



# EMENS & WOLPER LAW FIRM

"The Landowners Law Firm" SM

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## *Oil & Gas, Pipelines, Solar and Wind Farm*

### **NEWSLETTER** *January 2017*

Dear Clients, Friends, and Colleagues:

2017 should be an interesting year for landowners with energy issues; highlights are likely to include:

- Oil and gas leasing in the eight shale counties appears to be increasing with more drilling also anticipated;
- More solar and wind farm companies are attempting to sign up landowners on very landowner unfriendly documents;
- Rover and NEXUS pipelines expect to receive their Federal Energy Regulatory Commission authorization for pipeline construction early in 2017 and will likely sue unsigned landowners for eminent domain and quick-take;
- Landowners are getting very upset with oil and gas companies taking unwarranted deductions from royalty payments on shale wells; and
- Ohio landowners in the shale counties who do not want to lease are likely to see more forced unitizations of acreage for drilling in the coming months as drilling plans of oil and gas companies increase.

If you have questions or comments about any of the contents of this Newsletter, please call or email us!

Sincerely,

Emens & Wolper Team  
Dick, Sean, Craig, Michael, Chris, Bea, Kelly, Cody, and Gail



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## SOLAR AND WIND ENERGY UPDATE

### **EMENS & WOLPER LAW FIRM LEGAL SERVICES**

Our law firm provides numerous legal services related to natural resources including the following:

- We review, analyze and negotiate NEW and OLD oil and gas leases and mineral deeds;
- We review, analyze and negotiate solar options, letters of intent, and leases;
- We review, analyze and negotiate all wind farm documents;
- We review royalty payments and division orders;
- We review, analyze and negotiate pipeline easements;
- We analyze mineral abandonment claims and claims regarding expired leases;
- We represent landowners in ODNR mandatory unitization proceedings who are being forced unitized;
- We review, analyze and negotiate water, sand, timber, gravel, and coal rights agreements;
- We review, prepare and negotiate real estate deeds, mortgages, notes and liens;
- We review, analyze, negotiate sale of minerals and royalties; and
- We assist with litigation on all of these matters.

Our law firm also provides services regarding estate planning, succession planning for family farms and other businesses and purchases and sales of farms and other businesses.

**Major Wind and Solar Development Coming to Appalachian Ohio:** American Electric Power Company, Inc. ("AEP") is currently undertaking a major step toward establishing a significant investment in renewable energy in Ohio, according to *Columbus Business First*. The Columbus-based electric utility company is requesting proposals until February 16, 2017 on new projects to generate 100 megawatts of solar power and 250 megawatts of wind power, primarily in the Appalachian-Ohio area.

The total combined 350 megawatts is part of an overall renewable energy scheme where AEP has committed to the Sierra Club and the Public Utilities Commission of Ohio to build wind and solar electric generation facilities capable of producing 900 megawatts of power. This is a significant venture whose costs will be passed on by AEP to its Ohio consumers under a deal approved in early November.

It is estimated that each solar project would produce at least 10 megawatts of power. Generally, one megawatt of power is enough to power about 1,000 homes. Thus, AEP's current request for proposals could power about 350,000 homes at full capacity.

Our firm has become aware of numerous entities being formed in recent months seeking long-term options, leases, and easements covering landowners' properties for wind and solar development. New developers are attempting to take part in AEP's venture, but some have little to no experience in wind and solar development. We have also reviewed many of the documents proposed by these entities and believe most are very landowner unfriendly. The proposed agreements offer little protection for the land and often "tie up" the property for *over forty years*. If you, or someone you know, is approached regarding wind and solar development, we are happy to review any documents and explain the associated risks. For more information, see <http://www.bizjournals.com/columbus/news/2016/12/16/aep-taking-bids-for-350-megawatts-of-ohio-wind.html>.

