Marcellus Shale Natural Gas Extraction Study
2011 Addendum

Pooling
Amassing Property for the Extraction of Natural Gas
from Marcellus Shale

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Leagues of Women Voters of Southeastern Pennsylvania
and
Indiana County

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Amassing Property for the Extraction of Natural Gas from Marcellus Shale

Overview

Definitions
In the oil and gas industry, pooling refers to grouping together resources for the purposes of maximizing advantage and/or minimizing risk. The term has many connotations and implications. According to the Oilfield Glossary, unitization and communitization are related concepts. Unitization is the combining of wells producing from a specified reservoir. This type of “pooling” was first enacted in Texas because of safety concerns. Individual landowners, each wanting a piece of the action, drilled wells from tiny plots into a single, underground pool of oil. Explosions resulted as operations intersected in unpredictable ways. By combining wells and prorating the profits, the owners received compensation while the drilling industry reduced safety risks and became more efficient. Under communitization, small tracts of land are combined to form legal spacing units as required by federal or state regulation. Because horizontal hydrofracking allows a single well to access miles of underground resources, grouping properties could reduce the number of drilling sites. This, in turn, could minimize environmental

1 http://www.glossary.oilfield.slb.com/Display.cfm?Term=unitization
degradation and potential accidents. Establishing a minimum spacing between wells may or may not be linked to pooling.

Interstate Compacts and Legal Considerations
Pooling, unitization, and communitization can be seen to be consistent with the Interstate Compact to Conserve Oil and Gas in 1935. Under this voluntary agreement that Pennsylvania joined in 1941, the Commonwealth works with other states to find ways to conserve fossil fuel resources by minimizing physical waste. There is no enforcement mechanism. Today, Pennsylvania is a member of the Interstate Oil and Gas Commission Compact, a multi-state government agency that “works to ensure our nation's oil and natural gas resources are conserved and maximized while protecting health, safety and the environment.”

Although the exact rights and responsibilities vary, some form of forced pooling already exists in Colorado, Louisiana, New York, Oklahoma, and Texas. Under these regulations, gas producers file an application for pooling with the appropriate governmental agency. An unwilling landowner then receives a notice and has the opportunity to respond. If a response from the owner is not forthcoming within a given time period, the agency grants a pooling order. If a hearing occurs, the agency weighs the arguments from both sides and then uses its right to issue a pooling order or not. It is also the responsibility of this same agency to set forth the terms and conditions of the pooling, including compensation.

In Pennsylvania, provisions are already in place for pooling under existing provisions of the Pennsylvania Oil and Gas Conservation Law that went into effect in 1961. In prohibiting the waste of oil or gas, waste is deemed to be not only physical waste but also drilling more wells than are necessary. This law therefore provides for an Oil and Gas Commission (with powers now transferred to the Department of Environmental Protection) to administer forced pooling applications and issue pooling orders after a public hearing. This provision applies only to wells penetrating the Onondaga formation, a layer of limestone, just below the Marcellus Shale. Therefore, Marcellus Shale is currently exempt from provisions regarding pooling, well spacing, and compulsory unitization allowed by the Oil and Gas Conservation Law.

Depending on the terms of a pooling agreement, the owner may become a co-owner of a well, share in the costs of its production, reap a share of the profits, accrue royalty payments, receive a signing bonus, and/or also assume a portion of real liability.

Rule of Capture
Related to the issue of pooling is a long-standing practice derived from English common law. According to Webster’s New World Law Dictionary, rule of capture is defined as “acquiring the ownership of property where there previously was no ownership; thereby, any wild animals

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2 http://www.eoearth.org/article/Interstate_Compact_to_Conserve_Oil_and_Gas_of_1935___Unite d_States
3 http://www.iogcc.state.ok.us/about-us
4 http://www.pahouse.com/EnvResources/documents/Forced_pooling_Severnace_tax_ERE_Committee_May_Update.pdf
5 http://law.psu.edu/_file/aglaw/SummaryOfOilAndGasConservationLaw.pdf
captured belong to the person who captures them, regardless of whose property they were upon previously.” When applied natural resources such as water, oil, and gas, it is generally recognized that “The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands.”

In August 2009, a review of numerous cases involving this topic was completed by the Agricultural Law Research and Reference Center of Penn State’s Dickenson School of Law. In a frequently cited case, Westmoreland & Cambria Natural Gas Co. v. De Witt, 130 Pa. 235 (1889), the judge stated:

Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his. And equally so as between lessor and lessee in the present case, the one who controls the gas—has it in his grasp, so to speak—is the one who has possession in the legal as well as in the ordinary sense of the word.” Id. at 249-50

However, in 1962, Texas shut down nearly four hundred wells in the East Texas Oil Field where slant drilling was being used to drain the resources under the property of others. More recently, in Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (2008), the Texas Supreme Court held that the contents of frac fluid that traveled under adjoining land did not constitute a trespass.

