Welcome!

On behalf of the PBA Shale Energy Law Committee, co-chairs Anne John, John Carroll and Jeff Malak extend a warm welcome to all of our returning and new members as we present the third issue of your committee newsletter. We would like to acknowledge the efforts of Newsletter Editor Paul Yagelski, who, with the assistance of Brian Pulito and Jon Beckman, has worked hard to produce another outstanding newsletter. We hope you find it to be informative and that it will prove to be a helpful resource in your practice. We also would like to express our appreciation to PBA staff liaison Pam Kance and senior publication editor Nancy Wilkes for lending their expertise and hard work.

We are always looking for new ideas to make this committee work for you; this newsletter is an important part of that process. If you would be willing to provide content for the next newsletter, or suggested topics, please contact Mr. Yagelski or Mr. Pulito directly.

Message from the Co-editors

Dear fellow members of the Shale Energy Law Committee:

We are looking for ways to improve our newsletter. If you have an idea, please do not hesitate to contact us. In addition, if you have an article that you would like to have included in the newsletter, please forward it to us. We hope that you enjoy the newsletter. Best regards,

Paul R. Yagelski and Brian Pulito

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The PBA Shale Energy Law Committee will meet on Thursday, Nov. 16

from 9:15 – 10:45 a.m.
at the The Red Lion Hotel
4751 Lindle Rd., Harrisburg

as part of PBA Committee/Section Day

Register at www.pabar.org

Upcoming PBA Events

The PBA Minority Attorney Conference is Oct. 12-13 in Philadelphia.

The PBA Commission on Women in the Profession Fall Retreat is Nov. 10-11 in Hershey.

The PBA Avoiding Legal Malpractice Seminars are offered in numerous locations through Nov. 28.

The Pennsylvania Bar Foundation NightOUT is Nov. 16 in Harrisburg.
**Case Summaries**

**2017 Pennsylvania and Federal Court Decisions**


**Background:** Plaintiff, Cheryl B. Canfield, was the lessor of an oil and gas lease held, in part, by lessee, Stat Oil USA Onshore Properties, Inc. (“SOP”). On January 15, 2016, Canfield filed a putative class action complaint against SOP and other related defendants. Although Canfield’s complaint asserted various claims against the defendants, her dispute revolved primarily around the royalty clause in her lease agreement as it was interpreted by the lessee SOP. Three of Canfield’s claims were asserted solely against SOP and dealt with the royalty clause.

**Holdings:** (1) In her first claim, Canfield alleged that SOP breached the express terms of her royalty clause because SOP did not base its royalty calculation on “an actual market price” but instead, based its royalty calculation on a “published index price,” whether or not such index price had any relation to the actual market price conditions pertinent to the gas in question and whether the landowner’s gas was ever transported to the hub point where the index price was published. Canfield’s argument assumed that either: (1) the lease required royalties based on a market price from a downstream sale (an “express market price/downstream sale claim”) and/or (2) that SOP could not use an index price unrelated to the location where the natural gas was eventually sold to end-users (an “express index-price claim”). The court, in relying on the lease, found that SOP’s method of calculating royalties complied with the lease’s express and unambiguous terms. Accordingly, Canfield’s first claim, based on either a market price/downstream sale theory or index-price theory, was dismissed. (2) In her second claim, Canfield alleged that SOP breached the lease by engaging in an affiliate sale, which did not constitute an “arm’s length transaction.” The court after careful review of the lease found no express provision requiring SOP to make royalties based on an arm’s-length sale or on a sale to a non-affiliate. Thus, SOP’s actions did not amount to a breach of an express obligation. If the parties intended to require sales to a non-affiliate, they certainly could have agreed to do so expressly. (3) In her last claim solely against SOP, Canfield asserted that SOP had “an obligation to use reasonable efforts to market her gas and achieve the best price available” and that there was an “implied duty of good faith and fair dealing.” Canfield argued that these obligations/duties were breached because SOP sold the natural gas extracted from her land to an affiliate (an “implied affiliate claim”) and at an index price that was unconnected to comparable sales at the location of the well (an “implied index price claim”). The court held that Canfield stated a plausible claim for breach of the implied duty to market based upon her “sham sale” allegation, when coupled with the inter-affiliate nature of the sale and the fluctuating index price used by SOP.


**Background:** Landowners brought class action against lessee, alleging breach of gas leases for failure to pay amounts due under gas leases, including prepaid rental or bonus payments. The Court of Common Pleas Clearfield County denied the landowners’ motion for class certification. Landowners appealed. The Superior Court vacated and remanded.

**Holding:** Common questions of law or fact predominated as required for class certification in action for breach of lease brought by landowners against gas lessee, where the landowners’ claim is based on allegations that the lessee failed to pay class members a bonus under the lease within a specified time and failed to reject the parties’ agreements within the allowable deadline, so that the lessee’s obligation to pay a bonus became absolute, thus obviating the need for the fact-finder to examine the lessee’s basis for rejecting individual leases, such as improper title, surface, or geology.


**Background:** On April 29, 2011, Cornwall Mountain Investments, L.P. (“Cornwall”) commenced a quiet title action against the Proctor Heirs Trust and other defendants to resolve competing claims of ownership to the subsurface minerals, oil, and gas lying beneath 3,000 acres in Lycoming County. Cornwall claimed ownership of both the surface and subsurface mineral rights, including oil and gas rights, from a tax sale conducted in 1932.

