ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

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Arnold & Porter LLP is pleased to provide this summary of judicial decisions, settlements, case filings, and other litigation- and enforcement-related documents on hydraulic fracturing around the United States. It accompanies a litigation chart that the firm has posted online and will continually update, where the cases are organized by topic and where links are found to many of the decisions and pleadings. To be added to the free subscription list for this update service, or to send us additional decisions, complaints, or other litigation documents for posting, please e-mail Margaret Barry. You may also be interested in the Digest of Hydraulic Fracturing Cases published in January 2013 by the Center for Climate Change Law at Columbia Law School.

Arnold & Porter attorneys have a long history of counseling energy companies on regulatory compliance and defending their interests in enforcement proceedings and litigation. Information about the firm's experience with hydraulic fracturing is available here.

FEATURED DECISION

Center for Biological Diversity v. Bureau of Land Management, No. 11-CV-6174 (N.D. Cal. Mar. 31, 2013). In this challenge to the federal government's sale of oil and gas leases for nearly 2,700 acres of federal land in California, the court granted plaintiffs' motion for summary judgment as to their National Environmental Policy Act (NEPA) claims, finding that the potential use of horizontal drilling and hydraulic fracturing techniques in future well development had a "reasonably close causal relationship" to the action at issue even though single well development had been the norm in the past, and that the Bureau of Land Management (BLM) was unreasonable in categorically refusing to consider projections of drilling that included fracking operations. The court therefore found that BLM's environmental assessment and finding of no significant impact were erroneous as a matter of law. Rather than determining a remedy, the court ordered the parties to meet and confer and submit an appropriate judgment. The court denied plaintiffs' motion for summary judgment as to claims under the Mineral Leasing Act of 1920.

DECISIONS AND SETTLEMENTS

Civil Tort Actions

Strudley v. Antero Resources Corp., No. 12CA1251 (Colo. Ct. App. July 3, 2013). In this action alleging that natural gas drilling activities in the vicinity of plaintiffs' home caused property damage and personal injuries, the Colorado Court of Appeals reversed the trial court's "Lone Pine" order requiring plaintiffs to present prima facie evidence supporting their claims prior to commencement of discovery and a subsequent order dismissing plaintiffs' claims for failure to prove a prima facie case. The Court of Appeals held that Lone Pine orders are not permitted as a matter of Colorado law. The court cited two Colorado Supreme Court decisions disfavoring requirements that plaintiffs provide prima facie evidence of their claims prior to discovery and found that recent amendments to the Colorado Rules of Civil Procedure (CRCP) were not "so substantial as to effectively overrule" these decisions. The court further held that even if the CRCP amendments did overrule the Supreme Court decisions, a Lone Pine order would not be called for in this particular case, which was neither a mass tort case nor as complex as cases in which Lone Pine orders were issued in other jurisdictions.

Baker v. Anschutz Exploration Corp., No. 11-CV-6119 (W.D.N.Y. June 27, 2013). In this lawsuit by 15 landowners against companies that engaged in drilling activities on properties in close proximity to plaintiffs' properties, the court denied defendants' motion to strike plaintiffs' expert reports for failure to comply with the court's Lone Pine order, which had required plaintiffs to present certain prima facie evidence to support their claims. Though conceding that the expert reports were "far from models of clarity," the court rejected

defendants' contention that the reports failed to comply with the court's order to identify specific hazardous substances to which plaintiffs claimed exposure and to provide an explanation of causation. In the same decision and order, the court denied plaintiffs' motion to remand the proceeding to state court since plaintiffs no longer had a basis for arguing that a lack of diversity compelled remand in light of the stipulation and order dismissing Conrad Geoscience Corporation from the case.

Scoggin v. Cudd Pumping Services, Inc., No. 11-CV-00678 (E.D. Ark. June 10, 2013). This action was commenced by a grandmother on behalf of her minor grandchildren who resided with her and who were allegedly exposed to "noxious and poisonous carcinogenic matter and compounds" as a result of their home's proximity to hydraulic fracturing operations. Plaintiffs alleged strict liability, nuisance, trespass, and negligence claims and sought compensatory and punitive damages as well as establishment of a medical monitoring fund. On June 10, 2013, plaintiffs and defendants filed a stipulation to dismiss the action without prejudice.

