ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

May 29, 2014

Arnold & Porter LLP is pleased to provide this digest of judicial decisions, settlements, case filings, and other litigation- and enforcement-related documents on hydraulic fracturing and related activities 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. This digest includes cases for which there have been developments since our last litigation update. Other past hydraulic fracturing advisories are available here.

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.

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 CASE

Matter of Norse Energy Corp. USA v. Town of Dryden, No. APL-2013-00245 (N.Y.). On Tuesday, June 3, at 2:00 PM, the New York Court of Appeals will hear oral argument in appeals of the New York Appellate Division's ruling that state law did not preempt local land use restrictions on hydraulic fracturing and other oil and gas development activities. The oral argument can be viewed at https://www.nycourts.gov/ctapps/oral_arg.asx.

DECISIONS AND SETTLEMENTS

- Civil Tort Actions
- Challenges to Municipal Action
- Challenges to Agency Action
- Government Enforcement Actions
- Oil & Gas Lease Disputes
- Other Land Use and Property Rights Disputes
- Freedom of Information Lawsuits
- Defamation and SLAPP Suits

NEW CASES AND FILINGS

- Challenges to Municipal Action
- Challenges to Agency Action
- Oil & Gas Lease Disputes

DECISIONS AND SETTLEMENTS

Civil Tort Actions

Parr v. Aruba Petroleum, Inc., No. CC-11-01650-E (Dallas Co. Ct. at Law, filed Mar. 8, 2011, 11th am. pet. filed Sept. 17, 2013, jury verdict Apr. 22, 2014). A Texas jury awarded US$2.925 million to a family whose ranch and family home were located within two miles of more than 20 natural gas wells operated by Aruba Petroleum, Inc. Many of the wells were within a mile and a half of the family's home. The jury found Aruba liable for private nuisance. The verdict included US$2 million for past physical pain and suffering, US$250,000 for future physical pain and suffering, US$400,000 for past mental anguish, and US$275,000 for loss of market value on the family's home.

Antero Resources Corp. v. Strudley, Case No. 2013SC576 (Colo., cert. granted Apr. 7, 2014). The Colorado Supreme Court granted the certiorari petition seeking review of an appellate court decision ruling that case management orders known as *Lone Pine* orders are not permitted as a matter of state law. *Lone Pine* orders require plaintiffs to produce prima facie evidence of their claims after initial disclosures but prior to discovery.

Challenges to Municipal Action

Cave v. City & County of Broomfield, Colorado, No. 13CV303 13 (Colo. Dist. Ct. Feb. 27, 2014). A Colorado district court upheld the results of a November 2013 election in which residents of the City and County of Broomfield approved a measure that banned hydraulic fracturing in Broomfield for five years. The margin by which the measure was approved was very narrow (an initial vote count showed that it had failed), and the election was subject to a new voting law that imposed complicated residency requirements. Plaintiffs claimed that illegal votes were counted and legal votes rejected. Calling the election "remarkably transparent," the court found that local officials acted in good faith and had substantially complied with Colorado election law.

Challenges to Agency Action

Powder River Basin Resource Council v. United States Bureau of Land Management, No. 12-cv-00996 (BJR) (D.D.C. Mar. 28, 2014). The federal district court for the District of Columbia rejected a challenge by conservation groups to the U.S. Bureau of Land Management's (BLM's) approval of an amendment to a Resource Management Plan for the Fortification Creek Planning Area in the Powder River Basin in northeastern Wyoming. Plaintiffs said that BLM had caved in to demands of the coal bed natural gas industry. The court ruled that BLM had complied with the National Environmental Policy Act, in that it taken a hard look at environmental impacts, including impacts to a nonmigratory elk herd and impacts to water resources, soil, slopes, and reclamation. The court also said that BLM considered an appropriate no-action alternative and that BLM was not required to supplement its environmental assessment as a result of new information in a U.S. Geological Services study about impacts to water resources.

Chesapeake Appalachia, L.L.C. v. Department of Environmental Protection, No. 1570 C.D. 2013 (Pa. Commw. Ct. Apr. 3, 2014). The Pennsylvania Commonwealth Court affirmed the Environmental Hearing Board's (EHB's) dismissal of Chesapeake Appalachia LLP's (Chesapeake's) appeals of three letters from the Pennsylvania Department of Environmental Protection (PADEP) that modified a corrective action plan (CAP) that Chesapeake submitted to PADEP. Chesapeake was required to prepare the CAP pursuant to a consent order into which it entered after natural gas leaks contaminated drinking water supplies and surface waters. The CAP was required to identify actions Chesapeake would take to evaluate and rehabilitate 116 gas wells. The court agreed with the EHB that the PADEP letters modifying the CAP were not reviewable final actions.