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Cornwall moved for partial judgment on the pleadings based on the 1932 tax sale. The trial court granted the motion, concluding that the assessment of an interest described as “Mineral Rights Only” included oil and gas. Moreover, the court declined to invalidate the tax sale based on an assessor’s alleged inability to value the oil and gas interest, and held further that the tax sale could not be invalidated by retroactively applying *Independent Oil & Gas Association of Pennsylvania v. Bd. of Assessment Appeal of Fayette County*, 572 Pa. 240, 814 A.2d 180 (2002). In addition, the trial court found no proof that the Proctor heirs did not receive proper notice of the tax sale.

The trustees of the Proctor Trust moved for reconsideration, alleging that the trial court erred in requiring it to prove the lack of proper notice to avoid judgment on the pleadings. The court granted reconsideration, limited to whether the taxing authority’s failure to provide proper notice of the tax sale rendered it void. The court concluded that there was a dispute of fact as to the validity of the tax sale, and thus judgment on the pleadings was improper.

Range Resources, who had joined the proceedings asserting a claim to the gas and oil as Cornwall’s lessee, filed a motion for reconsideration of that decision. The trial court reinstated partial judgment on the pleadings, based on the finding that the six-year of statute of limitations barred any challenge to the adequacy of the notice of the tax sale. Cornwall and Range Resources filed another motion for judgment on the pleadings as to the pending counterclaims and cross-claims, which was granted, based upon the court’s prior finding that Cornwall owned the right to the oil and gas.

The trustees of the Proctor Trust appealed the order granting judgment on the pleadings. The Superior Court affirmed.

**Holding:** (1) tax assessment and sale of “Mineral Rights Only” included subsurface oil and gas interests, even if those interests had no taxable value at the time of sale; (2) decision in *Independent Oil & Gas Association of Pennsylvania v. Bd. of Assessment Appeal of Fayette County*, 572 Pa. 240, 814 A.2d 180 (2002), in which the Pennsylvania Supreme Court held that oil and gas interests could not be taxed while in the ground, did not apply retroactively to invalidate a tax sale in a case involving a determination of whether an unlawful tax assessment could divest a subsequent landowner of his property; (3) providing notice of a tax sale by publication alone met the requirements of due process; (4) the statute of limitations applied to challenge to procedural irregularities in notice, assessment, and tax sale process but did not preclude purported property owner from defending quiet title action on the basis that the tax sale was void, i.e., where there are jurisdictional defects; (5) motivation for assessment and tax sale of mineral rights beneath property was not relevant in determining the validity of the tax sale, where the assessment of the mineral estate was statutorily authorized, the assessment was conducted by a person charged with that duty, and taxes were not paid.


**Background:** Environmental organizations petitioned for the review of the Army Corps of Engineers’ approval of energy company’s application to build interstate pipeline project, alleging that the corps’ rejection of compression alternative was arbitrary and capricious in violation of the Clean Water Act. The energy company intervened as respondent. Petition denied.

**Holdings:** (1) Environmental organization did not waive its claim that the corps violated the Clean Water Act by rejecting the compression alternatives; (2) corps’ adoption of basic purpose for proposed project was not arbitrary and capricious; (3) the corps did not arbitrarily or capriciously ignore the compression alternative; (4) the corps could not reject the compression alternative on the basis of practicality; (5) the corps’ rejection of the compression alternative based on adverse environmental consequences was not arbitrary and capricious; and (6) the corps’ failure to conduct water-dependency analysis was harmless error.

**Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection, No. 171533 2017 W.L. 3725015 (3rd Cir. August 30, 2017).**

**Background:** Environmental organization member filed a petition to review the Pennsylvania Department of Environmental Protection’s (PADEP) Order approving pipeline company’s application to build interstate pipeline project. Pipeline company intervened. Petition denied.

**Holdings:** (1) PADEP’s order was final administrative order over which the Court of Appeals had jurisdiction; (2) peti
tion was timely; (3) PADEP’s determination that project was “water dependent” was not arbitrary and capricious; and (4) PADEP did not arbitrarily or capriciously disregard compres-
sion alternative.


**Background:** EQT Production Company and ET Blue Grass Clearing, LLC (collectively “Applicants”) sought review of a decision by the Borough Council of the Borough of Jefferson Hills, Allegheny County, denying its conditional use application to construct, operate and maintain a natural gas production facility on an area of their property known as the Bickertown Well site (applicants owned both the surface and the oil and gas rights). In support of its denial of the application, the borough council primarily cited the applicants’ alleged failure to satisfy Section 1003(a) of the zoning ordinance that: “The use shall not endanger the public health, safety or welfare nor deteriorate the environment, as a result of being located on the property where it is proposed.” The Allegheny County Court of Common Pleas reversed the council’s decision. The borough appealed and the Commonwealth Court affirmed.

**Holding:** Substantial evidence, i.e., such relevant evidence as a reasonable mind might find adequate to support a conclusion, did not support the council’s denial of a conditional use application for an unconventional gas well where the landowner met the specific requirements of the applicable zoning ordinance, the statements of the objectors (those who testified at the public hearing in opposition to the conditional use application) were speculative in that they related to problems at other well sites or harms posed by drilling and operating unconventional wells generally, and such statements did not demonstrate a high probability that the landowner’s proposed well would impose detrimental impacts exceeding those ordinarily to be expected from such wells.