Given that the Marcellus Shale can exist a mile or more below the surface, landowners and governmental agencies basically “trust” the industry to drill within the boundaries specified by the approved permit. The nature of the evidence required for a trespass and the related rulings of the Commonwealth courts are yet to be determined.

Eminent Domain
According to definition, eminent domain is the power to take private property for public use by a state, municipality, or private person or corporation authorized to exercise functions of public character, following the payment of just compensation to the owner of that property. The Fifth Amendment to the Constitution speaks to this issue: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” This is sometimes referred to as the “takings” clause. The Fourteenth Amendment of the Constitution, adopted in 1868, added that no state could: “...deprive any person of life, liberty, or property, without due process of law.”

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6 Robert E. Hardwicke in The Rule of Capture and its Implications as Applied to Oil and Gas, 13 TEx. L. REV. 392, 393 (1935).
8 http://www.youtube.com/watch?v=h15XDjxFwxM
9 http://legal-dictionary.thefreedictionary.com/eminent+domain
In 2005, the U.S. Supreme Court, in a 5-4 decision, gave a new interpretation to this power under the Constitution. In fact, the Court ruled that the government is permitted to use the power of eminent domain solely for economic development that it found to constitute “public use.”

As a result, two private homes were turned over to a private developer. In response to this controversial ruling, 31 states, including Pennsylvania, enacted legislation to tighten the rules for condemnation or the right to take a property. Acts 34 and 35 of 2006 changed the Urban Redevelopment Law and Eminent Domain Code. The legislation, sometimes called the Property Rights Protection Act (PRPA), specifically prohibits private enterprises from using eminent domain for development, except under limited circumstance that generally relate to blighted properties.

The Debate

Advantages of Pooling
Advocates of forced pooling promote its economic and environmental advantages. The industry can be more efficient in extracting the natural gas from a given area with the least number of wells and with a minimum number of pads, roadways, and other related facilities. By reducing the overall footprint, including related infrastructure, degradation of the land created by the drilling process will be reduced as well as the potential for accidents. There will be less water used and less waste produced. With costs reduced, willing mineral rights owners also maximize their financial gain. At the same time, pooling protects the unwilling owner by providing compensation for the loss of gas under his or her land. It counteracts the Rule of Capture by which any gas migrating from an unleased property into a well drilled on a leased property is fair game for extraction by the industry.

David Callahan, Vice President of The Marcellus Shale Coalition, an industry sponsored group, noted in a September 9th editorial that pooling is on the books in every major energy-producing state other than Pennsylvania. In his opinion, states have used pooling wisely for generations to reduce above-ground surface activities, while maximizing responsible shale gas production. A July 6, 2010 press release, “All Wet on Fair Pooling,” addresses the industry’s position relative to that of environmentalists on the issue. A related fact sheet describes “fair pooling” as a tool that helps organize scattered parcels of land into efficient drilling units, and ensures that those who want to lease their mineral rights are afforded the chance to do so under the law. It also protects those who may not want to enter into a formal agreement with the company, allowing unleased mineral holders to benefit fairly from new production instead of forgoing participation. In addition to the advantages for individuals and the environment, the Marcellus Shale Coalition also notes the benefits to the state that include more job creation and increased tax revenues as a result of more efficient operations. A graphic on the fact sheet illustrates how the failure to consolidate small land parcels can significantly reduce the productivity of the total

13 http://marcelluscoalition.org/2010/07/all-wet-on-fair-pooling/
leased acreage. Under one current proposal, given the configuration of the leased land, multiple drilling units of a minimum of 640 acres be would be required for the development of an area that one single well pad could serve.

Disadvantages of Pooling

Those who oppose pooling believe that it denies individuals their property rights. The Pennsylvania Constitution affirms the rights to acquire and protect property: “All men . . . have certain, natural, inherent, and inalienable rights, among which are, the enjoyment and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”

Pooling can be seen as a use or misuse of the government power of eminent domain provided under the United States Constitution. The use of eminent domain in the realm of mineral rights, such as gas and oil, remains controversial. Many claim that pooling is not in the public interest but for the benefit of private corporations. Some property owners who refuse to lease their mineral rights or sell their land for a variety of reasons consider pooling to be “compelled leasing.” The University of Pittsburgh’s FracTracker site is examining the impact of fracking on farms. Of particular interest is an article written by Samantha Malone regarding forced pooling and organic farming. The piece raises questions regarding potential repercussions of natural gas extraction on the certification requirements for organic farming, the livelihood of an increasing number of Pennsylvanians.

Forcing people to lease or sell rights, in and of itself, will not limit environmental degradation. The notion of communitization is critical to setting the minimum space of each natural drilling unit or distances between units. For this reason, the Campaign for Clean Water has adopted a platform that includes preventing gas companies from forcing residents to sign leases through forced pooling requirements. Efforts to regulate spacing of wells should not be used as a way to force property owners to sign leases they do not want.