## EXPLORATION AND DEVELOPMENT

**Developers Selling Pennsylvania and West Virginia Marcellus and Utica Shale Operations:** According to the *Herald-Star*, several oil and gas developers are selling a large portion of their Marcellus and Utica Shale operations across West Virginia and Pennsylvania because of the low commodities pricing of oil and gas over the last two years. In 2014, Chesapeake Energy Corporation sold the West Virginia operations it had established to Southwest Energy Co. for \$5 billion. Similarly, Gastar Exploration, Inc. sold its own West Virginia operations early in 2016 for \$80 million. Now, Anadarko Petroleum Corp. ("Anadarko") will sell 195,000 Marcellus Shale acres to Alta Resources Development, LLC for \$1.24 billion (about \$6,359 per acre) and Eclipse Resources Corp. will sell 9,900 acres for \$63.8 million (about \$6,444 per acre).

Anadarko's chairman, president, and CEO, Al Walker, has stated that Anadarko's sale is motivated in part so the company may focus on drilling and fracing in other on-shore shale plays. He mentions that Anadarko will now be focusing on the Delaware Basin (largely in Texas) and the DJ Basin (mostly in Colorado). For more information, see <http://www.heraldstaronline.com/news/local-news/2016/12/firms-selling-marcellus-utica-shale-operations-across-west-virginia-pennsylvania-play/>.



***Landowner Groups and  
Ohio Counties where  
Emens & Wolper will  
Assist Landowners***

**EXPLORATION AND DEVELOPMENT (CONTINUED)**

**Companies Charging Landowners For Losses!:** In our review of landowner's royalty checks in recent months, we have noticed several oil and gas companies reporting a net loss on the production of natural gas liquids and passing that loss on to the landowner by reducing the overall royalty check (netting the loss against the positive production). This seems to be the case even when the lease is silent as to whether the companies may even claim royalty deductions at all. While an oil and gas company may have the right under an oil and gas lease to take "post-production" costs out of the royalty if there is appropriate language, we do not believe, companies have the right to pass on losses to the landowner who only has a royalty interest. If operations for oil and gas result in a loss (which several Ohio drillers are claiming), that loss should be borne by the company that drilled and has a working interest. Landowners should continue to look closely at the deductions from royalties being taken by oil and gas companies.

**New Round of Targeted Leasing Begins in Eastern Ohio:** We have begun to see oil and gas developers offer new leases to landowners in eight of Ohio's eastern counties—Carroll, Columbiana, Jefferson, Harrison, Guernsey, Belmont, Noble, and Monroe. In addition, lease bonus payments or just royalty increases appear on the rise, likely caused by natural gas and crude oil futures contracts rising. Recent natural gas future contracts have been over \$3.50 per mcf and NYMEX crude oil future contracts have been over \$50.00 per barrel. Although leases are being offered again, we expect that oil and gas developers will be doing so on a targeted basis. We expect oil and gas developers will mostly be offering leases to landowners who own property that will be included in a unit that will be drilled upon soon after leasing.

**Forced Unitization in Ohio:** In Ohio, when oil and gas developers are faced with landowners that refuse to lease their land for oil and gas development, the developer may file an application with the Ohio Department of Natural Resources ("ODNR") under Ohio's forced unitization statute, R.C. § 1509.28. Forced unitization is a process where an oil and gas developer can drill and produce the mineral rights of a mineral owner even though the mineral owner does not lease or want the oil and gas developer to produce from their property. When an oil and gas developer files an application with the ODNR for forced unitization, a hearing is held in Columbus, Ohio where the developer must put on evidence. At this hearing, mineral owners can object to the forced unitization application. Our firm has helped many landowners in this process. The first appeal to the Oil and Gas Commission of an ODNR's Order under forced unitization was argued (by our firm representing the landowner from Carroll County) in the summer of 2015. On September 17, 2015, the Ohio Oil and Gas Commission (the "Commission") issued an Order in *Gary L. Teeter Revocable Trust v. Division of Oil & Gas Resources Management* (Appeal No. 895) for that appeal. While the decision by the Commission upheld some aspects of the Chief's Order issued by the ODNR, in an important victory for Ohio landowners the Commission's Order significantly increased the landowner royalty amount from 12.5% gross to 20% gross. This was a major win for landowners faced with their rights being taken from them. With oil and gas developers increasing the total number of leases they hold in eastern Ohio counties (see above) we may also see forced unitization applications increase.