**Background:** Operator of natural gas wells filed a declaratory judgment action, seeking declaration that the calculation of civil penalties under the Clean Streams Law proposed by the Department of Environmental Protection (“DEP”) was unlawful. The Commonwealth Court dismissed the complaint. The operator appealed. The Supreme Court reversed and remanded. The operator filed an application for summary relief, challenging the DEP’s interpretation of the Clean Streams Law.

**Holding:** Provision of the Clean Streams Law prohibiting pollution of waters of the commonwealth through the release of industrial waste does not provide for a violation based upon the movement of industrial waste from one water of the commonwealth to another; rather, a violation of the provision occurs when a person or municipality does what is prohibited, which is allowing industrial waste to enter into the waters of the commonwealth, and once it ceases that conduct, violations cease. The Clean Streams Law prohibits acts or omissions resulting in the initial active discharge or entry of industrial waste into waters of the commonwealth and does not authorize the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway of the commonwealth following its initial entry into waterways of the commonwealth. Following the operator’s initial release of industrial waste into water, the natural flow of the waste from the water into another water did not constitute a continuing violation of the Clean Streams Law, and thus, the law did not authorize the imposition of ongoing penalties for continuing presence of industrial waste in a waterway.


**Background:** Grandchildren brought quiet title action for declaratory judgment regarding ownership of oil and gas rights in a parcel of land once owned by their grandparents, which was opposed by a family partnership that had been formed by a widow of one of the grandparents’ sons and widow’s son. The Court of Common Pleas of Washington County granted summary judgment and entered a finding as to the allocation of oil and gas rights. All parties appealed. The Superior Court affirmed.

**Holdings:** (1) Grandparents’ deed from approximately 80 years prior in which they conveyed the land parcel did not change or convey the grandmother’s life estate in the oil and gas, in which the grandfather held the remainder interest; (2) the grandmother’s will conveyed to a specified daughter that one-third remainder interest in the oil and gas that the grandmother had inherited upon the grandfather’s death.
Case Summaries

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Background: Seneca Resources Corporation (“Seneca”), an oil and natural gas exploration and production company, sought to convert a natural gas well in Highland Township, Elk County, Pennsylvania into a Class II underground injection control well in which to store waste from fracking. Highland Township had enacted a far-reaching ordinance that, among other things, prohibited “disposal injection wells” from existing within Highland Township. Seneca sued the township and its board of supervisors, alleging that the ordinance was invalid. Three parties, Crystal Spring Echosystem, Highland Township Municipal Authority and Citizens Advocating a Clean Healthy Environment, Inc., sought to intervene. United States District Court for the Western District of Pennsylvania denied their motion to intervene.

Holdings: (1) Motion to Intervene to defend the ordinance was rendered moot when the township repealed the ordinance; (2) district court did not abuse its discretion in denying the proposed intervenors’ motion to reconsider the order denying their motion to intervene as consent decree did not establish rights of the proposed intervenors, who were not parties to the consent decree and would not be affected by estoppel, stare decisis, judicial or contractual consequences; (3) proposed intervenors lacked standing to challenge the consent decree adopted by the district court, under which the township stipulated that much of the challenged ordinance prohibiting a company engaged in oil and natural gas exploration and production from using a well to store waste from fracking was unenforceable, since they were not permitted to intervene in the action, and thus did not become parties to the action.


Background: Kendra Smith, on behalf of Smith Butz, LLC (“Requester”), submitted a request under Pennsylvania’s Right-to-Know Law (“RTKL”) for all records held by the Pennsylvania Department of Environmental Protection (“DEP”) relating to ProTechnics, a business that performs drilling diagnostics using radioactive tracers. The request sought records related to ProTechnic’s activities at all drill sites throughout the commonwealth. The DEP partially denied the RTKL request. Requestor appealed to the Office of Open Records (“OOR”), challenging the DEP’s denial and giving reasons why the records should be released. The OOR partially denied the requestor’s appeal. The net effect was that the DEP was not required to release “all the identified records and its privileged logs except for a small subset of records regarding ProTechnic’s license information and limited information regarding gas wellpads.” Requestor then filed an appeal to the Commonwealth Court contending that the OOR erred in not releasing the requested records. Affirmed in part and reversed in part.

Holdings: (1) investigative records pertaining to well sites are public records under the RTKL unless the reports contain trade secrets or confidential proprietary information that can be redacted, (2) DEP met its burden of demonstrating that certain requested records were protected either by the attorney-client privilege or the work-product doctrine, (3) DEP met its burden of demonstrating that disclosure of certain requested records would have likely jeopardized public safety and security so as to warrant denial of the request for them, (4) ProTechnics’ field receipt agreements, certain correspondence with the state of California relating to tracer materials, and the company’s raw data and methodology were exempt from disclosure as trade secrets or confidential proprietary information, (5) sufficient evidence supported the finding that the DEP demonstrated that certain handwritten records were exempt from disclosure under the RTKL’s “notes and working papers” exemption, (6) certain requested records were exempt from disclosure as relating to the DEP’s pre-decisional deliberations regarding ProTechnics, and (7) records relating to the DEP’s investigations of three incidents regarding ProTechnics’ shipments of residual waste that had triggered landfills’ radiation alarms were exempt from disclosure per the RTKL’s non-criminal investigations exemption.


Background: The owner of property in the Delaware River Basin brought an action against the Delaware River Basin
Commission seeking a declaration that the commission lacked authority under the Delaware River Basin Compact, an agreement entered into by the United States, New York, Pennsylvania, New Jersey and Delaware to require an owner to apply for and obtain project approval for a natural gas well pad, a gas well, and related facilities and associated hydraulic fracturing activities for natural gas development on the owner’s property. The commission moved to dismiss for lack of subject matter jurisdiction on standing and ripeness grounds, and for failure to state a claim. Motion granted.

