

Testimony of the
Pennsylvania Coal Association
Before the
Senate Environmental Resources and Energy Committee
on
Coal Bed Methane

May 22, 2007

Good morning. My name is George Ellis and I am President of the Pennsylvania Coal Association (PCA). Also with me this morning is Gary Slagel, Director of Government Affairs for Consol Energy, Inc. and PCA's Board Chairman.

PCA is a trade association that represents the interests of Pennsylvania's bituminous underground and surface coal mining industry and associated companies who provide services to the industry ranging from banking and insurance to equipment manufacturing and engineering.

Our members produce about 75 percent of the bituminous coal annually mined in Pennsylvania, which last year exceeded 72 million tons, retaining the Commonwealth's ranking as the fourth largest coal producing state in the nation.

Attached to my testimony is a booklet entitled *Pennsylvania Coal Data 2005*, which provides a profile of the Pennsylvania bituminous coal industry.

We appreciate this opportunity to provide the Committee with the coal industry's perspective on issues relating to coalbed methane (CBM) ownership and development.

Questions regarding who owns the rights to CBM and how those rights are reconciled with those of the surface owners are not new to Pennsylvania.

The former question on ownership was answered in 1983 by a Pennsylvania Supreme Court decision which held that whoever owns the coal also owns the CBM. I will discuss this decision in more detail later in my testimony.

The latter question relating to how the ownership rights play out vis-à-vis the surface owners' rights was addressed by a legislative committee's inquiry in 2003.

At that time an Indiana-based group known as PAYUP (Pennsylvanians Against Yielding to Unfair Property Usurpation) alleged that the rights of surface owners were being trampled by the owners of the rights to CBM.

In response to those allegations the Joint Legislative Air and Water Pollution Control Committee (Joint Committee), under the leadership of state Representative Scott Hutchinson, conducted an almost year-long study of the allegations and the issues surrounding CBM development.

Included in the Joint Committee's investigation was a thorough review of the longstanding tenets of Pennsylvania's common law and property law and the balancing of property rights that they provide between the mineral and surface owner.

In a letter summarizing the Joint Committee's findings that was sent to those who participated in the study, Chairman Hutchinson said that Pennsylvania's current property rights law is well established and strikes an appropriate balance among the rights of landowner, coal owner and cbm driller. He concluded by saying that he would, "...oppose any efforts to advance legislative proposals that would result in a radical change to the property rights of mineral owners as well as the negative economic, energy, and environmental effects..." that he maintained would occur if such legislation was enacted. PCA agrees with the chairman's position.

Legal Background

Most of the legal issues involved in Pennsylvania CBM projects are governed by longstanding rules of Pennsylvania property law and turn on the specific language of conveyances and agreements establishing the relationship between coal owners, surface owners, CBM developers and "conventional" oil and gas developers. These rules and the import of the language are well-recognized and understood in Pennsylvania.

In Pennsylvania, common law recognizes three estates in land, namely mineral (in this case coal), surface and the right of support (support estate) and these estates in land may be owned by different persons. When a mineral, for example, coal, is purchased from the owner of the land by another person, a separate estate in land (or coal estate) is held by that person and these transactions creating separate coal estates are referred to as severances. The coal estate is an interest in land, separate and apart from the estate held by the surface owner. Indeed, a severed coal estate is subject to separate assessment of real estate taxes, which provides a significant source of revenue to local governments in the coal regions of Pennsylvania.

Once the mineral is severed, the owner now has an interest in the mineral that is equivalent to the surface owner's interest. As such, the mineral estate is entitled to the same level of constitutional protection as any other estate in land in Pennsylvania.

CBM and "natural gas" generally have similar physical and chemical properties and characteristics but CBM is associated with the coal seams in which it is formed as contrasted with "natural gas sands" in which conventional natural gas is located. The most important difference between the two substances is "legal." When the coal estate is severed, the owner of the coal estate owns the CBM and a separate ownership interest of the natural gas in a given parcel of land is held by the landowner who may lease or convey it away.

Status of CBM Ownership Issue

The CBM ownership issue was definitively resolved in Pennsylvania in 1983 by the Pennsylvania Supreme Court in *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (1983) where

the Court expressly held that:

"such gas as is present in coal must necessarily belong to the owner of the coal, so long as it remains within his

property and subject to his exclusive dominion and control.”

