

December 29, 2020

The Honorable James L. Peters
Monroe County Prosecuting Attorney
101 North Main Street, Room 15
Woodsfield, Ohio 43793

SYLLABUS: 2020-007

Pursuant to R.C. 307.11, a board of county commissioners has authority to execute leases of county-owned property for the purpose of the construction and use of a Class II saltwater injection well involving disposal, as long as: (1) the lease benefits the county; (2) the lease does not exceed the statutory time limits listed under the provision; and (3) the material being injected is the byproduct of the mining authorized by the lease, as opposed to the byproduct of mining occurring elsewhere. However, the Ohio Department of Natural Resources retains regulatory authority over the construction and operation of such a Class II saltwater injection well involving disposal under R.C. Chapter 1509.



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OPINION NO. 2020-007

The Honorable James L. Peters
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Dear Prosecutor Peters:

You have requested an opinion regarding the authority of a board of county commissioners (“Commissioners”) to enter into a certain lease of county-owned real property. I have framed your question in the following manner:

Do Commissioners have authority to enter into a lease of county-owned property for the purpose of constructing and using a Class II saltwater injection well involving disposal?

I

Based on your request and subsequent conversations with you, this opinion focuses on the legality of leases for the construction and operation of a Class II saltwater injection well involving disposal. The United States Environmental Protection Agency (“EPA”) recognizes six classes of underground injection wells. The extraction of oil and gas produces large amounts of brine and other fluids, and Class II injection wells are used to safely inject these fluids back into the ground. *Class II Oil and Gas Related Injection Wells*,

<https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells> (accessed August 5, 2020).

The EPA recognizes three subcategories of Class II injection wells: disposal wells, enhanced recovery wells, and hydrocarbon storage wells. *Id.* This opinion is limited to an analysis of Class II saltwater injection wells involving disposal. Such wells isolate the extracted fluids at the surface and reinject the fluids into the ground to prevent the contamination of groundwater. *Id.*

The Ohio Department of Natural Resources (“ODNR”) has statewide regulatory authority over oil and gas production, and that authority extends to Class II saltwater injection wells involving disposal. R.C. Chapter 1509 provides “uniform statewide regulation” of oil and gas production in Ohio. *State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d. 128, ¶ 3. R.C. 1509.02 centralizes regulatory authority of such production in state government and entrusts ODNR with the “sole and exclusive authority to *regulate* the permitting, location, and spacing of oil and gas wells and production operations” within Ohio (except certain activities regulated by federal laws) (Emphasis added.) *Id.* at ¶ 4. Any person seeking to drill or operate an oil and gas well in Ohio must obtain a state permit and related authorization from ODNR. *Id.* at ¶ 5, 30. Further, ODNR has authority to adopt rules regarding the underground injection of brines and other wastes resulting from oil and gas production. R.C. 1509.22(C)-(D); *Athens Cty. Fracking Action Network v. Simmers*, 10th Dist. Franklin No. 16AP-133, 2016-Ohio-5388, ¶11; R.C. Chapter 6109; 42 U.S.C.S. § 300f.

II

Commissioners may lease county-owned land for the construction and operation of a Class II saltwater injection well involving disposal, as long as certain conditions are met.

A

To answer your question, it is important to begin with an overview of the Commissioners' authority. That overview starts with the well-established principle that "a board of county commissioners is a creature of statute that may exercise only those powers conferred upon it expressly by statute or as may be implied by necessity in order to facilitate the exercise of another express power." 2015 Op. Att'y Gen. No. 2015-007, Slip Op. at 2; 2-73; 2009 Op. Att'y Gen. No. 2009-040, at 2-296; *see State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917) ("[s]uch grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective").