In re Lipsky, No. 02-12-00348-CV (Tex. Ct. App. Fort Worth Apr. 22, 2013). In a lawsuit filed in 2011 (*Lipsky v. Durant, Carter, Coleman LLC*, No. 11CV-0798 (Tex. Dist. Ct. Parker Co.)), a husband and wife alleged that hydraulic fracturing near their property in Texas contaminated their water supply well. In July 2011, defendants Range Production Co. and Range Resources Corp. (Range) filed a counterclaim, alleging that plaintiffs and an environmental consultant conspired to harm Range's reputation. Among other things, the company alleged that plaintiffs and the consultant conspired to persuade EPA to get involved in the matter by using false and misleading data. In January 2012, the trial court dismissed plaintiffs' claims on jurisdictional grounds, holding that plaintiffs were required to appeal a March 2011 decision of the Railroad Commission of Texas that approved a report finding that Range had not caused the contamination in plaintiffs' well. In June 2012, the trial court denied plaintiffs' motion to dismiss Range's counterclaims as barred by the Texas Citizens' Participation Act, an anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. In August 2012, an appellate court dismissed plaintiffs' appeal for lack of jurisdiction, citing an earlier ruling that it did not have jurisdiction over interlocutory appeals from trial court orders denying motions to dismiss under the anti-SLAPP statute. The appellate court granted plaintiffs' request that the appeal be converted to an original proceeding seeking a writ of mandamus. In the original proceeding for a writ of mandamus concerning whether the trial court abused its discretion in denying motions to dismiss Range's counterclaims against the landowner plaintiffs and an environmental consultant (relators), the appellate court determined that relators had met their initial burden of establishing that Range's counterclaims were based on relators' exercise of their right to free speech and right to petition. The court of appeals further ruled that the trial court did not clearly abuse its discretion in determining that Range had presented clear and specific evidence to establish a prima facie case for its defamation and business disparagement claims against relator Steven Lipsky, but that it had abused its discretion in determining that prima facie cases for such claims had been made against the other relators. The court also ruled that the trial court abused its discretion in denying the motions to dismiss the civil conspiracy and "aiding and abetting" counterclaims against all relators. Finding that relators had no adequate remedy on appeal, the court conditionally granted writs of mandamus and ordered the trial court to dismiss the civil conspiracy and aiding and abetting claims against Steven Lipsky and all claims against the other relators.

Bombardiere v. Schlumberger Tech. Corp., No. 1:11-CV-50 (N.D. W. Va. Apr. 16, 2013). In this action, plaintiff alleged that he had been injured by exposure to hydraulic fracturing chemicals in the course of his work at gas wells. He asserted the following counts: negligence/willful, wanton and reckless misconduct; deliberate intent pursuant to West Virginia Code § 23-4-2(c) (Workers' Compensation Act); alter ego; agency; strict liability/ultrahazardous activity; preparation and use of proprietary chemical fracking fluids; wrongful interference with employment/wrongful interference with protected property interests; and punitive damages. In a series of decisions on defendants' motions for summary judgment issued on January 30, January 31, February 1, and February 21, 2013, the court dismissed all defendants but Schlumberger Technology Corp. (Schlumberger) from the action and dismissed all but the deliberate intent count against Schlumberger. In March 2013, a federal jury rendered a verdict in favor of Schlumberger on the remaining claim, and judgment was entered in April 2013.

Magers v. Chesapeake Appalachia LLC, No. 5:12-cv-49 (N.D. W.Va. Apr. 10, 2013). Plaintiffs alleged that defendants' gas drilling and storage activities on property adjacent to plaintiffs' land caused methane pollution in their water. The court denied a motion to dismiss for failure to state a claim, but granted an alternative motion to require a more definite statement—and instructed plaintiffs to include more "succinct allegations" against the individual defendants outlining their individual contributions to the alleged injury.

Harris v. Devon Energy Prod. Co., L.P., No. 12-40137 (5th Cir. Dec. 7, 2012). In this appeal of a district court decision adopting a magistrate judge's Report and Recommendation and granting plaintiffs' motion to dismiss without prejudice after testing revealed that contamination was no longer present in their well, the Fifth Circuit ruled in an unpublished opinion that the district court had abused its discretion and held that the lawsuit should

be dismissed with prejudice. Noting that plaintiffs had conceded that they could not prove that defendant's drilling activities caused the contamination in their well and that there was no evidence explaining the lab report upon which the complaint was based, the Fifth Circuit concluded that plaintiffs sought to avoid an imminent adverse result on summary judgment—which was sufficient to cause plain legal prejudice to defendant.