Government Enforcement Actions

State of Florida Department of Environmental Protection v. Dan A. Hughes Co., L.P., OGC File No. 14-0012 (Fla. Dep't of Envtl. Prot. consent order Apr. 8, 2014). On December 31, 2013, the Florida Department of Environmental Protection (FDEP) ordered Dan A Hughes Co., L.P. (Hughes) to stop work at a well at the Hogan Island Farm in Collier County where Hughes was conducting a "workover operation." In a consent order effective April 8, 2014, Hughes agreed to pay US$25,000 and to implement a groundwater monitoring plan. It also agreed not to conduct any similar "workover operations," which involved an "enhanced extraction procedure" similar to hydraulic fracturing, until it had submitted a report satisfactory to FDEP confirming that the activities would not cause or contribute to any violation of groundwater quality standards. On May 2, 2014, FDEP announced that it had asked Hughes to cease all new operations in Florida until the results of monitoring were assessed.

United States v. Lupo, No. 4:13-cr-00113-DCN (N.D. Ohio Mar. 24, 2014). Defendant Ben Lupo, who owned a company that provided services to oil and gas companies in Ohio and Pennsylvania, pleaded guilty to an indictment for violations of the Clean Water Act. Lupo's company owned a waste storage and processing facility in Youngstown, Ohio. In 2012 and 2013, Lupo directed an employee to dump waste liquid that included a mixture of brine and oil-based drilling mud into a stormwater drain that flowed into a tributary of the Mahoning River. Sentencing was scheduled for June 16, 2014.

Oil & Gas Lease Disputes

Sorenson v. Burlington Resources Oil & Gas Co., L.P., No. 4:13-cv-132 (D.N.D. May 14, 2014). The federal district court for the District of North Dakota concluded that it lacked subject matter jurisdiction over this case and 13 other lawsuits by mineral lessors seeking to recover royalties for natural gas that had been flared in violation of North Dakota law. (The 14 actions raised nearly identical issues, but they were not consolidated.) The court agreed with defendants that the lessors had not exhausted their administrative remedies because they should have pursued their claims before the North Dakota Industrial Commission (NDIC). The court was not persuaded by plaintiffs' arguments that their claims posed purely statutory construction issues not requiring the expertise of the NDIC, that the administrative remedy would be futile because they could not force NDIC to exercise its enforcement authority, and that state law did not require them to go first to the NDIC. The court also dismissed the actions on the grounds that state law did not create a private right of action and that common law claims for waste and conversion were preempted by statute.

EQT Production Co. v. Opatkiewicz, No. GD 13-013489 (Pa. Ct. Comm. Pl. Apr. 8, 2014). The court granted the motion for partial judgment on the pleadings of a mineral rights leaseholder who claimed that pursuant to 2013 amendments to Pennsylvania's Oil and Gas Lease Act (section 34.1), which permitted pooling of leases, it had the right to jointly develop its leases with defendant landowners. The court said that the Pennsylvania law violated neither the Pennsylvania nor the U.S. Constitution, rejecting defendants' contentions that the law was an ex post facto law or a law that impaired contracts. The court said that the law merely clarified existing rights. The court also said that the law did not constitute a taking or violate rights to possess and protect property.

Neuhard v. Range Resources–Appalachia, LLC, No. 4:11-cv-01989 (E.D. Pa. Apr. 3, 2014). The federal district court for the Eastern District of Pennsylvania issued a declaratory judgment in favor of landowners who contended that their lease of Range Resources–Appalachia, LLC had terminated. The court determined that although Range had "commenced a well" as required to avoid expiration of the lease, its activities did not take place "on the Leased Premises" or "on a spacing unit containing a portion of the Leased Premises" because Range's designation of a 395-acre unit exceeded its unitization authority under the lease. Nor did Range's drilling activities on an adjacent property suffice to extend the lease.

