ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

July 7, 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 Wallach v. Town of Dryden, No. 130 (N.Y. June 30, 2014); ***Cooperstown Holstein Corp. v. Town of Middlefield***, No. 131 (N.Y. June 30, 2014). The New York State Court of Appeals today affirmed that municipalities may ban oil and gas production activities, including hydraulic fracturing, within their borders. The court affirmed trial and appellate court rulings that the State's Oil, Gas and Solution Mining Law (OGSML) does not preempt local authority to regulate land use. The Court of Appeals said that the New York constitution, the Municipal Home Rule Law, other statutes, and Court of Appeals precedent have designated land use regulation through adoption of zoning ordinances as "one of the core powers of local governance," and that the court did not "lightly presume preemption where the preeminent power of a locality to regulate land use is at stake." The court concluded that neither the plain language, the statutory scheme, nor the legislative history of the OGSML supported preemption. Two judges dissented, indicating that in their view the zoning ordinances' restrictions on oil and gas development encroached on regulatory authority that the OGSML reserved for the State.

DECISIONS AND SETTLEMENTS

- Civil Tort Actions
- Challenges to State and Federal Laws and Regulations
- Challenges to Agency Action
- Government Enforcement Actions
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NEW CASES AND FILINGS

- Challenges to Municipal Action
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- Oil & Gas Lease Disputes
- Constitutional Claims

DECISIONS AND SETTLEMENTS

Civil Tort Actions

Parr v. Aruba Petroleum, Inc., No. 11-1650 (Dallas Co. Ct. at Law June 19, 2014). In April, a Texas state court jury awarded a family $2.9 million as damages for a private nuisance created by natural gas wells operated by Aruba Petroleum, Inc. (Aruba). On June 19, 2014, the Dallas County Court at Law denied without comment Aruba's motion for judgment notwithstanding the verdict. Aruba had argued that the type of damages awarded to plaintiffs would have required plaintiffs to present expert evidence, which the court had recognized plaintiffs lacked. Aruba argued that there was not sufficient evidence that Aruba (1) had the intent necessary to support a claim of intentional nuisance or (2) proximately caused plaintiffs' injuries.

Crowder v. Chesapeake Operating, Inc., No. 2011-008256-1 (Tarrant Co. Ct. at Law May 23, 2014). A Texas state court jury awarded $20,000 to plaintiffs who alleged that activities connected to a drilling site near their home constituted a nuisance. Plaintiffs complained of noise, odors, and truck traffic. The jury found that the activities were a temporary nuisance and therefore did not award an additional $88,000 sought by plaintiffs. Plaintiffs' attorney also represented plaintiffs in another case involving the same drilling site. The jury in that case—***Anglim v. Chesapeake Operating, Inc.***, No. 2011-008256-1 (Tarrant Co. Ct. at Law)—found in favor of defendant in April 2014.

Ely v. Cabot Oil & Gas Corp., No. 09-CV-2284 (M.D. Pa. order on motion for summary judgment, Apr. 23, 2014; report and recommendation, Jan. 9, 2014). Plaintiffs sued to recover damages for property damage and personal injuries allegedly arising from natural gas drilling in Dimock Township in Pennsylvania. The federal district court for the Middle District of Pennsylvania granted summary judgment to defendants on plaintiffs' strict liability claims. The court adopted in full the magistrate judge's report and recommendation, which found that plaintiffs had failed to "substantiate their contention that the natural gas drilling activities, including hydraulic fracturing at issue in this case, are so inherently dangerous that they should be deemed ultrahazardous activities subject to strict liability." The magistrate judge therefore recommended that the court decline to become the first jurisdiction to conclude that natural gas drilling is an abnormally dangerous activity.