Challenges to Municipal Action

Matter of Norse Energy Corp. USA v. Town of Dryden (N.Y. App. Div. 3d Dep't May 2, 2013); ***Cooperstown Holstein Corp. v. Town of Middlefield*** (N.Y. App. Div. 3d Dep't May 2, 2013). In these challenges to local zoning laws that barred oil and gas drilling activities, the New York State Appellate Division, Third Department affirmed the decisions of the courts below, holding that the New York State Oil, Gas and Solution Mining Law (OGSML) neither expressly nor impliedly preempted the Towns' zoning ordinances. With respect to express preemption, the Third Department held that the statutory text, legislative history and decisional law supported a conclusion that the OGSML did not preempt local bans on activities relating to oil and gas drilling. With respect to implied preemption, the court concluded that the OGSML did not conflict with local laws, finding that the local laws dictated the districts in which drilling could occur, while the OGSML mandated technical and operational requirements for drilling activities within such districts. On May 31, 2013, petitioners asked the New York State Court of Appeals for leave to appeal the Third Department's decisions.

Lenape Resources, Inc. v. Town of Avon, Index No. 1060-2012 (N.Y. Sup. Ct. Livingston Co. Mar. 15, 2013). The Town of Avon enacted a one-year moratorium on natural gas drilling activities within the Town. Plaintiff challenged the moratorium on a number of grounds. Plaintiff's principal contention was that the moratorium was expressly preempted by the OGSML, which provides that the OGSML "supersedes all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." Citing the Court of Appeals decision in *Frew Run Gravel Products v. Town of Carroll* (but writing that "[i]n this Court's view, the Court of Appeals' decision in Frew Run is flawed"), the court concluded that the local law enacting the moratorium was not preempted because it did not relate to the regulation of the oil, gas and solution mining industries but was concerned instead with general land use planning. The court quickly disposed of plaintiff's other contentions, including that the moratorium constituted an unreasonable use of the Town's police power (rejected on the ground that the moratorium was enacted pursuant to the Town's zoning authority, not its police powers); that the moratorium violated the ex post facto clause (rejected on the basis that the moratorium did not make past conduct prospectively criminal); that the moratorium was enacted in violation of the State Environmental Quality Review Act (SEQRA) (rejected on the basis that the moratorium was a Type II action not subject to SEQRA review); that the enactment of the moratorium was arbitrary and capricious (rejected on the ground that as a legislative enactment the moratorium was a valid exercise of the Town's zoning authority); that the moratorium was inconsistent with the Town's comprehensive plan (rejected on the basis that there was not a clear conflict with the plan); and that the Town's actions constituted a taking (rejected on ripeness grounds). The court also dismissed the proceeding against the Department of Environmental Conservation for failure to properly serve the Attorney General. Plaintiff has filed a notice of appeal to the New York State Appellate Division, Fourth Department.

State ex rel. Morrison v. Beck Energy Corp., 2013-Ohio-356 (Ohio Ct. App. Feb. 6, 2013). The Ohio Court of Appeals reversed a trial court order granting an injunction to the City of Munroe Falls, Ohio, which had issued stop work orders and filed a complaint to stop drilling activities within City limits for which permits had been issued by the Ohio Department of Natural Resources. The City claimed that the work violated local drilling, zoning, and rights-of-way ordinances. The appellate court ruled that the State's oil and gas drilling statute conflicted with and thus preempted the local drilling ordinances as well as the City's requirements for obtaining zoning certificates for drilling activities. The City's rights-of-way ordinances were not preempted but could not be enforced "in a way that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations." On June 19, 2013, the Ohio Supreme Court accepted an appeal of this decision for review.

Challenges to Agency Action

Matter of Encana Oil & Gas (USA) Inc., Case No. U-17195 (Mich. Pub. Serv. Comm'n June 28, 2013). The Michigan Public Service Commission (MPSC) approved the construction and operation of two natural gas pipelines. Petitioners filed a petition to intervene, consolidate proceedings, vacate the decisions, and hold a hearing to receive additional evidence. They also filed a claim of appeal in the Michigan Court of Appeals, which was stayed during the pendency of the MPSC petition. In April 2013, MPSC denied the request to intervene for lack of standing. Petitioners moved for reconsideration. On reconsideration, MPSC concluded that due to limited jurisdiction it could not consider environmental issues and that petitioners had brought their challenge in the wrong forum.