The Commissioners have two rights and responsibilities relevant here. *First*, Commissioners may contract on behalf of the county. 2014 Op. Att'y Gen. No. 2014-004, Slip Op. at 1-2; 2-24; 2004 Op. Att'y Gen. No. 2004-031, at 2-275. *Second*, Commissioners hold title to all property owned by the county, unless they transfer title to another governmental entity under R.C. 307.10(B). 2015 Op. Att'y Gen. No. 2015-027, Slip Op. at 2; 2-271; *see* 2006 Op. Att'y Gen. No. 2006-001, at 2-4. The Commissioners are responsible for managing and controlling county-owned property, and retain broad discretion as to the manner in which they do so. 2015 Op. Att'y Gen. No. 2015-027, Slip Op. at 2; 2-271; 1997 Op. Att'y Gen. No. 97-001, at 2-6 n.10.

Because Commissioners control county-owned property, and because Commissioners may enter contracts on their county's behalf, they may enter into contracts involving county property. Commissioners have been given statutory authority to act on behalf of the county and to enter into contracts on a wide variety of matters, including leases of mineral lands. 2004 Op. Att'y Gen. No. 2004-031, at 2-275; R.C. 307.11. For

example, Commissioners have statutory power to acquire and dispose of the county's real and personal property, *see* R.C. 307.01-.02, 307.09, 307.12 and statutory power to enter into various agreements on behalf of the county, *see* R.C. 307.02. 2014 Op. Att'y Gen. 2014-004, Slip Op. at 1-2; 2-24. Therefore, Commissioners have authority to enter into legal agreements involving county-owned property.

The Commissioners' authority includes the ability to enter into certain leases related to the extraction of natural resources. R.C. 307.11 sets forth certain requirements in order for Commissioners to enter into leases of mineral lands for county-owned property. It says: "When the county would be benefited, the board of commissioners may make, execute, and deliver contracts or leases to *mine* ... petroleum, gas ... and other minerals upon lands owned by such county, to any person complying with the terms prescribed by the board as to consideration, rights of way, and occupancy of ground for necessary purposes." (Emphasis added.) R.C. 307.11. The statute also imposes limits on the number of years for which these leases may run. *Id.*

The word "person" in this statute includes corporations, R.C. 1.59(C), meaning Commissioners may enter into these leases with corporations. And the question of whether "the county would be benefited" by a lease, R.C. 307.11, is a fact-specific determination for the Commissioners to make in the first instance. That said, my predecessors have concluded, and I agree, that R.C. 307.11 authorizes Commissioners to enter into oil and gas leases upon real property owned by a county for oil and gas exploration and development. 2015 Op. Att'y Gen. No. 2015-007, Slip Op. at 1, fn. 1; 2-72, fn. 1; *see* 1963 Op. Att'y Gen. No. 720, p. 657, at 661 ("[a] board of county commissioners has express authority under R.C. 307.11 to execute petroleum leases upon county owned lands"). I also agree with my predecessors that, "where the fee simple title to [land] is vested in the board of county commissioners, the board under R.C. 307.11 has the authority to lease

such [land] for oil and gas exploration and development so long as such lease does not interfere with the use of such [land] by [the occupant].” 1963 Op. Att’y Gen. No. 720, p. 657, at 662. The Commissioners must determine whether these leases benefit their county. And any contract or lease entered into must adhere to statutory time limits. R.C. 307.11. But when the Commissioners deem these requirements satisfied, they may, under R.C. 307.11, enter into contracts and leases to mine minerals upon lands owned by the county.

B

This brings me to your question. Does R.C. 307.11 authorize leases for the construction and operation of a Class II saltwater injection well involving disposal? I conclude that it does, as long as the injected material is the byproduct of the mining authorized by the lease, as opposed to the byproduct of mining occurring elsewhere.

Again, R.C. 307.11 says: “When the county would be benefited, the board of commissioners may make, execute, and deliver contracts or leases to *mine*...petroleum, gas... and other minerals upon lands owned by such county, to any person complying with the terms prescribed by the board as to consideration, rights of way, and occupancy of ground for necessary purposes.” (Emphasis added.) The answer to your question turns on whether a lease permitting the operation of a Class II saltwater injection well involving disposal is a lease “to mine” as that phrase is used in R.C. 307.11. It is.