Ely v. Cabot Oil & Gas Corp., No. 09-CV-2284 (M.D. Pa. May 22, 2014). On May 22, 2014, the magistrate judge issued a report and recommendation that recommended granting defendants' motion to sanction plaintiffs' former lawyer. Defendants alleged that the attorney had engaged in impermissible ghostwriting and other behind-the-scenes assistance to plaintiffs. Defendants pointed to metadata in plaintiffs' court filings that indicated that the lawyer had drafted the documents. The magistrate judge noted that many courts have found ghostwriting to be a "surreptitious practice … antithetical to the duty of candor owed to a tribunal," and that "[t]hese concerns are heightened when a pro se party who is secretly receiving counseled assistance, seeks the leniency of the court citing his pro se status." The court also noted, however, that the Middle District of Pennsylvania had not prohibited ghostwriting, and that many bar associations had said that the practice was permissible. The court therefore did not base its decision that sanctions were warranted on the attorney's ghostwriting. Instead, the magistrate judge said that given the unique factual context, the attorney's conduct "fell short of the standards of candor" expected by the court in ways that were potentially prejudicial to many parties. As an example, the court noted that the attorney had assisted in the preparation of papers in which plaintiffs argued that they should receive special leniency due to their pro se status. The court also criticized the attorney for involving an unwitting junior lawyer in unethical conduct. The magistrate judge recommended that the court reprimand the senior attorney and order her to bear the junior lawyer's defense expenses.

Challenges to State and Federal Law and Regulations

Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, No. 228 MD 2012 (Pa. Commw. Ct. June 5, 2014). After Governor Tom Corbett proposed a budget for Fiscal Year (FY) 2014–15 that included $75 million in revenues from "non-surface impact leasing" of state lands for natural gas extraction as well as almost $120 million for the operating expenses of the Department of Conservation and Natural Resources, which oversees state parks and other state lands, the Pennsylvania Environmental Defense Foundation asked the Pennsylvania Commonwealth Court to grant a preliminary injunction. Petitioner asserted that these proposals—as well as laws and appropriations previously challenged—violated the Environmental Rights Amendment of the Pennsylvania Constitution, as well as the Conservation and Natural Resources Act and the Oil and Gas Lease Fund Act. The court declined to hold a hearing or make a decision on petitioner's request prior to the completion of the State's FY 2014–15 budget process. The court concluded that doing so would interfere with negotiations and decision-making in other branches of government and run afoul of the

separation of powers. He asked that petitioner request a status conference after final enactment of the FY 2014–15 budget.

Challenges to Agency Action

Delaware Riverkeeper Network v. Delaware River Basin Commission, No. 10-cv-05639 (D.N.J. June 19, 2014). Plaintiffs commenced this action in 2010 to challenge the Delaware River Basin Commission's (DRBC's) approval of a water withdrawal docket authorizing Stone Energy Corporation to withdraw up to 0.7 million gallons of water per day from the West Branch of the Lackawaxen River in Pennsylvania. The water would be used for natural gas development and extraction activities, including hydraulic fracturing. Plaintiffs alleged that the approval violated the substantive and procedural requirements of the Delaware River Basin Water Code and the Delaware River Basin Administrative Manual: Rules of Practice and Procedure and that the DRBC had not met additional requirements applicable to Special Protection Waters. On June 19, 2014, the parties filed a stipulation of dismissal without prejudice in the federal district court for the District of New Jersey. Lead counsel for plaintiffs said that Stone Energy had relinquished the docket, rendering the case moot.

In re Environmental Impact Statement Regarding the David Nisbit Quarry Conditional Use Permit Application to Extract Industrial Sand, No. A13–0745, A13–1198 (Minn. Ct. App. June 16, 2014). The Minnesota Court of Appeals affirmed the Winona County Board of Commissioners' decisions to issue a negative declaration and a conditional use permit for a proposed silica sand mining project. The mine would be a source of industrial sand for use as a proppant for hydraulic fracturing of oil and gas wells. Among other things, the court found that the Board had properly considered potential cumulative effects and had concluded that the proposed mine was small and isolated, and that future potential mining projects in the relevant geographic area, of which there were several, were speculative or uncertain. The court also concluded that there was a reasonable basis for granting the conditional use permit.

