



**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

Study Committee

Roberta Winters, Chair, LWV of Radnor Township
Alma Forsyth, LWV of Chester County
Barbara Schraudenbach, LWV of Radnor Township
Linda Sall, LWV of Radnor Township
Bonnie Kauffman, LWV of Lower Merion and Narberth
John Shaw, LWV of Central Delaware County
Mary Beth Sweeney, LWV of Indiana County
Susan McClure, LWV of Indiana County

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Extracting Natural Gas from Marcellus Shale Addendum Study
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A Pennsylvania Perspective

Pooling is one of the many items open to debate regarding natural gas extraction from Marcellus Shale. Under the LWVPA position statement adopted on May 1, 2010, we support legislation and regulation that balances the rights of mineral and surface owners. What does this mean in terms of the rights of landowners who do not wish to lease or sell their mineral rights? Will it provide compensation for the natural gas that might, unknown to the owners, be removed from a mile or so below their lands? What does pooling mean to the industry? Will the operation become more efficient? Will the bottom line improve and the overall economic impact of natural gas extraction expand? What are the environmental consequences of pooling? Will it reduce the “waste” of natural gas that may be left untapped in the Marcellus Shale formation? Will it minimize the industrial footprint on the landscape of our Commonwealth?

The following document, although somewhat technical, is designed to provide a basis for developing a position from which the League of Women Voters of Pennsylvania can advocate. It is divided into four sections: Overview (definitions and legal context); The Debate (advantages and disadvantages); Arkansas: An Example (summary of a process); and the Future of Pooling in Pennsylvania (political initiatives). Each is helpful to developing an overall understanding of this complex issue.

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](http://www.glossary.oilfield.slb.com/Display.cfm?Term=unitization),¹ 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 1935.² 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.”³

Although the exact rights and responsibilities vary, some form of [forced pooling](#) already exists in Colorado, Louisiana, New York, Oklahoma, and Texas.⁴ 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](#).⁵ 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

²http://www.eoearth.org/article/Interstate_Compact_to_Conserve_Oil_and_Gas_of_1935,_United_States

³<http://www.iogcc.state.ok.us/about-us>

⁴http://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.”⁶

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.](#)⁷ 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](#).⁸ 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](#).⁹ 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.”

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).

⁷ http://law.psu.edu/file/aglaw/The_Rule_of_Capture_in_Pennsylvania_Oil_and_Gas_Law.pdf

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](#).”¹⁰ 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](#).¹¹ 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](#)¹² 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](#).¹³ 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](#).¹⁴ 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

¹⁰<http://www.law.cornell.edu/supct/html/04-108.ZS.html>

¹¹<http://www2.gtlaw.com/pub/alerts/2006/0507.pdf>

¹²<http://marcelluscoalition.org/2010/09/a-gas-reserves-pooling-law-is-about-fairness/>

¹³<http://marcelluscoalition.org/2010/07/all-wet-on-fair-pooling/>

¹⁴<http://marcelluscoalition.org/wp-content/uploads/2010/05/msc-fair-pooling-for-pennsylvania.pdf>

leased [acreage](#).¹⁵ Under one current proposal, given the configuration of the leased land, multiple drilling units of a minimum of 640 acres 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](#)¹⁶ 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](#).”¹⁷ The University of Pittsburgh’s [FracTracker](#)¹⁸ site is examining the impact of fracking on farms. Of particular interest is an article written by [Samantha Malone](#)¹⁹ 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 want²⁰.

[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

¹⁵ <http://marcelluscoalition.org/wp-content/uploads/2010/05/msc-fair-pooling-for-pennsylvania.pdf>

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>

¹⁹ <http://www.fractracker.org/2010/10/forced-pooling-vs-organic-farming.html>

²⁰ <http://www.pabucketbrigade.org/woodenhandleonapeck/wp-content/uploads/2010/09/Marcellus-Platform-FINAL-2010-2.pdf>

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.

²¹<http://www.arkansasonline.com/documents/2011/feb/17/arkansas-balance-shale-report/>

²²<http://www.bizjournals.com/pittsburgh/stories/2010/02/08/story12.html>

²³<http://www.legis.state.pa.us/WU01/LI/CSM/2009/0/5114.pdf>

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.²⁴ 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,²⁵ 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.²⁶ 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.