Other Land Use and Property Rights Disputes

Herder Spring Hunting Club v. Keller, No. 718 MDA 2013 (Pa. Super. Ct. May 9, 2014). The Pennsylvania Superior Court vacated a trial court judgment that awarded fee simple ownership of subsurface rights to the heirs of a husband and wife who in 1899 had transferred surface rights to the property but had retained subsurface rights. In 2008, the Herder Spring Hunting Club, which acquired the property in 1959, filed an action to quiet title. The appellate court ruled that a prior sale of the land for failure to pay taxes had rejoined the subsurface and surface rights because the husband and wife had not complied with their obligation under an 1806 law to inform the county commissioners of their retention of the subsurface rights. When the county acquired the property due to nonpayment of real estate taxes, it acquired (and subsequently sold) the entire property in fee simple, including subsurface rights.

Freedom of Information Lawsuits

Powder River Basin Resource Council v. Wyoming Oil & Gas Conservation Commission, No. S-13-0120 (Wyo. Mar. 12, 2014). The Wyoming Supreme Court reversed a district court judgment that the Supervisor of the Wyoming Oil and Gas Conservation Commission had not acted arbitrarily and capriciously in partially denying a public records request based on the Supervisor's conclusion that the identities of chemicals used in hydraulic fracturing operations were trade secrets exempt from disclosure. As an initial matter, the Supreme Court said that plaintiffs had failed to follow the appeal procedures in the Wyoming Public Records Act (WRPA) and that the court should not have reviewed the Supervisor's denial as an administrative decision under the arbitrary and capricious standard. The court therefore remanded the action to the district court for plaintiffs to

seek an order to show cause requiring the Supervisor to justify its determination, in response to which the district court should determine whether the information sought constitutes trade secrets, with the burden on the Supervisor to demonstrate that the information does constitute trade secrets. Despite the "procedural flaws" in the case, the Supreme Court decided in the interests of judicial economy not "to cast the district court adrift without some guidance on the standard to be applied in trade secret cases under the WPRA." Noting that it had consistently looked to federal precedent under the federal Freedom of Information Act (FOIA) in WRPA cases, the Wyoming Supreme Court adopted the definition of "trade secret" used by federal courts under FOIA: "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." In addition, there must be "a direct relationship between the trade secret and the productive process." The Supreme Court indicated that this relatively narrow definition of trade secret was consistent with the policy of the WRPA favoring disclosure over secrecy. (The court also noted that a broader definition of trade secret would "render meaningless" WRPA's exemption for "confidential commercial information," an exemption category that had not been placed at issue in this case.) The court declined to reach the question of whether the identities of ingredients in hydraulic fracturing fluids were trade secrets, finding that this determination would require the district to hear expert opinions and other evidence. The Supreme Court directed the district court "to review the disputed information on a case-by-case, record-by-record, or perhaps even on an operator-by-operator basis, applying the definition of trade secrets set forth in this opinion and making particularized findings which independently explain the basis of its ruling for each."

Defamation and SLAPP Suits

Cabot Oil & Gas Corp. v. Scroggins, No. 2013-1303 (Pa. Ct. Comm. Pl. Mar. 28, 2014). The Pennsylvania Court of Common Pleas narrowed the scope of an October 2013 injunction barring an anti-fracking activist from property owned or leased by Cabot Oil & Gas Corporation (Cabot). The court's March 2014 order identified specific properties that defendant was barred from entering, and also barred her from entering well pads where Cabot was conducting surface operations or maintaining a well in production, and from access roads to such well pads and within 100 feet of such well pads. The court concluded that the preliminary injunction was warranted to protect the safety of Cabot workers and defendant.

NEW CASES AND FILINGS

Challenges to Municipal Action

Trinity East Energy, LLC v. City of Dallas, No. DC-14-01443 (Tex. Dist. Ct. filed Feb. 13, 2014; am. pet. filed Apr. 1, 2014). Trinity East Energy, LLC (Trinity) commenced a lawsuit against the City of Dallas, alleging that the City had taken Trinity's property without just compensation. In 2008, Trinity leased 3,600 acres of mineral rights from the City (in the City's proprietary capacity) for which Trinity paid US$19 million. Trinity alleged that the City knew that Trinity would not have entered into the leases if it would not have had access to drilling sites on City property. After Trinity spent months working with City and federal officials on engineering, surveying, and planning for the design of the drilling sites, the City denied its applications for permits allowing drilling on City property. In addition to its state law inverse condemnation claim, Trinity alleged breach of contract, common law fraud, statutory fraud, promissory estoppel, and negligent misrepresentation claims, and reserved its federal claims pending resolution of the state law claims.