Concerned Citizens of St. Tammany v. U.S. Army Corps of Engineers, No. 14-1118 (E.D. La. June 12, 2014). After the U.S. Army Corps of Engineers agreed to extend the public comment period on an application by Helis Oil & Gas Co. (Helis) for a dredge and fill permit, plaintiff filed a motion to dismiss without prejudice its complaint alleging that the Corps had violated the Clean Water Act and Administrative Procedure Act by opening a public comment period without providing adequate information for meaningful comment. Plaintiff said that the permit would allow Helis to develop wells at which it would use hydraulic fracturing, the "first ever" use of fracking in the St. Tammany parish. The court granted the motion on June 12, 2014. Plaintiff reportedly filed a similar action against the Louisiana Department of Environmental Quality in state court seeking to prevent it from issuing a water certification necessary the dredge and fill permit. The Louisiana Department of Environmental Quality reportedly indicated that it, too, would extend the comment period. The motion and order came days after the St. Tammany Parish Council authorized a lawsuit (discussed below in "New Cases and Filings") seeking to block the Louisiana Department of Natural Resources from issuing drilling permits in the parish.

In re Windfall Oil & Gas, Inc., appeal nos. 14-04 to 14-62 (EAB June 10, 2014). In February 2014, EPA Region 3 issued an Underground Injection Control permit to Windfall Oil & Gas, Inc. for a Class II-D injection well in Pennsylvania for waste fluids associated with oil and gas development. EPA's Environmental Appeals Board (EAB) received 57 petitions challenging the permit. On May 15, 2014, EPA Region 3 filed a motion for a voluntary remand. The motion papers indicated that EPA Region 3 had not fully considered and responded to public comments and that there were factual errors in its response to comments document. For example, EPA Region 3 had indicated that there were no drinking water wells in the area of review, while the permit application had identified several drinking water wells (which Region 3 said were considered in drafting the construction requirements for the permit). EAB granted the motion. Among other things, the EAB directed EPA Region 3 to provide additional opportunity for public comment if it determined that a new draft permit should be issued.

Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, No. 13-1015 (D.C. Cir. June 6, 2014). The D.C. Circuit Court of Appeals ruled that the Federal Energy Regulatory Commission (FERC) had improperly segmented its National Environmental Policy Act review of one of four "connected, closely related, and interdependent" natural gas pipeline projects that constituted a major upgrade to the pipeline that carries natural gas eastward from western Pennsylvania. The court said that each of the four phases "fit with the others like puzzle pieces to complete an entirely new pipeline." The court further held that FERC had failed to meaningfully analyze the cumulative impacts of the four interconnected projects. Judge Brown concurred in the cumulative impacts portion of the opinion, but "would have declined to delve into the murky waters of backwards-looking segmentation review." And though Senior Judge Silberman concurred in both the segmentation and the cumulative impacts holdings, he agreed that the "the 'cumulative impact' issue is a

stronger ground upon which to base the decision."

In re Endangered Species Act Section 4 Deadline Litigation, No. 10-mc-00377 (D.D.C., order approving extension for listing determination, May 6, 2014; BLM Instruction Memorandum, May 30, 2014). The federal district court for the District of Columbia granted the Fish and Wildlife Service's (FWS's) unopposed motion seeking a six-month extension (to November 12, 2014) for finalizing an Endangered Species Act listing determination for the Gunnison sage grouse. The FWS said that the extension was necessary because information received during the public comment period on its proposal to list the Gunnison sage grouse as endangered suggested that the viability of the species might instead warrant a threatened status. In the event that the FWS determines that the species should be listed as threatened, it intends to concurrently issue a Section 4(d) special rule to specify conservation measures to avoid public confusion about what activities are prohibited. WildEarth Guardians agreed not to oppose the extension request in exchange for the application of additional conservation measures, including restrictions on oil and gas development. On May 30, 2014, the U.S. Bureau of Land Management issued an "Instruction Memorandum" describing the interim conservation measures for important Gunnison sage grouse habitat. The measures include a bar on the disturbance of habitat in a four-mile buffer area around leks (mating areas), except for valid existing rights.

In re Seneca Resources Corp., UIC Appeal Nos. 14-01, 14-02, & 14-03 (EAB May 29, 2014). The EAB denied three consolidated appeals that challenged an Underground Injection Control permit issued for a Class II injection well in Pennsylvania. The EAB denied one appeal because the petition lacked sufficient specificity; it was one page in length and raised general concerns regarding health and safety risks posed by injection wells. A second appeal was dismissed as untimely because the EAB had never received the petition, and the petitioner had not provided any proof of mailing. (The EAB noted that it would have rejected the appeal in any case because of insufficient specificity.) The third appeal was dismissed for lack of standing because the petitioner had not participated in the public review process for the permit.