Black River Landowners Association—  
Lorain County

Central Ohio Landowners  
Association—Richland and Ashland  
counties

Coshocton County Landowners  
Group—Coshocton and  
Northeastern Muskingum counties

Jefferson County Landowners  
Group—Jefferson County

Mohican Basin Landowners  
Group—Ashland, Wayne, and  
Holmes counties

Muskingum Hills Landowners—  
Southeastern Muskingum County

Resources Land Group—Licking  
and Southeastern Knox County

Smith Goshen Group—Belmont  
County

Adams, Allen, Ashtabula, Athens,  
Auglaize, Brown, Butler, Carroll,  
Champaign, Clark, Clermont,  
Clinton, Columbiana, Crawford,  
Cuyahoga, Darke, Defiance,  
Delaware, Erie, Fairfield, Fayette,  
Franklin, Fulton, Gallia, Geauga,  
Greene, Guernsey, Hamilton,  
Hancock, Hardin, Harrison, Henry,  
Highland, Hocking, Huron, Jackson,  
Lake, Lawrence, Logan, Lucas,  
Madison, Mahoning, Marion,  
Medina, Meigs, Mercer, Miami,  
Monroe, Montgomery, Morgan,  
Morrow, Noble, Ottawa, Paulding,  
Perry, Pickaway, Pike, Portage,  
Preble, Putnam, Ross, Sandusky,  
Scioto, Seneca, Shelby, Stark,  
Summit, Trumbull, Tuscarawas,  
Union, Van Wert, Vinton, Warren,  
Washington, Williams, Wood, and  
Wyandot



Please visit our website for  
Educational Articles  
[www.emenswolperlaw.com](http://www.emenswolperlaw.com)

- Selling Your Mineral Rights – Questions You Should Consider First!
- Separating your Mineral Rights: Remember Real Estate Taxes
- Post-Production Costs: Protecting Landowner Rights
- Oil and Gas Leases and Pipeline Easements - -This Time It's Different
- Oil and Gas Considerations When Buying and Selling Farmland
- "Force Pooling" in Ohio: Requiring Non-Consenting Landowner's to Develop Their Oil and Gas Minerals
- "Mineral Rights ARE Different Pipeline Easements and Right of Ways: Protecting Your Rights
- Pipeline Easements: Steps to Protecting Landowner Rights
- Unusual Ohio Oil and Gas Lease Provisions
- Ohio Oil and Gas Conservation Law – The First Ten Years (1965-1975)

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## PIPELINE UPDATE

**Kinder Morgan Utopia Pipeline Project:** The Utopia Pipeline Project continues to be held up as a result of the Wood County Common Pleas Courts decision to not grant Kinder Morgan eminent domain. The majority of outstanding Kinder Morgan Utopia Ohio eminent domain cases are currently on hold pending the outcome of Kinder Morgan's appeal of the Wood County decision. Based on conversations with Kinder Morgan, the Utopia Pipeline Project is still progressing, albeit slowly. Kinder Morgan has also recently indicated that there is a high probability of some route deviation around Wood County, though what that means is unclear at this time.

**Rover Pipelines Project:** As of this writing (January 4, 2017), Rover has not obtained a Certificate of Public Convenience and Necessity ("CPCN") to begin construction of its two 42-inch pipelines and it is nearly two years since Rover filed its application with the Federal Energy Regulatory Commission ("FERC"). While there may be several reasons for the delay, Rover's demolition of a historical building without appropriate approvals appears to be a major reason. Rover's next opportunity to be considered for approval will likely be the FERC Commission meeting on January 19, 2017. Rover will likely file eminent domain litigation shortly after receiving its CPCN against landowners on the pipeline route who have not signed an easement with Rover.

Rover recently published its proposed pipeline construction schedule. With the current delay in project approval, the specific dates are unlikely to be accurate (as Rover cannot begin any construction without FERC approval), but the timeline is interesting. If you would like a copy of this proposed timeline, please contact our office and we'll send it to you.