Mont. Envtl. Info. Ctr. v. BLM, (D. Mont. June 14, 2013). In this challenge to BLM's decisions approving oil and gas leases on public lands, plaintiffs asserted that BLM had failed to comply with NEPA because BLM allegedly failed to adequately consider climate change impacts. The court granted defendants' motion for summary judgment and dismissed the lawsuit on standing grounds, finding that plaintiffs had failed to establish injury-in-fact. Noting that plaintiffs' recreational and aesthetic interests were "uniformly local" and the effects of greenhouse gas emissions "diffuse and unpredictable," the court found that plaintiffs had presented "no scientific evidence or recorded scientific observations to support their assertions that BLM's leasing decisions will present a threat of climate change impacts on lands near the lease sites." The court further held that plaintiffs had made no effort to show that methane emissions from the lease sites would make a "meaningful contribution" to global warming and had thus failed to show that potential climate change impacts to the local environment were "fairly traceable" to greenhouse gas emissions associated with the challenged leases.

In re West Bay Exploration Co., UIC App. Nos. 13-01 & 13-02 (E.A.B. Apr. 16, 2013). Petitioners challenged an underground injection control permit for an oil and gas-related brine wastewater disposal well in Mississippi issued to West Bay Exploration Co. by the Environmental Protection Agency (EPA) Region V. Among other things, the petitions challenged EPA's findings that the permitted injection would not contaminate underground sources of water and that the well would not adversely affect endangered species, including the Indiana bat. The Environmental Appeals Board dismissed the petitions as moot after the Region V regional administrator unilaterally withdrew the permit.

In re Stonehaven Energy Mgmt., LLC, UIC Appeal No. 12-02 (E.A.B. Mar. 28, 2013). Petitioner sought review of EPA Region III's issuance of an underground injection control permit to Stonehaven Energy Management Co., LLC, which intended to convert an existing well to an injection well for disposal of brine produced from Stonehaven's oil production operations. The Environmental Appeals Board remanded the permit in part, finding that Region III had not responded adequately to public comments regarding the risks of contamination of underground sources of water due to earthquakes or faults.

Western Energy Alliance v. Salazar, No. 11-8071 (10th Cir. Mar. 12, 2013). Plaintiffs sued BLM alleging that it violated the Mineral Leasing Act by failing to issue oil and gas leases within 60 days of the dates on which the top qualified bidders paid for the leases. In 2011, the district court ruled that BLM was required to determine whether or not lands are to be leased within 60 days of payment, but was not required to issue the lease within the 60-day timeframe. In 2013, the Tenth Circuit dismissed the plaintiffs' appeal on the jurisdictional ground that the district court's June 2011 decision and order was not a "final decision" because the court had remanded the matter back to the agency for further action.

Challenges to State and Federal Laws and Regulations

American Petroleum Institute v. EPA, (D.C. Cir. Apr. 3, 2013). Petitioners in these consolidated proceedings challenge EPA's air pollution standards for certain source categories in the oil and gas sector, including natural gas processing plants and gas wells. In a clerk's order, the court granted EPA's unopposed motion to sever the challenge to the new source performance standards (NSPSs) from the challenge to the national emissions standards for hazardous air pollutants (NESHAPs). The challenges were suspended pending EPA action on petitions for reconsideration. The NSPS challenge is to be held in abeyance until August 30, 2013. The NESHAP challenge is to be held in abeyance until May 30, 2014, with a progress report due to the court from EPA on October 1, 2013. In January 2013, the court granted the state of Texas petitioners' motion for voluntary dismissal. The Texas petitioners had informed the court that they believed that "the issues in this case more directly affect the industry petitioners and can be fully and adequately addressed by them."