Government Enforcement Actions

Carrizo (Marcellus) LLC (Pa. Dept. of Envtl. Prot. June 18, 2014). The Pennsylvania Department of Environmental Protection (PADEP) announced that it had imposed fines totaling $192,044 on Carrizo (Marcellus) LLC for (1) a well control incident in March 2013 during which production fluid escaped from the well for a number of hours at a rate of 800 to 1,100 barrels per hour, and (2) a production water spill of more than 9,000 gallons in April 2013 that reached a private residence as well as a pasture where livestock were grazing. After both incidents, PADEP issued notices of violation for violations of the Clean Streams Law, Solid Waste Management Act, and Chapter 78 oil and gas regulations.

Oil & Gas Lease Disputes

Key Operating & Equipment, Inc. v. Hegar, No. 13-0156 (Tex. June 20, 2014). The Texas Supreme Court ruled that "when parts of two mineral leases have been pooled but production is from only one lease, the mineral lessee has the right to use a road across the surface of the lease without production in order to access the producing lease." In doing so, the court reversed an appellate decision that ruled that the lessee's use of the road was not authorized. The Texas Supreme Court said that the lessee had implied property rights to use the surface of the property regardless of whether the lease and pooling agreement were in the chain of title. The court said that the appellate court's decision was at odds with the "primary legal consequence" of pooling: "that production anywhere on the pooled unit and operations incidental to that production are regarded as taking place on each pooled tract."

Eastham v. Chesapeake Appalachia, L.L.C., No. 13-4233 (6th Cir. June 6, 2014). The Sixth Circuit Court of Appeals affirmed the granting of summary judgment to defendant Chesapeake Appalachia, L.L.C. regarding the renewal terms of an oil and gas lease embodied in the much-litigated Paragraph 19 of the lease, which included the sentence: "Upon the expiration of this lease and within sixty (60) days thereinafter, Lessor grants to Lessee an option to extend or renew under similar terms a like lease." The Sixth Circuit rejected the argument that Paragraph 19 was ambiguous and concluded that it permitted defendant either to extend the lease on the same terms or to renegotiate a new lease on similar terms. In particular, the court rejected the argument that options to "extend" were synonymous with options to "renew" under Ohio law. The Sixth Circuit also rejected the notion that the extension of the lease was invalid because it occurred before the expiration of the lease, and the arguments that defendant's interpretation of the lease was against public policy or led to an unconscionable result. The same result was reached in ***Kenney v. Chesapeake Appalachia, L.L.C.,*** No. 2013 CV 240 (Ohio Ct. Comm. Pleas Apr. 3, 2014); ***Bissett v. Chesapeake Appalachia, L.L.C.***, No. 5:13-CV-20 (N.D. W.Va. Apr. 14, 2014); and ***Brown v. Chesapeake Appalachia, L.L.C.***, No. 5:12-CV-71 (N.D. W.Va.

Aug. 18, 2013).

Cole v. EV Properties, L.P., No. 13-3677 (6th Cir. Apr. 18, 2014). In 2006, plaintiffs, who owned a farm in Ohio, executed documents purporting to grant an oil and gas lease to North Coast Energy, Inc. Plaintiffs alleged that they did not personally appear before the notary public who notarized the documents. In 2012, dissatisfied with North Coast's conduct under the leases, plaintiffs filed a lawsuit charging that the leases were invalid and unenforceable due to the defective acknowledgment. The Sixth Circuit Court of Appeals affirmed the federal district court for the Northern District of Ohio in holding that the lease gave rise to an enforceable interest between the parties despite the defective acknowledgment. In doing so, the Sixth Circuit rejected a distinction that plaintiffs tried to find in Ohio caselaw between transfers of fee interests and transfers of lease interests. The Sixth Circuit said it was confident that the Ohio Supreme Court "would not permit [plaintiffs] to exploit a technically defective acknowledgment to documents that they unquestionably executed."