**NEXUS Pipeline Project:** On November 30, 2016, FERC published the Final Environmental Impact Statement ("FEIS") for the NEXUS Pipeline Project. The FEIS is one of last major hurdles prior to NEXUS receiving a FERC CPCN. NEXUS now must wait a minimum of 45 days for other agencies to approve or comment. Nexus has advised it expects its CPCN by the end of January 2017 and will likely file suits shortly thereafter against landowners on the pipeline route who have not signed an easement.

While most of the findings in the FEIS were consistent with the Draft Environmental Impact Statement, we did learn that FERC determined that there would be no significant environmental benefits by adopting the City of Green's proposed reroute out of Summit County. There are still continued efforts from a group in Medina County pushing for a reroute, but this is now unlikely to happen based on the FEIS.





## LEGAL UPDATE

**Supreme Court of Ohio Declines to Resolve Royalty Dispute: IMPORTANT CASE FOR LANDOWNERS.** In *Lutz v. Chesapeake Appalachia, L.L.C.*, Slip Opinion No. 2016-Ohio-7549, the Supreme Court of Ohio declined to answer a certified question from the federal court for the Northern District of Ohio regarding whether Ohio follows the "at the well" rule or the "marketable product" rule with respect to landowner royalty calculations regarding post-production costs. Under the "at the well" rule, an oil and gas company may deduct postproduction costs before calculating landowner royalties. Alternatively, under the "marketable product" rule, the deductions of postproduction costs are limited in certain circumstances. The Court opined that, in Ohio, oil and gas leases are contracts. "The rights and remedies of the parties to an oil and gas lease must be determined by the terms of the written instrument." Thus, the Court de-certified the question holding that either the lease language was ambiguous (so the Court did not have extrinsic evidence to determine the parties' intent) or the lease language is unambiguous (so the federal district court could settle the dispute without the Ohio Court's assistance). Although the Ohio Court's holding did not clearly settle Ohio law with respect to disputed royalty calculations, *Lutz* is an important decision nonetheless. Based on the Ohio Court's decision to de-certify the case, a landowner is now faced with the challenge of bringing his/her own individual suit against an oil and gas company should the landowner wish to challenge deductions being taken from royalty payments under an oil and gas lease.