**Holdings:** (1) Owner had Article III standing; (2) owner and commission had adversity of interests, as would support finding of ripeness; (3) owner sought conclusive legal judgment, rather than mere advisory opinion, as would support ripeness finding; (4) a declaratory judgment would have utility, as would support ripeness finding; (5) absence of federal agency action did not prevent the owner from proving essential elements of claim; (6) compact did not require a putative plaintiff to exhaust his or her administrative remedies prior to bringing a challenge to the commission's jurisdiction; and (7) under compact, the owner proposed a natural gas development “project” subject to review by the commission.

4829-3258-9903, v. 1

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PENDING LEGISLATION

Regular Session 2017-2018

House Bill 113

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, repealing expiration; and providing for imposition of tax, for registration, for meters, for assessments, for time for assessment, for extension of assessment period, for reassessments, for interest, for penalties, for criminal acts, for abatement of additions or penalties, for bulk and auction sales, for collection upon failure to request reassessment, review or appeal, for tax liens, for tax suit reciprocity, for service, for refunds, for refund petition, for rules and regulations, for recordkeeping, for examinations, for unauthorized disclosure, for cooperation with other governments, for bonds and for deposit of proceeds.
Prime Sponsor: Representative HARPER
Last Action: Resolution to discharge committee from further consideration of this bill presented, July 11, 2017 [House]
Memo: Marcellus Shale Severance Tax Combines with the Shale Impact Fee
Printer's No.: 89

House Bill 534

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, further providing for distribution of fee and for Statewide initiatives.
Prime Sponsor: Representative THOMAS
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 17, 2017 [House]
Memo: Marcellus Legacy Fund
Printer's No.: 560

House Bill 557

Short Title: An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions; and providing for minimum royalty for unconventional oil or gas well production and for remedy for failure to pay the minimum royalty on unconventional oil or gas wells.
Prime Sponsor: Representative EVERETT

Last Action: Resolution to discharge committee from further consideration of this bill presented, June 28, 2017 [House]
Memo: Guaranteed Minimum Royalty Act (Act 60 of 1979)
Printer's No.: 580

House Bill 695

Short Title: An act providing for certain nonnatural earthquake insurance coverage; conferring powers and imposing duties on the Insurance Department; and providing for enforcement and penalties.
Prime Sponsor: Representative MATZIE
Last Action: Referred to INSURANCE, March 3, 2017 [House]
Memo: Seismic Testing & Drilling Legislation/Earthquake Insurance
Printer's No.: 746

House Bill 696

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well location restrictions.
Prime Sponsor: Representative MATZIE
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 3, 2017 [House]
Memo: Legislation Providing for Increased Setback Requirements for Unconventional Gas Wells (House Bill 2366 of 2015-2016)
Printer's No.: 747

House Bill 943

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in general requirements relating to development, providing for liability bonding.
Prime Sponsor: Representative MURT
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 23, 2017 [House]
Memo: Protection of Natural Resources in the commonwealth (Prior HB 2277)
Printer's No.: 1099

House Bill 1054

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well location restrictions.
Prime Sponsor: Representative MATZIE
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 3, 2017 [House]
Memo: Legislation Providing for Increased Setback Requirements for Unconventional Gas Wells (House Bill 2366 of 2015-2016)
Printer's No.: 747

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Pennsylvania Consolidated Statutes, providing for natural gas severance tax; and establishing the Severance Tax Restricted Account.

Prime Sponsor: Representative STURLA
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, April 3, 2017 [House]
Memo: Fair Marcellus Shale Severance Tax
Printer's No.: 1225

House Bill 1086

Short Title: An act amending the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, in personal income tax, further providing for imposition of tax; and providing for imposition of severance tax.

Prime Sponsor: Representative THOMAS
Last Action: Referred to FINANCE, April 7, 2017 [House]
Printer's No.: 1282

House Bill 1090

Short Title: An act providing for erosion and sediment control requirements.

Prime Sponsor: Representative BENNINGHOFF
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, April 7, 2017 [House]
Memo: DEP Accountability
Printer's No.: 1286

House Bill 1103

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well reporting requirements.

Prime Sponsor: Representative SONNEY
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, April 7, 2017 [House]
Memo: Exempt Reporting for Existing Conventional Well Owners
Printer's No.: 1297

House Bill 1283

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, further providing for definitions.
AND ENERGY, June 12, 2017 [House]
Memo: Preservation of Interests in Oil and Gas (former HB 67 of 2015-16)
Printer’s No.: 1977

House Bill 1601

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in Oil and Gas Lease Fund, further providing for definitions, establishing the Public Natural Resources Trust Fund and further providing for funds; and making related repeals.
Prime Sponsor: Representative HANNA
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 22, 2017 [House]
Memo: Public Natural Resources Trust Fund
Printer’s No.: 2119

House Bill 1624

Short Title: An act amending the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, providing for education reinvestment severance tax, for minimum royalty for unconventional oil or gas well products and for remedy for failure to pay the minimum royalty on unconventional oil or gas wells; and making a related repeal.
Prime Sponsor: Representative DEAN
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 26, 2017 [House]
Memo: Severance Tax on Natural Gas Extraction
Printer’s No.: 2150