Other Land Use and Property Rights Disputes

Fayviard, LLC v. UGI Storage Co., No. 4:13-cv-02400 (M.D. Pa. June 6, 2014). Plaintiff originally filed this lawsuit in the Pennsylvania Court of Common Pleas, seeking the appointment of "viewers" to assess damages owed as a result of the de facto condemnation by defendant of plaintiff's interests in oil and gas beneath the surface of property in Tioga County, Pennsylvania. Defendant, a gas storage utility, was seeking a certificate of public convenience and necessity from the Federal Energy Regulatory Commission to operate a gas storage facility that would have a 3,000-square-foot buffer zone. Plaintiff alleged that its oil and gas interests were located within the storage facility and buffer zone, and that hydraulic fracturing would not be permitted there, destroying plaintiff's property's value. Defendant removed to the federal district court for the Middle District of Pennsylvania on the basis of federal question jurisdiction. The federal court remanded the action, finding that plaintiff's state law claim for relief did not state a federal claim for relief and did not necessarily require resolution of a substantial question of federal law, despite the fact that the de facto condemnation claim "implicated" federal law, including the Natural Gas Act, which was the source of defendant's eminent domain power. The court was highly critical of counsel for both parties, stating that "[t]he parties's briefs are, to put it lightly, not exemplary, and certainly do not meet the complexity of the issues involved." The court noted that plaintiff's counsel had "candidly, if ludicrously" admitted that he had not extensively researched the law before filing briefs in support of remand.

Contract Disputes

Mifflin Energy Corp. v. Chevron Appalachia LLC, G.D. No. 10-007408 (Pa. Ct. Comm. Pleas May 21, 2014; notice of appeal, May 28, 2014). The Pennsylvania Court of Common Pleas dismissed Mifflin Energy Corporation's (Mifflin's) lawsuit against Chevron Appalachia LLC (Chevron). Mifflin sought unjust enrichment damages in connection with the breach of a joint venture agreement concerning natural gas drilling. Mifflin had terminated the joint venture agreement prior to its assignment to Chevron. The court ruled that Mifflin did not have standing to bring a restitution or other claim because it had not demonstrated that it had been "negatively impacted in real and direct fashion" since Mifflin's alleged lost profits were profits that "might" have been realized under different circumstances. Even if Mifflin did have standing, the court concluded that it would not have established the element of an unjust enrichment claim requiring that it had conferred a benefit on Chevron. The court also said Mifflin had not adequately pled damages. Mifflin filed a notice that it would appeal the court's judgment to Pennsylvania Superior Court.

NEW CASES AND FILINGS

Challenges to Municipal Action

Bass Energy, Inc. v. City of Broadview Heights, No. CV 14 828074 (Ohio Ct. Comm. Pleas, filed June 10, 2014). In 2007, plaintiff Bass Energy, Inc. entered into an oil and gas lease with a church that owned 100 acres of land in the City of Broadview Heights, Ohio. Plaintiff Ohio Valley Energy Development Corporation entered into nondevelopment oil and gas leases with property owners in the vicinity of the church property authorizing the drilling of directional wells beneath the properties. Plaintiffs alleged that three wells permitted by the Ohio Department of Natural Resources (Ohio DNR) were operating and producing on the church property. Plaintiffs further alleged that Ohio DNR had granted a permit for a fourth well on the church property, but that plans for the well had been hampered by a 2012 amendment (Article XV) to the City's charter that barred new oil and gas development and prohibits transportation of drilling wastewater and other drilling waste products and byproducts in the city. Plaintiffs claim that enforcement of the charter amendment deprived them of their

property in violation of their rights to due process, and that the amendment was in conflict with state law that required uniform regulation of oil and gas activities. Plaintiffs sought an order declaring that the City had no authority to prevent them from drilling the fourth well and an order enjoining the City from preventing them from undertaking activities authorized by the Ohio DNR permit.