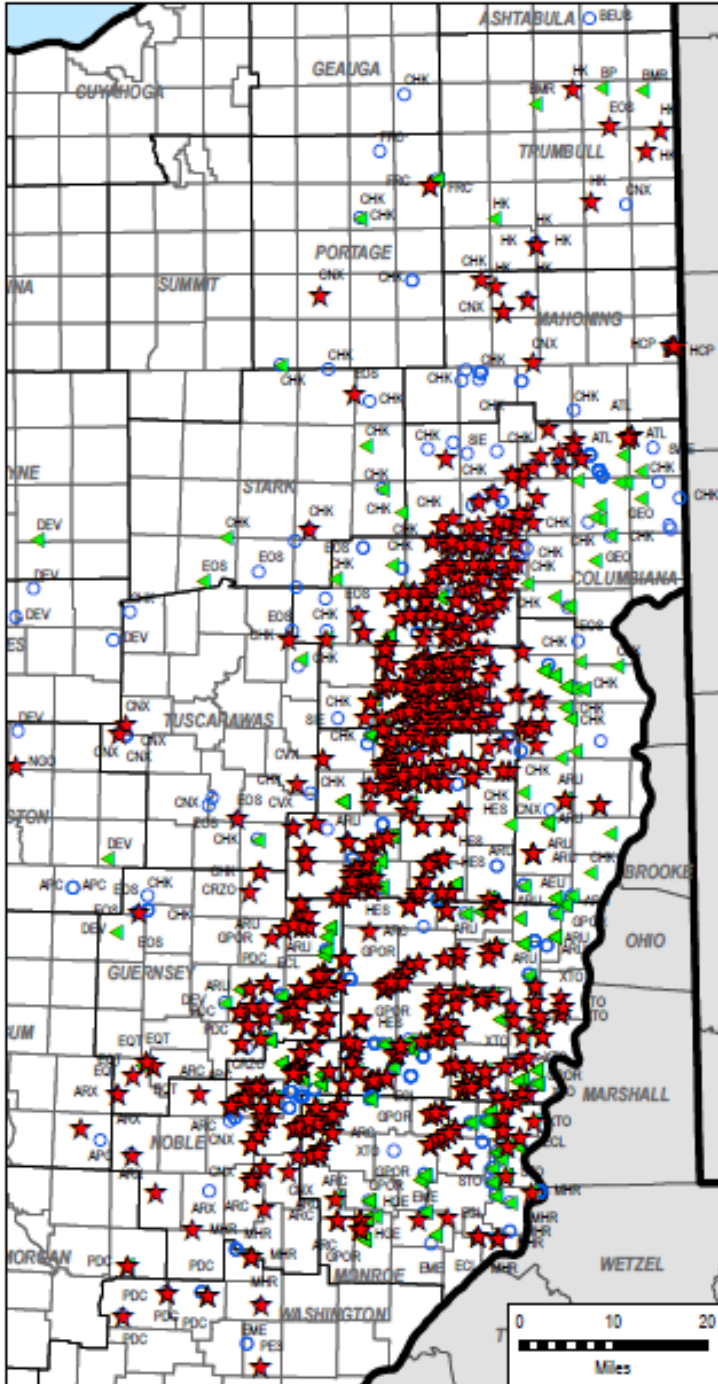
**Force Majeure Prevents Lease Expiration:** In *Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, 2016-Ohio-8030, the Court of Appeals for the Seventh District of Ohio held that an oil and gas lease did not terminate after the expiration of the primary term even though no well was drilled, due to a broadly written force majeure clause. James F. Hillman, the owner of Harmon Creek Coal and Haverhill Coal Company, reserved an oil and gas mineral interest underlying 3,583 acres in Harrison County, Ohio before passing his interest to his heirs at his death. The Hillman heirs subsequently transferred all of the mineral interests to Haverhill Glen, LLC ("Haverhill") which executed a lease with Eric Petroleum Corporation ("EPC") in 2004. EPC wished to drill a well and produce from the Haverhill mineral interest, but were unable to survey the surface for a suitable location because the surface owners, New Rocky Valley Farms, Inc. ("New Rocky") and Faith Ranch and Farms, Inc., denied access to the surface by "threatening, lunging at, and physically threatening" EPC representatives. EPC and Haverhill filed a joint suit against New Rocky for access to the surface, but, before the trial was concluded, the primary term of the Haverhill lease had expired. Haverhill immediately filed an action to have the lease terminated for non-production but EPC relied on a broadly written force majeure clause to claim that the actions of the surface owners wholly prevented any possible well being drilled during the primary term. The trial court agreed with EPC (and the appellate court affirmed) citing that EPC had paid significant expense to obtain a force majeure clause in the lease that allowed for drilling delays where the delay was by any cause "not reasonably within [EPC's] control."

**Lease Terminates for Non-Production:** In *Lang v. Weiss Drilling Co.*, 2016-Ohio-8213, the Court of Appeals for the Seventh District of Ohio affirmed a decision from the Monroe Common Pleas Court that an oil and gas lease had expired due to non-production. In 1981, Gerald L. Weiss, d.b.a. Gerald L. Weiss Drilling Company ("Weiss"), drilled a well under an oil and gas lease covering 32.5 acres in Monroe County, Ohio. The well, known as the Donald Miller No. 1 Well (the "Well"), was said to have produced in paying quantities for two years, but reported losses to the IRS in 1983, 1984, 1985, 1986, and 1987. In 1988, the Well began producing again until 2003 where Weiss reported losses in 2003, 2004, 2005, 2006, and 2007. After the landowner sought to have the lease terminated for lack of production, Weiss argued that even though it reported losses for the Well from 1983 to 1987 on IRS forms, the landowner could not show that there was not production "in paying quantities" because the well was supplying free gas for home use. Furthermore, Weiss argued the trial court failed to consider the doctrine of temporary cessation because the Well's pump was malfunctioning in 2005 and 2006 and Weiss was reasonably diligent in obtaining its repair. According to the Court, this malfunction, in hindsight, was likely the cause of the 2003 and 2004 cessation as well. The Court disagreed with Weiss' contentions citing evidence that Weiss had included the Well on a "common meter" where a "handful" of wells were connected to a single meter. Thus, Weiss could not show how much of the meters production was a product of the Well and any royalties paid to the landowner were, according to the Court, a "guesstimate" at best. Thus, the Court found sufficient evidence to affirm the lower court's decision that the lease had been terminated.