Arkansas: An Example

An Excerpt from: Arkansas-in-the-Balance: Managing the Risks of Shale Gas Development in the Natural State

Integration [POOLING] is a technique used by oil and gas development companies to organize an oil or gas field so that the minimum number of wells needed to access the resource is drilled. It is sometimes the case that not all mineral owners within a drilling unit are in agreement about

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16 http://www.the-patriot-s-voice.org/id18.html
17 http://www.pahouse.com/george/all.asp?med=NR
18 http://www.fractracker.org/2011/01/tracking-effects-on-farms.html
development. In that case, a party interested in development can make an application for forced or involuntary integration. If forced integration is approved, then the drilling unit is developed with or without the consent of all mineral owners. Mineral owners not participating in the development in any manner are considered non-consenting owners.

The land to be force integrated must have been spaced for maximum ultimate production. All mineral owners must have received a reasonable offer to lease their interests and the oil and gas company must notify all mineral owners after which a hearing is held.

A mineral owner has MINERAL OWNERS HAVE five options in the context of forced integration. They can:

1. Lease their mineral interest.
2. Sell their mineral interest.
3. Participate materially in the development of the gas field.
4. Be a non-consenting owner.
5. Protest forced integration.

In the first four cases, it is likely that there will at least be some positive financial returns. Even a non-consenting owner receives royalties under state law. The size and nature of those returns will vary, however. The difference in these various options may be the degree to which the surface owner can influence the impacts on the surface. An attorney will probably be needed to negotiate minimal impacts.21

The Future of Pooling in Pennsylvania
Pooling is currently an area of growing interest in Pennsylvania. Property rights advocates, environmentalists, industry representatives, legal authorities, and politicians are examining the issues. There appears to be a fundamental conflict between citizens’ property rights and the role of government in implementing economic development.

According to a February 5, 2010 article in the Pittsburgh Business Times, pressure will continue to increase for legislative action.22 In this piece, Kevin West, spokesperson for Equitable Resources, Inc., noted that his company would prefer for pooling to be addressed as part of a comprehensive legislative package, one that also would tackle a proposed severance tax on natural gas and regulations for well spacing. The notion of fairness is critical.

In June 2010, Representatives Marc Gergely (D-35) and Garth Everett (R-84) distributed a request for co-sponsors of a “Conservation Pooling Act.” The proposed bill would require an operator to have leases to drill 75 percent of the land in a proposed unit (640 acres) before applying for a permitting order. Holdouts could receive royalty checks as if they signed leases or invested in the project more directly, sharing costs and profits.23 No action was taken on pooling during the 2010 legislative session.

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In a January 2011 interview for *The Daily Review*, reporter James Loewenstein met with Senator Gene Yaw (R-23) to discuss his planned legislative initiatives for the coming year. In regard to some form of pooling, Senator Yaw views it as an environmental necessity. He sees it as a way to reduce the number of well pads that would be needed for a given unit. For example, if a landowner in the middle of a proposed unit refuses to lease, a gas company may need to develop two pads rather than one. This would “double the environmental impact.” At the same time, Senator Yaw said that most of the problems are not created by reluctant landowners but by “holdout” gas companies that happen to have a gas lease in the middle of an area where another company wants to drill. Thus, instead of proposing legislation directed at “holdout” landowners, Yaw is proposing pooling legislation that would address the "holdout" gas companies who refuse to transfer their leases or otherwise cooperate to allow the drilling to go forward. His proposal for "company-to-company pooling” maintains the property rights of reluctant individuals who would not be required to lease their lands for drilling. By providing compensation for cooperating gas companies, Yaw believes that this legislation would solve 90% of the problems related to pooling in the Commonwealth.

The Pennsylvania Campaign for Clean Water, a coalition of over 140 environmental, conservation, sporting, and religious groups from all corners of the state, has a platform for state action regarding Marcellus Shale Natural Gas Extraction. It calls for state officials to prevent gas companies from forcing residents to sign leases through forced pooling requirements. Efforts to regulate spacing of wells should not be used as a way to force property owners to sign leases they do not want.

An editorial published in the September 24th *Patriot-News* calls for public debate on the controversial issue of pooling. The piece advocates that public hearings should be held so that the voices of constituents can be registered. Further, proposed legislation should be drafted with details regarding compensation, unit size, and spacing requirements debated openly. Time is needed for hard questions to be asked and appropriate answers to be heard before legislation is enacted.

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The following graphic was helpful to local Leagues of the Southeastern Region in developing a consensus position.

Pooling

Optimizing Essential Components
Protecting Property Rights

Maximize Advantage ($, gas)
Minimize Risk (environment)

Regulate Well Spacing
(Reduce Surface Footprint)

Protect Property Rights of individuals
(not subject to eminent domain)

Forced Pooling of lands leased or owned by Gas Industry
References