Challenges to Agency Action

Defenders of Wildlife v. Jewell, No. 1:14-cv-01025 (D.D.C., filed June 17, 2014); ***Permian Basin Petroleum Association v. Department of the Interior***, No. 7:14-cv-00050-RAJ (W.D. Tex., filed June 9, 2014); ***Oklahoma Independent Petroleum Association v. Department of the Interior***, No. 4:14-cv-00307-JHP-PJC (N.D. Okla., filed June 8, 2014). Multiple challenges were filed in multiple venues to the final determination by the U.S. Fish and Wildlife Service (FWS) regarding the status of the lesser prairie-chicken under the Endangered Species Act (ESA). Three conservation groups challenged the decision to list the lesser prairie-chicken as threatened rather than endangered, noting its "precipitous population decline" and the dwindling of its range to include a few areas in southeastern Colorado, western Kansas, eastern New Mexico, western Oklahoma, and the Texas Panhandle. Their complaint filed in the federal district court for the District of Columbia alleged that the decision to list the species as threatened was driven at least in part by the agency's plan to create a Section 4(d) rule that exempted some of the primary threats to the species, including oil and gas development, from the most powerful ESA protections. In another lawsuit, this one brought in the federal district court for the Western District of Texas, the Permian Basin Petroleum Association and four New Mexico counties claimed that FWS defendants had acted arbitrarily and capriciously in designating the lesser prairie-chicken as threatened because they had not properly taken into account the conservation efforts implemented on a "massive scale" by private and public stakeholders. Similarly, six organizations representing oil and gas interests brought suit in the federal district court for the Northern District of Oklahoma claiming that listing the species as threatened violated the ESA and the Administrative Procedures Act because the agencies had ignored the success of voluntary conservation programs and the improvement in the species's status between the proposed listing in 2012 and the final listing in 2014.

St. Tammany Parish Council v. Welsh, No. C631370 (La. Dist. Ct., filed June 16, 2014). The St. Tammany Parish Council commenced a proceeding against the Office of Conservation of the Louisiana Department of Natural Resources, seeking to bar it from issuing permits to Helis Oil & Gas Co. for the drilling of a well at which hydraulic fracturing would be used. The parish council seeks a declaratory judgment that the parish's zoning ordinances should be given primary consideration in defendant's review of the permit application. The Parish Council authorized the lawsuit on June 5, 2014. Also in June, a community group withdrew its lawsuit against the U.S. Army Corps of Engineers in connection with the same project (see discussion above).

Collier County v. Florida Department of Environmental Protection, OGC File No. 14-0012 (Fla. Dep't of Envtl. Prot., filed June 12, 2014). Collier County and the Collier County Water-Sewer District (County) requested a formal administrative hearing to challenge the April 8, 2014 consent order between the Florida Department of Environmental Protection (FDEP) and Dan A Hughes Co., L.P. (Hughes). The consent order concerned a well at the Hogan Island Farm in Collier County where Hughes conducted a "workover operation" that petitioners contend involved hydraulic fracturing. Petitioners also charge that Hughes conducted the operation in violation of its FDEP-issued permit, and that it continued to do so after being notified by FDEP that its activities were not approved. The County also claims that the FDEP's issuance of a permit to Hughes was improper, in part because FDEP did not provide notice to the County. The County seeks either revocation of the permit or modification of the consent order to require that the County be involved in the review of water quality information, reports, and plans generated pursuant to the consent order, that Hughes notify the County of incidents and accidents at the well site, and that Hughes post a $1 million bond for potential cleanup costs. The County filed its challenge despite receiving a letter from FDEP urging it to collaborate with FDEP rather than pursue litigation. The letter warned that challenging the consent order would suspend the consent order and delay implementation of its water quality monitoring requirements and other provisions. FDEP also indicated that the County could not challenge the permit itself. On June 18, 2014, FDEP sent a letter to Hughes and Collier Resources Company, which owns the well, requiring that they hold three public hearings to discuss and take public comment on plans for the well site and on plans for current and future energy operations in Collier County.

Lander County, Formal Administrative Protest (BLM, filed June 1, 2014). Lander County filed a formal protest of the U.S. Bureau of Land Management's planned oil and gas competitive lease sale, which was scheduled for July 17, 2014. The Lander County commissioner reportedly said the protest was filed on behalf of ranchers and farmers in the county who were concerned that hydraulic fracturing would take water away from them. This is the second protest filed challenging the lease sale. The Center for Biological Diversity filed a protest on May 12, 2014.