The word “mine” is not defined under R.C. 307.11 itself. But its meaning is well known. When used as a verb in this context, “to mine” means “[t]o get (a natural constituent, as ore, metal, or hydrocarbons) from the earth by digging, blasting, etc.” *Webster’s Second New International Dictionary* 1563 (1948). That natural meaning fully accords with statutory definitions

elsewhere in the Revised Code, which define a “mine” as “an underground or surface excavation or development with or without shafts, slopes, drifts, or tunnels...for the extraction of natural gas or petroleum by means that are substantially similar to the underground extraction of...[minerals]; and embraces the land or property of the mining plant, the surface, and underground, that is used for or contributes to the mining properties, or concentration or handling of...natural gas or petroleum.” R.C. 1561.01(A). The verb “to mine” means to take minerals out of such an excavation or development.

That definition also covers Class II saltwater injection wells involving disposal. Reinjecting brines and other waste minerals underground is necessary to prevent ground water contamination and is a required part of the mining process. *See* R.C. 1509.22(C)-(D); *see also* R.C. Chapter 6109; 42 U.S.C.S. § 300f. The Ohio Safe Drinking Water Act sets standards for public water systems to protect humans and prevent unsafe contamination. *See* 1999 Op. Att’y Gen. No. 99-053, at 2-325 to 2-326; R.C. 6109.03. Thus, the injection of brines and other waste is a part of the mining process, and so a lease that permits the disposal of such waste as part of the mining process remains a lease “to mine.” Just as a car-rental contract implicitly authorizes the driver to expel the emissions that the car produces when driven, a contract to mine naturally encompasses the waste produced by the mining activity.

Critically, this conclusion only applies to disposal of brines and other waste created by the mining—the extraction of minerals—permitted by the lease. Waste produced from *other* mines or wells is not the unavoidable byproduct of the activity authorized by a lease “to mine,” and so wells designed to inject such waste are not part of the mining process for which leases may be made under R.C. 307.11. What is more, R.C. 307.11 authorizes Commissioners to make “leases to mine iron ore, stone, coal, petroleum, gas, salt, and other minerals upon lands *owned by such county*[.]”.

(Emphasis added.) A lease to dispose of waste produced on lands *not* owned by the county does not even arguably come within this section.

Finally, it is important to emphasize that, although Commissioners have the statutory authority to enter into a lease for a Class II saltwater injection well involving disposal, any construction or operation of such Class II saltwater injection well involving disposal remains subject to substantial regulatory authority of the ODNR. R.C. Chapter 1509; *State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d. 128, ¶ 3. Specifically, Class II saltwater injection wells involving disposal must comply with ODNR's regulations, for the injection of brines and other waste as a result of oil and gas production. R.C. 1509.22(C)-(D); *Athens Cty. Fracking Action Network v. Simmers*, 10th Dist. Franklin No. 16AP-133, 2016-Ohio-5388, ¶ 10-11. In addition, Class II saltwater injection wells involving disposal must comply with both the state and federal the Safe Drinking Water Acts. R.C. Chapter 6109; 42 U.S.C.S. § 300f. Again, the Commissioners' authority to enter into mineral leases does not free them from having to strictly follow ODNR's regulations or any other laws relating to mining.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

Pursuant to R.C. 307.11, a board of county commissioners has authority to execute leases of county-owned property for the purpose of the construction and use of a Class II saltwater injection well involving disposal, as long as: (1) the lease benefits the county; (2) the lease does not exceed the statutory time limits listed under the provision; and (3) the material being injected is the byproduct of the mining activity that the lease authorizes. However, the Ohio Department of Natural Resources retains regulatory

The Honorable James L. Peters

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authority over construction and operation of such a Class II saltwater injection well involving disposal under R.C. Chapter 1509.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style.

DAVE YOST
Ohio Attorney General