House Bill 1625

Short Title: An Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, repealing expiration; and providing for imposition of tax, for impact fee credits, for registration, for meters, for assessments, for time for assessment, for extension of assessment period, for reassessments, for interest, for penalties, for administration of tax, for criminal acts, for abatement of additions or penalties, for bulk and auction sales, for collection upon failure to request reassessment, review or appeal, for tax liens, for tax suit reciprocity, for service, for refunds, for refund petition, for rules and regulations, for recordkeeping, for examinations, for unauthorized disclosure, for cooperation with other governments, for bonds, for prohibition, for future agreements and for deposit of proceeds.
Prime Sponsor: Representative SANTORA
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 28, 2017 [House]
Memo: Shale Legislation for Variable Rate
Printer’s No.: 2171

House Bill 1626

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, further providing for definitions and repealing expiration; and providing for imposition of tax, for impact fee credits, for registration, for meters, for assessments, for time for assessment, for extension of assessment period, for reassessments, for interest, for penalties, for administration of tax, for criminal acts, for abatement of additions or penalties, for bulk and auction sales, for collection upon failure to request reassessment, review or appeal, for tax liens, for tax suit reciprocity, for service, for refunds, for refund petition, for rules and regulations, for recordkeeping, for examinations, for unauthorized disclosure, for cooperation with other governments, for bonds, for prohibition, for future agreements and for deposit of proceeds.
Prime Sponsor: Representative MICCARELLI
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 26, 2017 [House]
Memo: Shale Legislation provides a tax rate between 3.5% and 7%.
Printer’s No.: 2172

House Bill 1662

Short Title: An act amending the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, providing for an unconventional natural gas severance tax and for the Unconventional Natural Gas Severance Tax Fund; establishing the Unconventional Gas Well Employment Tax Credit Program; and making a related repeal.
Prime Sponsor: Representative PETRI
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, July 19, 2017 [House]
Memo: Marcellus Shale Tax Bill
Printer’s No.: 2231

House Bill 1700

Short Title: An act establishing the Pipeline Safety and Communication Board and providing for its powers and duties.

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Legislative Update
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Prime Sponsor: Representative COMITTA
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 15, 2017 [House]
Memo: Legislation Providing for the Creation of a Pipeline Safety and Communication Board
Printer's No.: 2284

House Bill 1708

Short Title: An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions and for royalty guaranteed; and providing for written summary of unconventional gas well deductions and for inspection of records for unconventional gas wells.
Prime Sponsor: Representative ORTITAY
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 16, 2017 [House]
Memo: The Landowner Protection Act
Printer's No.: 2293

House Bill 1721

Short Title: An Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well permits.
Prime Sponsor: Representative CONKLIN
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 16, 2017 [House]
Memo: Legislation Providing for Public Notice of Natural Gas Permit Applications (Former HB523
Printer's No.: 2306

House Bill 1723

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, providing for a natural gas severance fee; establishing the Natural Gas Severance Fee Account; and providing for distribution from account.
Prime Sponsor: Representative CONKLIN
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 18, 2017 [House]
Memo: Legislation Providing for a Severance Fee to fund the Natural Gas Energy Development Program (Former HB526)
Printer's No.: 2308

House Bill 1729

Short Title: An act providing for the establishment of response teams relating to certain well operations and for the powers and duties of the Secretary of Labor and Industry.
Prime Sponsor: Representative CONKLIN
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 18, 2017 [House]
Memo: Well Operation Response Team Act (Former HB 524)
Printer's No.: 2314

House Bill 1730

Short Title: An act amending the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929, in powers and duties of the Department of Environmental Resources, its officers and departmental and advisory boards and commissions, providing for toll-free response telephone number.
Prime Sponsor: Representative CONKLIN
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 18, 2017 [House]
Memo: Legislation Providing for a Telephone Number to Report Suspected Violations of Oil and Gas Laws (Former HB 522)
Printer's No.: 2315

Senate Bill 32

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well plugging funds.
Prime Sponsor: Senator HUTCHINSON
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 12, 2017 [Senate]
Memo: DEP Regulation Violation Fee Transfer
Printer's No.: 13

Senate Bill 77

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, further providing for distribution of fee.
Prime Sponsor: Senator GREENLEAF
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 13, 2017 [Senate]
Memo: Funding for Natural Gas Drilling Health Research
Printer's No.: 57

House Bill 91

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**Legislative Update**

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**Senate Bill 138**

**Short Title:** An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions, for payment information to interest owners, for accumulation of proceeds from production and for conflicts and providing for joint ventures and for inspection of records.

**Prime Sponsor:** Senator YAW

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 2, 2017 [House]

**Memo:** Oil and Gas Lease Protection Package

**Printer’s No.:** 92

**Senate Bill 139**

**Short Title:** An act providing for protection for a lessor of natural gas rights who reports a violation or suspected violation of a contractual agreement and for remedies and penalties.

**Prime Sponsor:** Senator YAW

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 2, 2017 [House]

**Memo:** Oil and Gas Lease Protection Package

**Printer’s No.:** 93

**Senate Bill 141**

**Short Title:** An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for lease extended by production.

**Prime Sponsor:** Senator YAW

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 20, 2017 [Senate]

**Memo:** Pugh Clause

**Printer’s No.:** 118

**Senate Bill 142**

**Short Title:** An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in utilization, providing for unconventional oil and gas conservation by consolidating the Oil and Gas Conservation Law with modifications relating to definitions, standard unit order, process, administration, standard of review, hearings and appeals, establishment of units, integration of various interests, lease extension and scope, providing for gas and hazardous liquids pipelines; and making a related repeal.

