-*

95. *Id.*
96. *Id.*
97. *Id.* at 67.
98. *Id.*
99. *Id.* (citing Bath v. Raymond C. Firestone Co., 747 N.E.2d 262, 265 (Ohio Ct. App. 2000)).
100. *Id.* at 67–68 (citing Harris v. Ohio Oil Co., 48 N.E. 502, 506 (Ohio 1897)).
101. *Id.* at 68 (citing Oxford Oil Co. v. Wills, No. 1999 AP 11 0067, 2000 WL 1901451, at *3 (Ohio Ct. App. Dec. 21, 2000)).
102. *Id.* at 69.
103. *Id.*
104. *Id.*
105. *Id.*

tion, L.L.C.,[106] the Harrison County Court of Common Pleas ruled that a 1959 mineral reservation did not authorize the use of a well on the surface of the leased premises to remove oil and gas from underneath adjoining properties.[107] In *Jewett Sportsmen & Farmers Club*, North American Coal Company had transferred 177 acres of land to Jewett Sportsmen & Farmers Club, reserving the minerals and other rights.[108] When North American Coal Company later conveyed this interest to Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy L.L.C., they proposed to develop two drill pads to recover oil, gas, and other substances, both from below the property and, through horizontal drilling, from areas beyond its boundaries.[109] The reservation granted the two organizations "the privileges of mining and removing *through and under* said described premises other coal, oil, gas, or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor."[110] Consulting the dictionary, the court interpreted that the phrase "through and under" merely "authorizes the mining, transfer, and removal of coal, oil, gas, and other minerals found outside the described premises which takes place beneath the surface of the described premises" and does not involve use of the surface.[111] The language of the reservation was construed against the drafter, who could have included (but did not) express language to permit the desired use of the surface (e.g., "through *or* under").[112]

From a practical standpoint, the court considered the phrase "through and under" to permit "an underground mine operator to 'wheel' coal through the underground passages beneath the subject premises," but not to use the premises as "the removal site for [outside] coal."[113] By extension, the court did not take the phrase to authorize the use of a wellhead on the premises to extract oil and gas recovered from outside parcels because such "oil and gas and water recovered would not stay under the surface," but rather "would exit the wellhead above ground and then would be piped underground to the separator for each well and the oil and water would be stored above ground."[114] The court distinguished its narrow interpretation in this case, which concerned the language of a permanent reservation, from the "sweeping conclusions" of courts in other cases that interpreted temporary lease agreements.[115]

106. Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, L.L.C., No. CVH-2011-0113 (Ohio Ct. Com. Pl. Jan. 17, 2012), *available at* http://media.cleveland.com/business_impact/other/Judgement%20Entry%201-17-12.pdf.
107. *Id.* at 13.
108. *Id.* at 2.
109. *Id.* at 1.
110. *Id.* at 3 (emphasis added).
111. *Id.* at 6.
112. *Id.* at 7.
113. *Id.* at 8.
114. *Id.* at 9.
115. *Id.*

The court's decision addresses the language contained in a specific mineral reservation. Because each grant of mineral rights should be construed in light of its unique language, the applicability of this decision to disputes involving different language may be limited.

V. CONCLUSION

Although the general tenor of the many changes in Ohio oil and gas law suggests a restriction on production activity, in actuality these developments only impose greater precision and certainty. Much of SB 315 and the new well construction rule merely codify industry standards. In exchange for having to collect and report additional information to help keep water sources pollution-free and prevent earthquakes, producers can now take advantage of a streamlined OEPA permit process, certainty in well specifications, and a clear and broad regulatory exemption for gathering lines and midstream facilities.