The Court went on to say:

“...The owner of the coal may, as may any property owner, exercise dominion over his property so as to maximize his right of enjoyment thereover, within the bounds limiting impingement upon the rights of other property owners. Hence, the coal owner may mine his coal, extract the gas from it, or both. If he chooses to extract the gas, drilling as well as hydrofracturing are available means, so long as their utilization does not impinge upon the rights of owners of the surrounding property, since the damage to coal inflicted by these processes is within his dominion to inflict.”

I am not aware of any unreported Pennsylvania appellate cases which amplify or limit the *Hoge* case (and cases which refer to it do not involve CBM ownership or development).

Thus, in the vast majority of situations in Pennsylvania, the owner of the coal owns the CBM and has the right to develop it.

Absent some rare quirk or anomaly in a particular underlying conveyancing document, the CBM ownership issue has been resolved by the *Hoge* case in favor of the coal owner.

CBM developers are extracting CBM, not “natural gas.” CBM, as the *Hoge* decision conclusively determined, is the property of the coal owner which means that we have the right to extract, transport, process and sell this resource. While it is not the property of “landowners” or “gas rights owners,” the concerns of surface owners (e.g., for surface disturbance, etc.) for the most part are addressed under consensual agreements with CBM developers.

PCA’s member companies that capture and sell cbm contact the landowner in advance of any drilling and work in good faith towards reaching a mutually satisfactory agreement on the

location of roadways, pipeline routes and well locations. We remediate or repair damage caused to the landowner's property.

Pennsylvania's case law dealing with property rights is adequate in balancing mineral development with due concern for the surface owners' interest. The existing situation does not warrant new laws and PCA would oppose any initiative that would limit our ability to extract the resource or alter our constitutionally protected property rights.

We view certain recommendations offered by critics of the status quo – for example, requiring surface owner consent to access the land as a prerequisite for obtaining a well permit or mandating royalty payments to surface owners of severed estates – as tantamount to taking our property and “readjusting” long settled property rights.

In this instance, we agree with the sentiments offered by Representative Hutchinson on this subject in his letter following the Joint Committee's investigation:

“During the public discussion of cbm issues, there have been suggestions that landowner consent be required prior to a cbm operator locating a well on an individual's property. The committee's research into this issue leads me to the conclusion that such a change would dramatically alter the economic relationship between landowner, coal rights owner, and cbm operator, and in effect, disrupt more than a century of property rights law in Pennsylvania. The well established law provides that the cbm belongs to the owner of the coal in which the gas is present and that the owner (or leasee, in some instances) has a clear right to use the surface to extract the cbm from the coal.”

Correlative Property Rights

The correlation between the rights of cbm owners and surface owners and how Pennsylvania's property law applies to each was best explained by Pennsylvania's Superior Court in its decision in *Hiltabidle v. BBC/DRI Blacklick Joint Venture*, 704 A.2d 1125 (Pa. Super 1997), *Appeal Denied*, 724 A.2d 935 (Pa. 1998). In *Hiltabidle*, the Indiana County Common Pleas Court enjoined access to surface land for CBM development claimed under conventional mining rights (solid ones at that) granted in a coal severance deed.

The Common Pleas Court, however, was reversed by the Superior Court.

The Superior Court logically applied longstanding principles of Pennsylvania law dealing with correlative rights involved in concurrent use and development of separate estates in land. Essentially, the Superior Court panel found that the law requires the surface owner to allow access to a separately owned subsurface mineral deposit (in that case, the coal estate which included CBM) but that this right must be exercised reasonably to accommodate the interest of the surface owner (i.e., if there are two potential locations for a CBM well and one location would injure the interests of the surface owner, without benefit to the CBM owner, while the other location would result in no such injury, the CBM owner should choose the latter location if in so doing he is not substantially injured or disadvantaged.).

The Superior Court followed the Supreme Court's decision in *Hoge* when it resolved the CBM ownership issue in favor of the coal owner. The injunction issued by the Court of Common Pleas of Indiana County was reversed and the Superior Court recognized not only the coal owner's ownership of the CBM but also a long established right of access to it through the overlying surface:

“by implication [grantor] thus gave [grantees] the use of the surface of such tract of land to the extent that such use was necessary to carry on and accomplish the work of mining and extracting coal from beneath the surface of such land.”