**Prime Sponsor:** Senator YAW

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 20, 2017 [Senate]

**Memo:** Company to Company Integration

**Printer’s No.:** 119

**Senate Bill 335**

**Short Title:** An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for protection of water supplies.

**Prime Sponsor:** Senator FONTANA

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 15, 2017 [Senate]

**Memo:** Water Testing Results by DEP

**Printer’s No.:** 333

**Senate Bill 392**

**Short Title:** An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for protection of water supplies, for transportation records regarding wastewater fluids, for inspection and production of materials, witnesses, depositions and rights of entry and for inspection reports.

**Prime Sponsor:** Senator YUDICHAK

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 16, 2017 [Senate]

**Memo:** Reintroduction of Legislation – Improvements to DEP’s Water Quality Testing Program

**Printer’s No.:** 391

**Senate Bill 402**

**Short Title:** An act providing for erosion and sediment control requirements.

**Prime Sponsor:** Senator BARTOLOTTA

**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 27, 2017 [Senate]
Memo: Elevating DEP’s Erosion and Sediment Control Permits
Printer’s No.: 400

Senate Bill 452

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well reporting requirements.
Prime Sponsor: Senator BREWSTER
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 28, 2017 [Senate]
Memo: Elevating DEP’s Erosion and Sediment Control Permits
Printer’s No.: 400

Senate Bill 566

Short Title: An act amending the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, providing for a natural gas severance tax; and repealing expiration provision relating to unconventional gas well fees.
Prime Sponsor: Senator TOMLINSON
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, April 5, 2017 [Senate]
Memo: Protect American Jobs
Printer’s No.: 446

Senate Bill 605

Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, providing for an impact fee for natural gas and oil pipelines; establishing the Pipeline Impact Fund; and imposing powers and duties on the Pennsylvania Public Utility Commission.
Prime Sponsor: Senator RAFFERTY
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, April 13, 2017 [Senate]
Memo: Pipeline Impact Fee
Printer’s No.: 682

Senator Bill 835

Short Title: an Act amending the act of February 19, 1980 (P.L.15, No.9), known as the Real Estate Licensing and Registration Act, in definitions, further providing for definitions; in application of act and penalties, further providing for unlawful to conduct business without license or registration certificate, for criminal penalties and for exclusions; in powers and duties of the State Real Estate Commission in general, further providing for administration and enforcement; adding provisions relating to land agent registration certificates; and, in duties of licensees, further providing for prohibited acts.
Prime Sponsor: Senator DINNIMAN
Last Action: Referred to CONSUMER PROTECTION AND PROFESSIONAL LICENSURE, Aug. 29, 2017 [Senate]
Memo: Legislation to Regulate Pipeline Land Agents
Printer’s No.: 1130


The new fifth edition of the Pennsylvania Ethics Handbook is available for purchase from Pennsylvania Bar Institute. It is a substantial update, incorporating discussion and citation to numerous recent ethics opinions, court decisions, articles, and significant developments of interest in the field. Each and every chapter has been revised and supplemented. Among the many areas of additional guidance, this edition incorporates the amendments to the Pennsylvania Rules of Professional Conduct through February 9, 2017, including recent amendments to RPC 1.2, 1.7, 1.8, 1.15, 1.17, 5.7, and 5.8. This update also includes discussions of recent formal opinions issued by the Ethics Committee covering topics such as the ethical use of social media by attorneys, ethical constraints in responding to a client’s negative online review, participation in fixed-fee, limited-scope legal services referral programs, and providing advice to marijuana-related businesses. The fifth edition features updates of all 15 chapters, annotations, and commentary, as well as an appendix of the Rules of Professional Conduct with comments included on the accompanying USB drive. Order at the PBI website.
HB 453 SECTION 1610-E  
RESURRECTION OF OLD OIL AND GAS LEASES

By Paul R. Yagelski, Rothman Gordon, PC

The PA House of Representatives passed the Fiscal Code, the budget bill, on July 27, 2017, which includes a section, 1610-E, that will allow oil and gas companies to revive old leases that were thought to have expired.

Under this section, an oil and gas lessor shall be deemed to acknowledge that a period of non-production is a temporary cessation insufficient to terminate the lease and the lessor waives his right to seek lease termination upon those grounds, if prior to claiming that the lease has terminated:
(1) production is recommenced and the lessor accepts royalty payments for the production. Any first royalty payment following recommencement of production after more than one year of inactivity is to be accompanied by an explanation that acceptance of an existing royalty payment shall constitute acknowledgment of an existing lease with the operator; or
(2) the operator, after notifying the Lessor of its intent to drill a new well and giving the Lessor 90 days to object, drills a new well under the lease.

HB 453 now goes to the Senate for passage. The text of Section 1610-E is on page 14.

Paul R. Yagelski is a partner at Rothman Gordon, P.C. and a member of the Bars of Pennsylvania, Ohio and West Virginia, representing owners of oil and gas interests. He is co-chair of Rothman Gordon’s Oil and Gas Section.