South Fayette Township v. Commonwealth of Pennsylvania, No. 2014-071 (Pa. Envtl. Hearing Bd., filed May 29, 2014). South Fayette Township in Pennsylvania filed a notice of appeal with the Pennsylvania Environmental Hearing Board challenging the Pennsylvania Department of Environmental Protection's (PADEP's) approval of an application by Range Resources–Appalachia, LLC (Range Resources) for coverage under an erosion and sediment control general permit for earth disturbance associated with oil and gas development. The Township contended that Range Resources had not complied with local ordinances and that PADEP's approval of the application was therefore improper.

Challenges to State and Federal Laws and Regulations

Willmeng v. State of Colorado, No. 2014CV30718 (Colo. Dist. Ct., filed June 10, 2014). Two residents of the City of Lafayette filed a class action lawsuit against the State of Colorado, its governor, the Colorado Oil and Gas Association (COGA), and a John Doe oil and gas company. The lawsuit sought the dismissal of a lawsuit brought by COGA in which COGA claimed that state law preempted a charter amendment barring oil and gas drilling within city limits that Lafayette voters approved in 2013. The class action plaintiffs alleged that the interpretation of the Oil and Gas Act as preempting the charter amendment violated the U.S. and Colorado constitutions. The class action lawsuit also sought declaratory relief and an injunction against the enforcement of the Oil and Gas Act to preempt the charter amendment.

Oil & Gas Lease Disputes

Suessenbach Family Limited Partnership v. Access Midstream Partners, L.P., No. 3:14-cv-01197-MEM (M.D. Pa, filed June 20, 2014). Plaintiffs leased almost 140 acres of land for purposes of natural gas extraction to oil and gas production companies, including Chesapeake Appalachia, LLC, a subsidiary of defendant Chesapeake Energy Corporation (Chesapeake). On June 20, 2014, plaintiffs commenced a class action lawsuit under the Racketeering Influenced and Corrupt Organizations Act against Chesapeake and Access Midstream Partners, L.P. (Access Midstream). Plaintiffs also alleged claims under common law principles of unjust enrichment, conversion, and civil conspiracy. The complaint alleged that Chesapeake formed Access Midstream in 2010 and later began spinning off Chesapeake's midstream assets (e.g., natural gas gathering and intrastate pipeline operations) to the new company. The crux of plaintiffs' action is that Chesapeake artificially manipulated and deducted from royalty payments the costs of marketing, gathering, and transporting natural gas. In particular, plaintiffs alleged that Chesapeake subsidiaries agreed to pay above-market fees for midstream services provided by Access Midstream. Plaintiffs' allegations drew extensively from a ProPublica article published in March 2014 that reported that Chesapeake Energy had financially resuscitated itself by shortchanging oil and gas lessors.

Sorenson v. Burlington Resources Oil & Gas Co., L.P., No. 4:13-cv-132 (D.N.D. June 13, 2014). Thirty days after the federal district court for the District of North Dakota dismissed an action by mineral lessors alleging improper gas flaring, the mineral lessors filed a notice of appeal. The district court dismissed the suit on the grounds that plaintiffs had failed to exhaust administrative remedies because they should have pursued their claims before the North Dakota Industrial Commission. Other grounds for dismissal included that state law did not create a private right of action and that common law claims for waste and conversion were preempted by statute.

Constitutional Claims

Trail Enterprises, Inc. d/b/a Wilson Oil Co. v. City of Houston, No. 13-1374 (U.S. May 14, 2014). Trail Enterprises, Inc. d/b/a Wilson Oil Co. (Wilson Oil) filed a petition for certiorari in the United States Supreme Court seeking review of the Texas appellate court decision that reversed a trial court's $17-million judgment in its favor. The case involved Wilson Oil's claim that the City of Houston's restrictions on oil and gas drilling in the vicinity of Lake Houston constituted a compensable taking. The appellate court said they did not. In its petition for Supreme Court review, Wilson Oil presented five questions, including whether the Texas Supreme Court had erred in denying review of the appellate court's decision, which Wilson Oil contended improperly applied a "substantially advancing formula" to determine that there was no compensable taking because the City's actions were designed to advance a legitimate government interest in protecting water sources. Wilson Oil contended that reliance on this factor was in contravention of Supreme Court precedent in *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

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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.