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Recent Pa. Fracking Charges May Set A New Trend

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Law360, New York (October 15, 2013, 1:33 PM ET) -- The Pennsylvania attorney general's office recently brought criminal charges against an energy company for alleged fracking-related offenses in Penn Township, Pa. On Sept. 10, 2013, on the recommendation of a statewide investigating grand jury, Pennsylvania charged XTO Energy Inc., a subsidiary of ExxonMobil, with eight criminal counts — five counts of unlawful conduct under Pennsylvania's Clean Streams Law and three counts of unlawful conduct under the commonwealth's Solid Waste Management Act. The company is alleged to have unlawfully disposed of waste liquids from the fracking process, contaminating a stream with chlorides, barium, strontium and other materials.

The Pennsylvania charges, which come on the heels of a federal consent decree based on much of the same underlying alleged conduct, may signal a new direction in regulation of the fracking industry. Although businesses operating in the fracking area have long recognized the possibility of federal criminal enforcement, Pennsylvania's prosecution of XTO could be a sign of a trend toward state criminal enforcement.

Regardless of the case's conclusion, it serves as a useful reminder that companies in the area may find themselves subject to prosecution in two courts, under two sets of laws, based on the same core set of facts.

Background

Hydraulic fracturing, commonly known as fracking, has been transforming the U.S. energy market by enabling the extraction of natural gas and oil from geological formations previously beyond energy companies' reach.

Fracking involves the injection of high-pressure liquid into a well to open fractures in the rock formation. After the rock has been fractured, pressure in the well is reduced, permitting hydrocarbons propelled by the pore pressure of the rock formation to flow into the well and back toward the wellhead. The fracking process tends to generate large volumes of waste liquids, which have been the subject of substantial litigation.[1]

XTO Energy's Marquardt well site in Penn Township — about 20 miles east of Pittsburgh — is built on the Marcellus Shale. The Marcellus Shale runs through Virginia, most of West Virginia, western Maryland, eastern Ohio, much of Pennsylvania and up into New York and has been a focal point of natural gas fracking activity in the northeastern United States.

XTO has two wells at the Marquardt site. The state criminal charges originated with a November 2010 site visit by an inspector from the Pennsylvania Department of Environmental Protection. When the inspector arrived at the Marquardt site, which was deserted at the time, he allegedly "heard the sound of running water coming from the rear of a waste water storage tank."

The inspector investigated, allegedly finding that a valve on the 21,000 gallon tank had been left open, draining waste fracking solution onto the ground. He reported finding signs that unpermitted discharges had taken place from five additional tanks and noted that “drain plugs had been removed or were missing from the rear valves on numerous other storage tanks.”

According to the grand jury presentment — as the document in which the grand jury recommends charges is known in Pennsylvania — investigators found that an unnamed tributary running by the Marquardt site “was polluted by elevated levels of chlorides, aluminum, barium, and total dissolved solids.”

The presentment alleges that these same substances were identified in water puddled on the ground near the tank which had been draining liquid. According to the presentment, “[t]he discharge of waste water at the Marquardt site necessitated the excavation and removal of approximately 3,098 tons of contaminated soil.”

The grand jury found that XTO stored waste fracking liquids at the Marquardt site not only from the site’s two wells but also from three other nearby wells. Based in part on records of waste liquids transported to the site from these other wells, the grand jury found that “[a]pproximately 57,000 gallons of gas well waste water ... was unaccounted for following the spill on November 16, 2010.”

Neither the presentment nor the criminal complaint based on it allege that XTO intentionally discharged pollutants, but the Pennsylvania statutes at issue do not require such a showing. The criminal complaint charges XTO with five counts of negligent discharge in violation of Pennsylvania’s Clean Streams Law — a second-degree misdemeanor.[2]

The three Pennsylvania Solid Waste Management Act counts are based on a strict-liability provision which permits the commonwealth to convict a defendant of a third-degree misdemeanor without introducing any evidence of the defendant’s mental state.[3]

Pennsylvania long has had investigators and prosecutors who specialize in environmental crimes. The commonwealth’s Environmental Crimes Section is descended from a unit founded in 1980 — one of the first offices in the nation to specialize in the investigation of environmental crimes.

Given Pennsylvania’s longstanding and active environmental crimes program, the commonwealth certainly has the expertise necessary to investigate and prosecute a case of this type. Still, it is interesting that criminal charges in such a significant case have been brought by Pennsylvania rather than by the federal government.

The U.S. Department of Justice did bring a civil Clean Water Act action against XTO based on the alleged discharges at the Marquardt site. The DOJ and XTO resolved the federal civil action in June of this year in a consent decree.

In the consent decree, XTO admitted no liability for the Marquardt discharges and agreed to pay a \$100,000 fine. XTO also agreed to make \$20 million in upgrades to its wastewater management systems in Pennsylvania and West Virginia; it is not apparent from the consent decree whether these upgrades constitute additional work that would not have been required but for the consent decree or whether certain upgrades may already have been mandatory under existing or soon-to-be instituted regulations.[4]

Less than three months after DOJ and XTO signed the federal consent decree, Pennsylvania announced state criminal charges.

The Feds and the States: Looking Forward

A federal criminal case under the Clean Water Act would face hurdles not present in a Pennsylvania state case. To establish federal jurisdiction, for example, the DOJ would have to show beyond a reasonable doubt that XTO discharged a pollutant into the “waters of the United States” as that term is defined in the U.S. Supreme Court’s tangled *Rapanos* decision, which curtailed the jurisdictional reach of the Clean Water Act.^[5]

Although the DOJ would have had to prove the existence of a jurisdictional water in a civil case too, the government only would have had to do so by a preponderance of the evidence — a significantly lower burden.

Rapanos’ requirements are far from the only challenge federal prosecutors face in the fracking arena. Both civil and criminal prosecutors must contend with the federal Energy Policy Act of 2005, which substantially limits the applicability of the federal Safe Drinking Water Act and the Clean Water Act with respect to fracking-related activities.

Although federal prosecutors still are able to pursue fracking-related cases in some circumstances — especially under the Clean Water Act — the legal environment can be less than hospitable to federal action, and the obstacles to federal prosecution are greater in the criminal arena.^[6]

Only time will tell whether Pennsylvania’s criminal prosecution of XTO signals the beginning of a trend. The case should be closely watched, however, both in Pennsylvania and in other states with substantial fracking activity. Depending on the case’s outcome, it may encourage or discourage similar prosecutions elsewhere.

In any event, the case highlights the possibility of state criminal action and is a useful reminder that fracking companies facing possible prosecution will be well advised to keep their eyes on both federal and state enforcement authorities.

[1][1] Existing case law is summarized in the Hydraulic Fracturing Case Chart, available at <http://www.arnoldporter.com/resources/documents/Hydraulic%20Fracturing%20Case%20Chart.pdf>.

[2][1] See 35 P.S. §§ 691.611(1), (2), (4); 691.602(b).

[3][1] See 35 P.S. §§ 6018.610; 606(b).

[4][1] See, e.g., Pennsylvania Department of Environmental Protection, Environmental Quality Board Approves Proposed Regulation for Oil and Gas Surface Activities (Aug. 27, 2013), available at <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=20140&typeid=1> (discussing proposed Pennsylvania regulations).

[5][1] *Rapanos v. United States*, 547 U.S. 715 (2006).

[6][1] The Department of Justice has brought one criminal prosecution based on fracking-related activity. See *United States of America v. Lupo*, 4:13-cr-00113, Doc. 1 (N.D. Ohio Feb. 13, 2013) (complaint).

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