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PBA Shale Energy Law Committee  

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 453  Session of 2017

INTRODUCED BY RYAN, CUTLER, DUNBAR, DUSH, GABLER, GROVE, JOZWIAK, MILLARD, SAYLOR, SCHWYER, WARD, CORR, ZIMMERMAN, PHILLIPS-HILL, SOLOMON, STAATS, RABB, ROZZI, B. MILLER AND GREINER, FEBRUARY 13, 2017

SENATOR BROWNE, APPROPRIATIONS, IN SENATE, RE-REPORTED AS AMENDED, JULY 26, 2017

AN ACT

Amending the act of April 9, 1929 (P.L.343, No.176), entitled
"An act relating to the finances of the State government; providing for the settlement, assessment, collection, and lien of taxes, bonus, and all other accounts due the Commonwealth, the collection and recovery of fees and other money or property due or belonging to the Commonwealth, or any agency thereof, including escheated property and the proceeds of its sale, the custody and disbursement or other disposition of funds and securities belonging to or in the possession of the Commonwealth, and the settlement of claims against the Commonwealth, the resettlement of accounts and appeals to the courts, refunds of moneys erroneously paid to the Commonwealth, auditing the accounts of the Commonwealth and all agencies thereof, of all public officers collecting moneys payable to the Commonwealth, or any agency thereof, and all receipts of appropriations from the Commonwealth, authorizing the Commonwealth to issue tax anticipation notes to defray current expenses, implementing the provisions of section 7(a) of Article VIII of the Constitution of Pennsylvania authorizing and restricting the incurring of certain debt and imposing penalties, affecting every department, board, commission, and officer of the State government, every political subdivision of the State, and certain officers of such subdivisions, every person, association, and corporation required to pay, assess, or collect taxes, or to make returns or reports under the law imposing taxes for State purposes, or to pay license fees or other moneys to the Commonwealth, or any agency thereof, every State depository and every debtor or creditor of the Commonwealth," in department of the Auditor General, further
SECTION 1610-E. TEMPORARY CESSION OF OIL AND GAS WELLS.

(A) GENERAL RULE.—AN OIL AND GAS LESSOR SHALL BE DEEMED TO ACKNOWLEDGE THAT A PERIOD OF NONPRODUCTION UNDER AN OIL AND GAS LEASE IS A TEMPORARY CESSION INSUFFICIENT TO TERMINATE THE LEASE AND THE LESSOR WAIVES HIS RIGHT TO SEEK LEASE TERMINATION UPON THOSE GROUNDS IF, PRIOR TO CLAIMING THE LEASE HAS TERMINATED:

(1) PRODUCTION IS RECOMMENCED AND THE LESSOR ACCEPTS ROYALTY PAYMENTS FOR THE PRODUCTION. ANY FIRST ROYALTY PAYMENT FOLLOWING RECOMMENCEMENT OF PRODUCTION AFTER A PERIOD OF MORE THAN ONE YEAR OF INACTIVITY SHALL BE ACCOMPANIED BY AN EXPLANATION, IN PLAIN TERMS, THAT ACCEPTANCE OF THE ROYALTY PAYMENT SHALL CONSTITUTE ACKNOWLEDGMENT OF AN EXISTING LEASE WITH THE OPERATOR; OR

(2) THE OPERATOR, AFTER NOTIFYING THE LESSOR OF ITS INTENT TO DRILL A NEW WELL AND GIVING THE LESSOR 90 DAYS WITHIN WHICH TO OBJECT, DRILLS A NEW WELL UNDER THE LEASE.

(B) LEASE PROVISIONS.—NOTHING IN THIS SECTION IS INTENDED TO WAIVE LEASE REQUIREMENTS RELATED TO COMMENCEMENT OF OPERATIONS DURING A LEASE’S PRIMARY TERM OR AFFECT A LEASE PROVISION EXPRESSLY PROVIDING FOR LEASE TERMINATION FOLLOWING A FIXED PERIOD OF NONPRODUCTION.

SECTION 5.1. THE HEADING OF ARTICLE XVI-M OF THE ACT, ADDED JULY 13, 2016 (P.L.664, NO.85), IS AMENDED TO READ:

ARTICLE XVI-M

TRANSPORTATION NETWORK COMPANIES

[AND], MOTOR CARRIER COMPANIES AND PARKING AUTHORITY OF A CITY OF THE FIRST CLASS

SECTION 5.2. THE ACT IS AMENDED BY ADDING SECTIONS TO READ:

SECTION 1603-M. REGULATION OF TAXICABS AND LIMOUSINES BY

20170HB0453PN2258
A. Pennsylvania’s Environmental Rights Amendment

Arguably, the most significant regulatory development affecting the oil and gas industry since the last publication of this newsletter is the Supreme Court of Pennsylvania’s decision to reject the Payne test previously used to determine the constitutionality of commonwealth actions in light of the Environmental Rights Amendment to the Pennsylvania Constitution (“ERA”). Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 2017 WL 2645417 (Pa. 2017) (“PEDF”); Pa. Const. art. I, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the commonwealth shall conserve and maintain them for the benefit of all the people”). PEDF strengthened what had been a plurality in Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901 (Pa. 2013) and broadened the review of commonwealth actions under the ERA, including permitting, local land use ordinances and, as was the case in PEDF, spending decisions.

Pennsylvania Environmental Defense Foundation challenged the constitutionality of certain sections of the fiscal code that allowed a portion of the revenues generated from leasing state lands to be diverted to the general fund without any condition or restriction that those revenues be allocated to environmental conservation. Pa. Envtl. Def. Found., 161 A.3d at 921 – 922; see 72 Pa. Stat. Ann. §§ 1602-E - 1604-E. The Commonwealth Court, reviewing the challenge under the Payne Test, granted summary relief in favor of the commonwealth, upholding the Code Sections. Pa. Envtl. Def. Found., 161 A.3d at 928. The Supreme Court of Pennsylvania took the opportunity to reject the Payne test and invalidate the Sections 1602-E and 1603-E of the fiscal code (the “Code Sections”) under the language of the ERA, itself, and through private trust principles. Finding the provisions of the ERA, self-executing, the court held the code sections facially unconstitutional because “[t]hey plainly ignore the commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose — conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.” Id. at 938.