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## UTICA HORIZONTAL WELL STATUS THROUGH 12/24/2016

- ★ PRODUCING (1,472)
- ▲ DRILLING; DRILLED (407)
- PERMITTED OR NOT DRILLED (461)

OPERATOR	LBL	PROD	PMT	DRLG	DRLD	TOT
AMERICAN ENERGY UTICA LLC	AEU	5	0	0	0	5
ANADARKO E & P ONSHORE LLC	APC	1	2	0	1	4
AMERICAN PETROLEUM PRTR OH LLC	APP	1	1	0	0	2
ANTERO RESOURCES CORPORATION	ARC	126	75	0	13	214
ASCENT RESOURCES UTICA LLC	ARU	148	41	1	6	196
ARTEX OIL COMPANY	ARX	6	1	0	0	7
ATLAS NOBLE LLC	ATL	12	0	0	0	12
BEUSA ENERGY LLC	BEUS	1	0	0	0	1
BP AMERICA PRODUCTION COMPANY	BP	1	0	0	0	1
BRAMMER ENGINEERING INC	BMR	1	1	0	0	2
CHESAPEAKE EXPLORATION LLC	CHK	715	90	4	19	828
CNX GAS COMPANY LLC	CNX	60	5	0	7	72
CARRIZO (UTICA) LLC	CRZO	13	1	0	2	16
CHEVRON APPALACHIA LLC	CVX	4	2	3	1	10
DEVON ENERGY PRODUCTION CO	DEV	6	6	0	1	13
ECLIPSE RESOURCES I LP	ECL	83	21	8	22	134
EM ENERGY OHIO LLC	EME	9	3	0	1	13
ENERVEST OPERATING LLC	EOS	15	2	4	2	23
EOT PRODUCTION COMPANY	EOT	3	3	2	0	8
MOUNTAINEER KEYSTONE LLC	FRC	7	1	0	0	8
NGO DEVELOPMENT CORP	NGO	1	0	0	0	1
GEOPETRO LLC	GEO	2	0	0	0	2
GULFPORT ENERGY CORPORATION	GPOR	159	77	11	74	321
HILCORP ENERGY COMPANY	HCP	15	9	16	9	49
HESS OHIO DEVELOPMENTS LLC	HES	48	12	5	26	91
HG ENERGY LLC	HGE	4	1	0	2	7
HALCON OPERATING COMPANY INC	HK	7	2	3	1	13
TRIAD HUNTER LLC	MHR	1	9	2	13	25
PDC ENERGY INC	PDC	4	2	2	34	42
PROTÉGÉ ENERGY III LLC	PE3	0	0	0	1	1
RICE DRILLING D LLC	RDD	10	17	24	25	76
R E GAS DEVELOPMENT LLC	REG	1	20	25	6	52
SIERRA RESOURCES LLC	SIE	0	3	0	0	3
STATOIL USA ONSHORE PROP INC	STO	0	14	10	2	26
SWEP I LP	SWE	0	1	0	0	1
XTO ENERGY INC.	XTO	3	39	18	1	61
<b>TOTALS</b>		<b>1472</b>	<b>461</b>	<b>198</b>	<b>269</b>	<b>2940</b>



KEY	DESCRIPTION
PROD	PRODUCING
PMT	PERMITTED
DRLG	DRILLING
DRLD	DRILLED

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Emens & Wolper would like to thank Marty Shumway for providing the Utica Status Map, above.