Colorado Oil & Gas Association v. City of Fort Collins, No. 2013CV031385 (Colo. Dist. Ct., mot. to intervene filed Feb. 13, 2014). Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks sought to intervene in the Colorado Oil and Gas Association's lawsuit challenging the five-year moratorium on hydraulic fracturing approved by Fort Collins voters in November 2013. The environmental groups' motion to intervene was accompanied by a motion to dismiss. The City also filed a motion to dismiss.

Challenges to Agency Action

Concerned Citizens of St. Tammany v. U.S. Army Corps of Engineers, No. 14-1118 (E.D. La., filed May 15, 2014). A citizen group asked the federal district court for the Eastern District of Louisiana to enjoin the U.S. Army Corps of Engineers' commencement of a public comment period on an application by Helis Oil & Gas Co. for a dredge and fill permit that would allow Helis to develop wells at which it would use hydraulic fracturing. Plaintiff alleged that this would be the "first ever fracking project" in the St. Tammany parish and that the public was only made aware of the proposed project when the Corps initiated a public comment period in April 2014.

Plaintiff claimed that the Corps' actions violated the Clean Water Act and Administrative Procedure Act because the Corps had not provided information necessary for meaningful public comment.

Petition for Listing and Rulemaking Under Section 112 of the Clean Air Act to Establish an Area Source Category for Oil and Gas Production Wells and Associated Equipment and to Set National Emission Standards for Hazardous Air Pollutant Emissions (May 13, 2014). Sierra Club, Earthjustice, and the Natural Resources Defense Council submitted a petition to the United States Environmental Protection Agency (EPA) on behalf of a number of national, regional, and local environmental organizations, asking EPA to list oil and gas wells in urban areas as area sources for purposes of regulating them under the Clean Air Act's hazardous air pollutant provisions. The petition cited the authority granted to EPA in 42 U.S.C. § 7412(n)(4)(B) to establish an area source category for such wells where "emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health."

WildEarth Guardians v. United States Forest Service, No. 2:14-cv-00349-EJF (D. Utah, filed May 7, 2014). WildEarth Guardians commenced a lawsuit in federal court in Utah alleging that the United States Forest Service and the United States Bureau of Land Management failed to comply with the National Environmental Policy Act, the Federal Onshore Oil and Gas Leasing Reform Act, the National Forest Management Act, the Clean Air Act, the Clean Water Act, and Utah Water Quality Standards when they approved a 400-well oil and gas development project in the Ashley National Forest.

Center for Biological Diversity, **Protest of BLM's July 17, 2014 Oil and Gas Competitive Lease Sale and Environmental Assessment DOI-BLM-NV-B000-2014-0001-EA** (May 12, 2014). The Center for Biological Diversity (CBD) submitted a formal protest to BLM's Nevada office objecting to BLM's plan to conduct an oil and gas lease sale in July 2014 for 102 parcels covering 174,021.36 acres. CBD asked BLM to cancel the lease sale and prepare a full environmental impact statement. CBD said BLM must reopen the decision-making process to address methane waste, water quality, air quality, sage grouse and other biological resources, and climate change impacts.

Mosher v. Dan A. Hughes Co., L.P., Case No. 13-004254; ***Schwartz v. Dan A. Hughes Co., L.P.***, Case No. 13-4920 (Fla. Div'n of Admin. Hearings FDEP status report, Apr. 15, 2014; proposed orders May 14, 2014). Two individuals (Thomas G. Mosher and Matthew Schwartz) challenged a permit issued by the Florida Department of Environmental Protection (FDEP) for an exploratory oil and gas well in the Big Cypress Swamp Watershed in Collier County. The permit expressly stated that it did not authorize hydraulic fracturing. In a status report filed with the Florida Division of Administrative Hearings on April 15, 2014, FDEP submitted the recommendation of the Big Cypress Swamp Advisory Committee that the permit be denied but indicated that FDEP saw no basis for denial. FDEP indicated that the concerns and recommendations of the advisory committee were beyond FDEP's purview. On May 14, 2014, all parties submitted proposed recommended orders. Case documents are available at the Florida Division of Administrative Hearings' website. As discussed above, FDEP announced on May 2 that it had asked Hughes to cease all new oil and gas operations pending the results of groundwater monitoring at another well in Collier County.