Pa. Envtl. Def. Found. v. Commonwealth of Pennsylvania, No. 228 M.D. 2012 (Jan. 22, 2013). Plaintiff challenged the constitutionality of various legislative enactments that plaintiff alleged impermissibly diverted funds from the Oil and Gas Lease Fund—which was created exclusively to preserve state parks and forests in connection with extraction activities on public lands—to the General Fund and other funds. Plaintiff also alleged that the laws compelled leasing of State forest lands without evaluation of potential harm to the State's natural resources in violation of the State's obligation as trustee. Pennsylvania's constitution imposes the duty to "conserve and maintain" Pennsylvania's public natural resources "for the benefit of all the people," including future generations. In January 2013, the court overruled the Commonwealth's preliminary objections, which challenged the legal sufficiency of the allegations and argued that they presented non-justiciable political questions.

Government Enforcement Actions

D & L Energy, Inc. v. Div. of Oil & Gas Resources Mgmt., Appeal No. 847 (Ohio Oil & Gas Comm'n June

2013). D & L Energy, Inc. (D&L) appealed an order of the Ohio Division of Oil and Gas Resources Management revoking saltwater injection well permits held by D&L, denying applications for new injection wells, ordering cessation of use of a temporary storage facility, and ordering disposal of all oilfield waste at the temporary facility within a specified timeframe. This order effectively terminated D&L's oilfield waste disposal operations in Ohio. On appeal, the Ohio Oil and Gas Commission affirmed the order, finding that the Division chief had authority to revoke permits and that D&L's participation in an illegal dumping incident in January 2013 was "so egregious" as to justify the draconian effects of the mandates in the Division chief's order.

Matter of Fluid Recovery Services, LLC, Docket No. CWA-03-2013-0051DN; ***Matter of Hart Resource Technologies, Inc.***, Docket No. CWA-03-2013-0049; ***Matter of Pennsylvania Brine Treatment, Inc.***, Docket No. CWA-03-2013-0050 (EPA Region III May 2013). EPA entered into consent agreements and final orders (CAFOs) with two companies that operated wastewater treatment facilities in western Pennsylvania and an administrative order for compliance on consent (AOCOC) with the two companies and a third company that was to become their successor in interest. The CAFOs and AOCOC settled alleged violations of National Pollutant Discharge Elimination System (NPDES) permits. The violations were associated with the treatment of wastewater produced by shale gas extraction activities. The AOCOC barred the wastewater treatment facilities operated by respondents from discharging wastewater from shale gas extraction activities until certain improvements had been made at the facilities and Water Quality Management permits and renewed or modified NPDES permits that specified more stringent discharge limitations had been obtained.

U.S. v. SG Interests I, Ltd., No. 12-cv-00395 (D. Colo. Dec. 12, 2012; Apr. 22, 2013). In a civil antitrust action, the U.S. alleged that Gunnison Energy Corporation (GEC) and SG Interests I, Ltd. and SG Interests VII, Ltd. (collectively, SGI) violated section 1 of the Sherman Act (15 U.S.C. § 1). In 2005, the companies—which acquired and developed gas leases in the Ragged Mountain Area in Colorado—entered into a memorandum of understanding that provided that only SGI would bid on certain leases offered by BLM and that if SGI won the auction it would assign a 50-percent interest to GEC at a cost. In December 2012, the district court rejected a settlement proffered by the parties as not in the public interest and denied a motion for entry of final judgment. The court found that it was inappropriate to combine settlement of the antitrust allegations with settlement of False Claims Act claims pending in a separate lawsuit. Moreover, the court cited the "unrepentant arrogance" of GEC in its response to public comments on the proposed settlement and found that it would not be in the public interest to permit a defendant "to leave its civil action in such a smirking, self-righteous attitude." The court found no basis for saying that the settlement would deter defendants or other actors in the industry, noting that GEC had indicated that "joint bidding" was a common practice. In April 2013, the district court approved a settlement that did not involve the False Claims Act claims, which were settled separately. The court entered final judgment with respect to both SGI and GEC.

Oil & Gas Disputes

Caldwell v. Kriebel Resources Co., LLC, No. 1305 WDA 2012 (Pa. Super. Ct. June 21, 2013). The Pennsylvania Superior Court affirmed the dismissal by the Court of Common Pleas of plaintiffs' amended complaint. Plaintiffs had entered into an oil and gas agreement in 2001 with defendant Kriebel Resources Co., LLC. The agreement provided for a two-year term that could be extended so long as oil or gas was being produced. Plaintiffs sought to terminate the lease, alleging that defendants had only engaged in shallow gas drilling and had not initiated development activities for the Marcellus shale. The Superior Court declined to read an implied covenant to develop all strata of natural gas into the 2001 agreement, and also rejected plaintiffs' claim that defendants had breached an implied covenant to develop in "paying quantities." The court also was not persuaded that it should impose a "good faith" standard for all aspects of the industry that affect natural gas production and therefore give plaintiffs an opportunity to show that defendants had not acted in good faith as to the amount of gas being produced from plaintiffs' property.