²⁴ <http://thedailyreview.com/news/sen-yaw-introduces-marcellus-shale-legislation-1.1089334>

²⁵ <http://www.pacleanwatercampaign.org/>

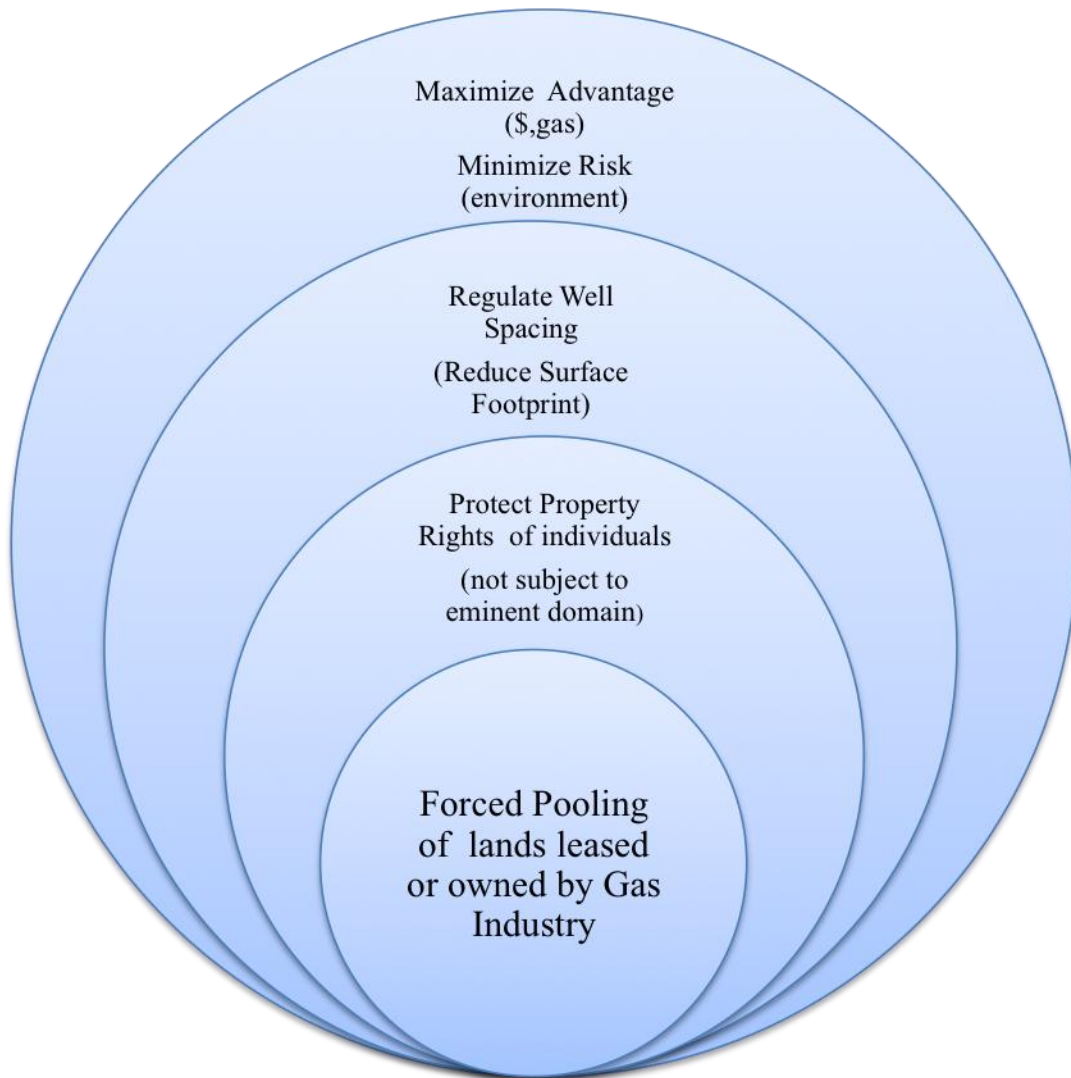
²⁶ http://www.pennlive.com/editorials/index.ssf/2010/09/marcellus_pooling_state_lawmak.html