Appellants Stedge et al., No. 2014-042 (Pa. Envtl. Hearing Bd., appeal filed Apr. 28, 2014; am. notice of appeal filed May 16, 2014); ***Appellant Smithfield Township***, No. 2014-044 (Pa. Envtl. Hearing Bd. appeal filed Apr. 30, 2014). Individual appellants challenged the Pennsylvania Department of Environmental Protection's issuance of a permit to Chesapeake Appalachia, LLC (Chesapeake) for a facility to be used for storage of oil and gas liquid waste for use as a water supply to develop or hydraulically fracture an oil or gas well. Appellants contended in their notice of appeal filed with the Environmental Hearing Board that Chesapeake did not fully disclose the purpose of the facility to the public, that the facility's name (Lamb's Farm Storage Facility) was deceptive, and that a public hearing should have been held prior to issuance of the permit. Appellants called Chesapeake "a frequent violator" of environmental laws and identified 18 areas of concern that should be addressed prior to issuance of the permit, including assessment of the potential impact on nearby waterways. Smithfield Township also challenged the permitting of the facility. The Township's objections included that the facility's liner would be inadequate to prevent spills and that inadequate attention was given to impacts on air, traffic, and wetlands, and to the possibility of radiation accumulation.

Joint Landowners Coalition of New York, Inc. v. Cuomo, Index No. 000843/2014 (N.Y. Sup. Ct., filed Feb. 14, 2014; hearing Apr. 25, 2014). A nonprofit organization formed "in a response to the regulatory barriers to natural gas development in New York" filed a lawsuit in New York state court seeking to compel the State to issue a supplemental generic environmental impact statement and a findings statement under the State Environmental Quality Review Act (SEQRA) with respect to the issuance of oil and gas well permits involving high-volume hydraulic fracturing and horizontal drilling. The nonprofit organization, along with two other petitioners-plaintiffs, also asked the court to determine that the New York Department of Environmental

Conservation (DEC) acted arbitrarily and capriciously and violated its lead agency obligations under SEQRA when it asked the New York State Department of Health (DOH) to evaluate the public health impacts of fracking. Petitioners-plaintiffs also alleged that Governor Andrew M. Cuomo should be declared an interested agency due to his intervention in the SEQRA process and that Governor Cuomo should be declared to have acted outside his jurisdiction by "orchestrating the delay" in the SEQRA process and precluding DEC from exercising its decision-making authority. In connection with these allegations, petitioners-plaintiffs asked the court to require Governor Cuomo, DEC, and DOH to require disclosure of records related to the SEQRA process.

Oil & Gas Lease Disputes

Fort Worth Housing Finance Corp. v. Chesapeake Energy Corp., No. 352-272138-14 (Tex. Dist. Ct., filed May 16, 2014); ***Star-Telegram, Inc. v. Chesapeake Exploration LLC***, No. 096-272142-14 (Tex. Dist. Ct., filed May 16, 2014); ***Fort Worth Independent School District v. Chesapeake Energy Corp.***, No. 236-272136-14 (Tex. Dist. Ct., filed May 15, 2014). The Fort Worth Housing Finance Corporation and related parties and the Fort Worth Independent School District alleged that oil and gas developers, including Chesapeake, Total, and Aubrey McClendon, materially breached their contractual obligations under mineral rights leases entered into with plaintiffs. Plaintiffs contended that defendants had "acted in concert with related and affiliated parties to manipulate sales points and to enter into non-arm's length agreements as a means to perpetuate a fraud in order to try to impose upon [plaintiffs] costs the lessees agreed to bear." Plaintiffs sought damages equal to the underpayments of royalties as well as declaratory relief, including a declaration that plaintiffs could terminate their leases. In a third lawsuit, the Fort Worth Star-Telegram alleged that Chesapeake entities had underpaid royalties on one lease and had failed to pay royalties on another, despite the fact that the lease began production more than three years before the filing of the lawsuit. The Star-Telegram lawsuit pleads breach of contract claims and also a claim under the Texas Natural Resources Code, which requires payment to lessors within 120 days after the end of the month of the first sale of production.

To speak with an Arnold & Porter attorney about these issues, contact:

Lawrence E. Culleen
Partner
Washington, DC
tel: +1 202.942.5477
Lawrence.Culleen@aporter.com

Matthew J. Douglas
Partner
Denver
tel: +1 303.863.2315
Matthew.Douglas@aporter.com

Michael D. Daneker
Partner
Washington, DC
tel: +1 202.942.5177
Michael.Daneker@aporter.com

Jonathan Martel
Partner
Washington, DC
tel: +1 202.942.5470
Jonathan.Martel@aporter.com