Vodenichar v. Halcon Energy Properties, Inc., No. 13-cv-00360 (W.D. Pa. Apr. 4, 2013). Plaintiff landowners initiated this class action lawsuit alleging breaches of contracts against energy companies. Plaintiffs had previously initiated a federal lawsuit against Halcon Energy Properties, Inc. (Halcon) under the court's diversity jurisdiction, which they voluntarily dismissed after Halcon indicated it would join two Pennsylvania companies. After plaintiffs reinitiated their lawsuit in Pennsylvania state court, Halcon removed the action, claiming that it fell within the scope of the Class Action Fairness Act. The federal court remanded the action, finding that the "home state exception" applied because plaintiffs had established that at least two-thirds of the plaintiffs and the "primary defendants" (which did not include Halcon) were Pennsylvania citizens.

Other Land Use and Property Rights Disputes

Matter of Cent. N.Y. Oil & Gas Co., LLC, No. 515347 (N.Y. App. Div. 3d Dep't June 13, 2013). Petitioner

owns a natural gas underground storage facility in Tioga County, New York. In condemnation proceedings to acquire perpetual easements for underground gas storage in land owned by respondents, respondents sought to introduce the testimony of a geologist that the easement would interfere with their rights to develop gas in the Marcellus and Utica shale formations. The New York State Supreme Court, Tioga County barred the expert from testifying, and the Appellate Division, Third Department affirmed, finding that the expert's testimony was not relevant. The terms of the easement explicitly reserved to respondents the right to grant oil and gas rights in formations others than those in the Oriskany Sandstone formation. Moreover, no commercial development of the Marcellus shale was currently taking place as a result of a New York State moratorium on hydraulic fracturing, so an analysis of the potential effects of such activity would be "premature and speculative." If hydraulic fracturing eventually proved to pose an unacceptable risk to petitioner's storage facility, petitioner could at such time seek to acquire whatever additional rights were necessary.

Vavala v. Hall, No. 1147 WDA 2011 (Pa. Super. Ct. May 1, 2013). In 2009, plaintiffs filed a complaint to quiet title with respect to a 71.28-acre tract they owned in Fox Township, Pennsylvania. They alleged that defendants had not paid taxes on the oil and gas rights appurtenant to the property and further alleged that they had obtained the oil and gas rights through adverse possession or abandonment. The trial court granted plaintiffs' motion for service by publication, and subsequently granted their motion for default judgment. In March 2010, six months after entry of judgment and publication of the judgment in two local newspapers, appellant Seneca Resources Corp. sought to open or strike the judgment, claiming that it was the successor to the oil and gas rights. The trial court denied Seneca's motion. On appeal, the Superior Court concluded that notice by publication was appropriate and that the trial court therefore had jurisdiction. The Superior Court further found that the trial court had not abused its discretion in denying Seneca's petition to open the judgment because Seneca's petition was untimely.

Butler v. Charles Powers Estate, No. 27 MAP 2012 (Pa. Apr. 24, 2013). In this action to quiet title, the Pennsylvania Superior Court had reversed a trial court order and ruled that it was unclear whether Marcellus shale constituted a type of mineral such that the gas in it fell within the deed's reservation of rights for "minerals." The Pennsylvania Supreme Court reversed the Superior Court's decision and reinstated the order of the trial court. Citing the longstanding Dunham Rule (derived from *Dunham & Shortt v. Kirkpatrick*, 101 Pa. 36 (Pa. 1882), and its progeny), the Supreme Court held that the trial court correctly concluded that Marcellus shale natural gas was not contemplated in the reservation of rights.