Appendix

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

Pooling

Optimizing Essential Components Protecting Property Rights



References

- Callahan, D. (2010, September 28). A gas reserves pooling law is about fairness. Marcellus Shale Coalition. Retrieved from <http://www.marcelluscoalition.org/2010/09/a-gas-reserves-pooling-law-is-about-fairness>
- Clovis, A. M. & Pifer, R. H. (2009, March). The Pennsylvania Oil and Gas Conservation Law: A summary of the statutory provisions 58 p.s. §§ 401-419. Retrieved from http://law.psu.edu/_file/aglaw/SummaryOfOilAandGasConservationLaw.pdf
- Cornell University Law School. (N.D.). Kello V. New London (04-108) 545 U.S. 469 (2005) Conn. 1, 843 A. 2d 500, affirmed. *Legal Information Institute*. Retrieved from <http://www.law.cornell.edu/supct/html/04-108.ZS.html>
- Doss, D. (2011, February). Arkansas in the Balance: Managing the risks of shale gas development in the natural state. Retrieved from <http://www.geekfest.com/showthread.php?472295.Fracking-in-Arkansas>
- Farlex. (2008). Eminent domain. *The Legal Dictionary*. Retrieved from <http://legal-dictionary.thefreedictionary.com/eminent+domain>
- George, C. (2010, May). Special update on severance tax and forced pooling and H. B. 2213. House Environmental Resources and Energy Committee.
- Gerge, M. & Everett, G. (2010, June 15). Request for sponsorship: Conservation pooling. Memorandum. Retrieved from legis.state.pa.us/WU01/LI/Csm/2009/0/5114.pdf
- Interstate Oil and Gas Compact Commission. (N.D.) About us. Retrieved from <http://www.iogcc.state.ok.us/about> us
- Kubiszewski, I. (2008, September 4). Interstate compact to conserve oil and gas of 1935. *Encyclopedia of the earth*. Retrieved from www.eoearth.org/article/Interstate_Compact_to_Conserve_Oil_and_Gas_of_1935,_United_Stateshttp://www.eoearth.org/article/Interstate_Compact_to_Conserve_Oil_and
- Lowenstein, J. (2011, January 12). Senator yaw introduces Marcellus Shale legislation. *TheDaily Review.com*. Retrieved from <http://www.thedailyreview.com/news/sen-yaw-introduces-marcellus-shale-legislation-1.1089334>
- Malone, S. (2010, October 29). Forced pooling vs. organic farming. FracTracker
- Malone, S. (2011, January 26). Fracking effects on farms. FracTracker
- Marcellus Shale Coalition. (2010, July). Fair pooling for Pennsylvania. Retrieved from <http://www.marcelluscoalition.org/wp-content/uploads/2010/05/msc-fair-pooling-for-pennsylvania.pdf>

Marcellus Shale Coalition.(2010, July 6). All wet on fair pooling. News release. Retrieved from <http://www.marcelluscoalition.org/2010/07/all-wet-on-fair-pooling>

Murphy, T. (2010, June 18). Can a drilling company steal your gas. Video. Retrieved from <http://www.youtube.com/watch?v=h15xDJxfwxM>

Patriot News Editorial Board. (2010, September 24). Where is the public debate on Marcellus Shale pooling law? *The Patriot News*. Retrieved from http://www.pennlive.com/editorials/index/ssf/2010/09/marcellus_pooling_state_lawmak.html

Pennsylvania Campaign for Clean Water. Web page. Retrieved from <http://www.pacleanwatercampaign.org/>

Pennsylvania Constitution - Article I. Retrieved from <http://www.the-patriot-s-voice.org/id18.html>

Pifer, R. H. & Jochen, R. M. (2009, August 21). The rule of capture in Pennsylvania oil and gas law. Retrieved from http://www.law.psu.edu/_file/aglaw/The_Rule_of_Capture_in_Pennsylvania_Oil%20and_Gas_Law.pdf

Poppel, S. D. (2006, May). Pennsylvania limits exercise of eminent domain in the wake of *kelo v. city of new haven*. *Greenberg Traurig: Alert*. Retrieved from <http://www2.gtlaw.com/pub/alerts/2006/0507.pdf>

Schlumberger. (2011). Glossary. Retrieved at <http://www.glossary.oilfield.slb.com/Display.cfm?Term=>