B. Severance Tax and the ERA: Will the Budget Trade-off Pass Constitutional Muster?

Pennsylvania’s legislative and executive branches are focused on correcting the commonwealth’s budget shortfall through multiple means. Governor Wolf campaigned on generating revenue through a levy on natural gas extraction. 2017 featured a budget compromise that would institute a severance tax on the oil and gas industry, but also allow some oil and gas permit review to be completed by private consultants, rather than solely by DEP. H.B. 542, 2017 Gen. Assemb., 2017 Sess. (Pa. 2017). The severance tax issue and attendant compromise makes HB542 a hot topic to watch in its own right, but with the recent PEDF decision, HB 542 will likely become one of the next matters to further elucidate the application of the ERA to commonwealth actions.

C. Aggregating Sources for Air Pollution Control Permitting

Continued on page 17
The Commonwealth Court clarified how facilities that emit air pollution may be aggregated for the purposes of air pollution control permitting. In *National Fuel Gas Midstream Corp. v. Department of Environmental Protection*, the Commonwealth Court vacated and remanded an EHB order that affirmed DEP’s Single Source Determination aggregating a compressor station with a well pad under a single air pollution control permit. *Natl. Fuel Gas Midstream Corp. v. Dept. Envtl. Prot.*, No. 116 C.D. 2016 and No. 195 C.D. 2016, 2017 WL 2391719 (Pa. Commw. Ct. 2017). The court considered whether or not Trout Run LLC’s Bodine Compressor Station and Seneca Resources Corporation’s Well Pad E, which — was exempt from air pollution control permitting requirements — were “under the control of the same person (or persons under common control)” which would allow DEP to aggregate both facilities under the same permit. Through differing analyses, both DEP and EHB found the two sources could be aggregated despite being operated by two separate companies and despite Well Pad E’s exemption from permitting. The court vacated the EHB decision and remanded to determine either direct involvement by a common parent company in the operations of both facilities or to pierce the corporate veil by showing that the two entities are the alter ego of one another or their parent.

DEP applied a three-part test to determine if more than one facility should be considered a single air pollution source. *Id.* at *3. Under the test, two or more facilities may be aggregated if they (1) belong to the same industrial grouping (having the same first two digits of the Standard Industrial Classification code); (2) are on one or more contiguous or adjacent properties; and (3) are under the control of the same person (or persons under common control). *Id.* Here, the only issue in dispute was that of “control” under the third prong. DEP found the corporate structure and common ownership of Seneca Resources and Trout Run satisfied the control element of the three-part test. *Id.* at *4. EHB disagreed with the common ownership/corporate-structure analysis used by DEP, but still found common control due to National Fuel Gas Corporation’s power to influence or control the behavior of its subsidiaries through, in part, the “power of the purse.” *Id.* at *6. EHB concluded that “it is the possession of the power to influence or direct behavior of the parties or the course of events, not the actual exercise of that power that satisfies the requirement of control.” *Id.* at *7.

The court concluded, “[u]nder the facts of this case, where one facility is exempt from permitting requirements, but its emissions are still being aggregated with another facility for purposes of that facility’s permit, DEP is required to either demonstrate [National Fuel Gas Corporation’s] direct involvement in the operations of Well Pad E and the Bodine Compressor Station or pierce the corporate veil by showing that the two entities are the alter ego of one another or their parent.” *Id.* at *13.

**D. Impact Fees: the Definition of “Stripper Well”**

of producing more than 90,000 cubic feet [cf] of gas per day during any calendar month . . . .” 58 Pa. Con. Stat. § 2301 (emphasis supplied). On appeal, the court had to determine whether the General Assembly, in drafting Act 13, intended the word “any” to mean “one” or “every.” Snyder Bros., Inc., 157 A.3d at 1020.

PUC argued the term “any” in the definition of “stripper well” was ambiguous because the word “any” was subject to multiple reasonable meanings, as evidenced by the interpretations advanced by the parties. Id. at 1021. Snyder Brothers argued that PUC erred in finding ambiguity in the word “any.” The Commonwealth Court, sitting en banc, sided with Snyder Brothers and concluded that the word “any” in the definition of “stripper well” is unambiguous and “it clearly and plainly means what it says—‘any month.’” Id. at 1023 – 1024. The court gave limited deference to PUC’s findings because its interpretation of the word “any” was presented in the course of litigation, and had not been previously articulated in an official rule or regulation. Id. at 1028. By concluding the word “any” in the term “stripper well” unambiguously means “any” or “one” and not, as PUC argued, “all” or “every,” the court found that the facts established that the wells at issue produced less than 90,000 cf of gas in at least one month and were “stripper wells.” Id. at 1030. Therefore, the court held that Snyder Brothers did not have to pay impact fees for those wells.

PUC filed a Petition for Allowance of Review with the Supreme Court of Pennsylvania. See 166 WAL 2017. As of Aug. 30, 2017, the court has not rendered a decision on the petition.

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Regulatory Update
CONTINUED FROM PAGE 17

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