Stone v. Chesapeake Appalachia, LLC, No. 5:12-cv-00102 (N.D. W. Va. Apr. 10, 2013). Plaintiffs, who were parties to a lease held by defendants for the oil and gas within and underlying their property, commenced this action alleging (1) breach of contract based on defendants' pooling and unitizing the Marcellus shale formation underlying plaintiffs' property in violation of their lease; (2) trespass by engaging in hydraulic fracturing on plaintiffs' property; and (3) that the defendants failed to protect plaintiffs' property from drainage. The court denied defendants' motion for summary judgment. The court found that hydraulic fracturing under the land of a neighboring property without that party's consent is not protected by the "rule of capture," but rather constitutes an actionable trespass. In reaching this conclusion, the court determined that the West Virginia Supreme Court would not adopt the "rule of capture" principles ascribed to in the Texas Supreme Court's *Coastal Oil & Gas Corp. v. Garza Energy Trust* decision, which in the court's view "gives oil and gas operators a blank check to steal from the small landowner." The court also denied summary judgment on the breach of contract and drainage claims.

Cain v. XTO Energy Inc., No. 1:11-cv-111 (N.D. W. Va. Mar. 28, 2013). Plaintiff sought declaratory and injunctive relief to prevent the surface of his land from being used to drill horizontal wells to produce oil and gas from neighboring mineral tracts that do not underlie his land. He alleged that plaintiffs had permits to drill three horizontal wells from one well site on his property, and that plans were underway for additional well sites and horizontal wells, and that these wells would be used to produce gas from tracts beyond the mineral tract of which his land was once a part. In an order filed on March 28, 2013, the court certified to the West Virginia Supreme Court the question of whether a mineral owner or lessee, whose rights are expressly limited by deed to surface rights for the production of oil and/or gas within and underlying the subject tract, nonetheless may use the surface for the production of oil and/or gas that is not within and underlying the subject tract. The court denied plaintiff's motion to certify other questions that concerned damages since the factual record was underdeveloped on the issue of damages and since any number of issues could moot the question of damages.

Freedom of Information Lawsuits

Heavens v. Pennsylvania Department of Environmental Protection, 912 CD 2012 (Pa. Commw. Ct. Apr. 9, 2013). Plaintiff had requested documents from the Pennsylvania Department of Environmental Protection

(PADEP) in connection with a tank fire accident at a natural gas drilling site. PADEP declined to provide some documents on the ground that they were exempted from public access requirements. The court upheld PADEP's determination, finding that PADEP had shown that the records fell within the noncriminal investigation exception or were protected by the attorney-client or work product doctrine privileges.

Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission, No. 94650-C (Wyo. Dist. Ct. Mar. 21, 2013). Four environmental groups filed a lawsuit alleging that the Wyoming Oil and Gas Conservation Commission unlawfully withheld the identities of hydraulic fracturing chemicals used by oil and gas producers. The complaint challenges Wyoming's application of the trade secret exception under Commission rules that otherwise require oil and gas companies to disclose the chemicals they use in the hydraulic fracturing process. In March 2013, the Wyoming district court affirmed the agency's determination that the information constituted trade secrets and was therefore exempt from disclosure. Plaintiffs are appealing the ruling to the Wyoming Supreme Court.

Citizens for a Healthy Cmty. v. U.S. Dep't of Interior, No. 12-cv-01661 (D. Colo. Feb. 13, 2013). Plaintiff challenged BLM's withholding of information requested under the federal Freedom of Information Act (FOIA). Plaintiff had requested Expressions of Interest (EOIs) for parcels in Colorado that were to be included in an upcoming sale of oil and gas leases, as well as all documents related to such EOIs. BLM declined to disclose certain information, including the identities of parties submitting EOIs. On administrative appeal, the Department of the Interior invoked FOIA's exemption for commercial or financial information obtained from a person that is privileged or confidential (Exemption 4) as the basis for withholding the information. The court granted summary judgment to plaintiff on its FOIA claim, finding that Exemption 4 did not shield the information provided by an EOI submitter. The court rejected defendants' contention that it was necessary to exempt such information from disclosure because exploration for oil and gas on public lands was very competitive and businesses' interest in certain parcels and their preliminary investigative work to determine which parcels they were interested in should therefore be protected information. The court found that this contention "runs directly contrary to the purpose of the public sale process," noting that competition in bidding would promote fair pricing for publicly owned minerals and that disclosure of the EOI information would permit plaintiff and others to raise concerns regarding the stewardship records of potential owners. The court subsequently denied a motion to intervene by the Western Energy Alliance, which sought to intervene for the sole purpose of filing an appeal. The federal defendants declined to appeal, and in April 2013 the requested information was released.