PCA supports concurrent development of mineral resources with due accommodation of surface owners’ rights and interest. As I explained earlier in my testimony, our members and their lessees go to great lengths in their efforts to secure in advance separate and explicit surface rights for CBM development from the surface owner. In our experience Pennsylvania local courts, absent negotiated agreements, expect CBM developers to be prepared to reasonably accommodate surface owners’ rights and interests by limiting surface impacts to those reasonably necessary to extraction of the underlying CBM.

In summary, under common law principles the owner of a subsurface mineral interest, here CBM, has a right of access to that interest over and through the surface overlying it.

Legal principles aside, CBM production can be and is being done in a manner that is sensitive to surface owner interests and concerns. Time permitting during the question and answer period, Mr. Slagel is prepared to elaborate on the practices of CNX Gas, a subsidiary of Consol involved in CBM development, relative to addressing surface owners issues.

Environmental Impacts

Any suggestion that CBM development is an unregulated industry or that residents in development areas are not protected from environmental impacts of associated activities is simply false. The environmental impacts of cbm development are regulated by DEP under the statutes and regulations that govern conventional gas and oil extraction activities. Under Pennsylvania law and companion regulations, safeguards are provided that require developers to

protect the environment and restore or replace water supplies affected by their operations. The law and regulations are vigorously enforced by DEP.

CBM wells are permitted and inspected by DEP's Oil and Gas Division and CBM well operations are regulated "environmentally" in a similar fashion as conventional oil and gas wells. Affected surface owners have the right to object to drilling permits, participate in permit proceedings, comment on permit applications and appeal any permit that is issued. In addition, the Department must respond to any complaint it receives from the landowner.

CBM operations (drilling, hydrofracturing and extraction operations) do not "redirect" groundwater in any way which impact wells, springs and reservoirs. CBM wells are cased through subsurface areas containing such sources. Deeper groundwater is also sealed off and the fluids used in the process of hydrofracturing the coal seams and any other water incidentally encountered are contained and disposed of off site. In the rare instances where a water supply may be disrupted, the developer is held, by law, to the presumption that the operation caused the water loss and is required to restore or replace the water source.

SB61

We also have been asked to provide comments on a bill, SB61, pending before the Senate Environmental Resources and Energy Committee, which would provide surface owners who don't own the mineral rights beneath their property the right of first refusal to purchase the minerals if they are being offered for sale. It would also void any conveyance of an interest in such mineral rights if this right of first refusal wasn't exercised.

For the sake of time, we have listed our concerns with SB61 as Attachment I of our testimony.

We oppose the bill for a number of reasons, including its restraint on the ability of property owners to sell their property, its improper interjection of the state into what should otherwise be a purely business transaction, its lack of understanding as to how “mineral estates” are acquired and its potential to destroy the value of real property held by individuals and business entities, both large and small. Simply put, SB61 on its face is unconstitutional.

Finally, as the state and nation move toward a position of energy independence, one of the keys for achieving energy self-sufficiency is the ability to maximize development of all our indigenous sources, including CBM.

For decades, CBM had been considered a “nuisance gas” that often stymied the safe and systematic development of our coal reserves. Advances in technology and the government’s commitment to reduce our reliance on foreign oil have led to a re-evaluation on how we treat CBM.

Policies are now being established to encourage capturing CBM and using it as an energy source and millions of dollars have been invested by the private sector in such development projects.

Not only is CBM beneficial in helping to diversify our energy portfolio, it is also producing significant regional economic benefits in terms of creating jobs and improving revenue bases.

In addition, since CBM is considered a greenhouse gas that is 21 times more potent than carbon dioxide, capturing it where feasible instead of venting it into the atmosphere pays environmental dividends.

Attempts to limit an owner’s proper right of access to this resource and discourage its development would foreclose these economic, environmental and energy security benefits.

In conclusion, PCA maintains that legislation is not needed to resolve any ownership or access issues in Pennsylvania. This is not an issue on first impression in Pennsylvania; it is a settled matter of property law. General Pennsylvania common law principles and the existing regulatory framework are adequate and addressing isolated problems that may arise from time-to-time relating to ownership, access and environmental impacts.

Thank you for giving us this opportunity to present PCA's views. We will be happy to attempt to answer any questions you may have.