Constitutional Claims

NRDC v. Town of Sanford, N.Y., No. 3:13-CV-163 (N.D.N.Y. Apr. 18, 2013). In February 2013, plaintiffs Natural Resources Defense Council and Catskill Citizens for Clean Energy challenged a resolution of the Town of Sanford, New York that barred discussion of natural gas development during the public participation portion of defendant's Town Board meetings. Plaintiff organizations alleged that the resolution violated their members' state and federal constitutional rights. The Town repealed the resolution, and on April 18, 2013 the court entered a stipulation dismissing the action.

CASES AND FILINGS

Challenges to Municipal Action

Matter of Grafe-Kieklak v. Town of Sidney, Index No. 2013-602 (N.Y. Sup. Ct. Delaware Co. filed June 12, 2013). Petitioners challenged the Town of Sidney's temporary moratorium on oil and gas drilling activities within the Town. Petitioners claimed that the Town Board did not follow proper procedures in enacting the moratorium. The complaint's claims draw from the decision in *Jeffrey v. Ryan* (N.Y. Sup. Ct. Binghamton Co. Oct. 2, 2012) that struck down a drilling moratorium in the City of Binghamton.

Colo. Oil & Gas Ass'n v. Longmont, (Colo. Dist. Ct., filed Dec. 2012). Plaintiff challenged a City of Longmont resolution approved by voters in November 2012 that prohibited hydraulic fracturing within the City's limits. Among other claims, plaintiff alleged that the resolution was an illegal, *de facto* ban on oil and gas drilling and was preempted by state law. Plaintiff further alleged that the resolution imposed a regulatory taking without compensation.

Challenges to Agency Action

Manning v. Pa. Dep't of Envtl. Protection, No. 2013-67 (Pa. Envtl. Hearing Bd. May 29, 2013). Petitioners appealed the PADEP determination that drilling activities near their property were not the cause of methane

contamination in their private water supply. They argued that PADEP's determination provided insufficient information about the sampling data and methodology to support the conclusion.

Center for Biological Diversity v. Jewell, No. 13-CV-1749 (N.D. Cal., filed Apr. 18, 2013). Plaintiffs asserted a NEPA challenge to BLM's sale of oil and gas leases for almost 18,000 acres of federal land in California. Plaintiffs alleged that in asserting that only one well would be drilled on each acre, BLM failed to address the potential impacts of hydraulic fracturing on water and air quality and other resources.

Ctr. for Biological Diversity v. Cal. Dep't of Conservation, No. RG13664534 (Cal. Super. Ct., filed Jan. 24, 2013). The Center for Biological Diversity commenced this action seeking declaratory and injunctive relief in connection with the permitting practices of the Division of Oil, Gas and Geothermal Resources (DOGGR) of the California Department of Conservation. Plaintiff alleged that DOGGR issues permits for oil and gas operations in violation of California's underground injection control program and in violation of DOGGR's mandate under the California Public Resources Code to approve and supervise all oil and gas extraction so as to prevent, as far as possible, damage to life, health, property, and natural resources.

S. Utah Wilderness Alliance v. BLM, No. 13-cv-00047 (D. Utah, filed Jan. 18, 2013). Plaintiffs challenged the federal defendants' approvals of the Gasco Energy Inc. Uinta Basin Natural Gas Development Project in Utah. Plaintiffs alleged that BLM violated NEPA in approving the project. Less than a month later, plaintiffs filed a notice of dismissal.

Citizen Suits

Clean Air Council, 60-Day Notice of Intent to Sue (May 30, 2013). The Clean Air Council (CAC) submitted to EPA a 60-day Notice of Intent to Sue, citing EPA's failure to respond to a February 2012 petition in which CAC asked EPA (1) to make a finding that Pennsylvania was not implementing the requirements of its State Implementation Plan, (2) to determine that Pennsylvania was not adequately administering and enforcing its Clean Air Act Title V permitting program, and (3) to apply sanctions for these failures. These failures are in connection with Pennsylvania's alleged failure "to perform legally adequate and complete single source determinations for the oil and gas industries."

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Arnold & Porter attorneys have a long history of counseling energy companies on regulatory compliance and defending their interests in enforcement proceedings and litigation. Information about the firm's experience with hydraulic fracturing is available here.