ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

November 14, 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 a selection of 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

Eighth Circuit Affirmed Denial of New Trial After Jury Awarded $300,000 to Homeowner for Drilling Vibration Damages. The Eighth Circuit Court of Appeals affirmed a district court's denial of a motion for a new trial in a case where a jury awarded an Arkansas homeowner $300,000 for damages caused to her home by vibrations from drilling. The Eighth Circuit rejected defendant's argument that a new trial was warranted because a juror brought extraneous, prejudicial information about hydraulic fracturing to the jury's attention during its deliberations. The jury had not heard any evidence about fracking, but asked the court during deliberations, "Were they drilling only or were they also fracking," after which the court instructed them to make their decision based on what they recalled of the evidence and the instructions provided. The Eighth Circuit said the court's instruction eliminated any risk of prejudice, noting that fracking had not been discussed again after the court's instruction. The court also said that the court had not abused its discretion when it refused to subpoena a juror who had not agreed to a voluntary interview. ***Hiser v. XTO Energy, Inc.***, No. 13-3443 (8th Cir. Oct. 3, 2014).

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DECISIONS AND SETTLEMENTS

Civil Tort Actions

Oklahoma Court Dismissed Lawsuit Alleging Injuries Caused by Earthquakes. A state court in Oklahoma concluded that it did not have jurisdiction to hear a lawsuit brought by a woman who alleged that she suffered personal injuries as a result of earthquakes caused by the disposal of fracking wastewater in injection wells. The court said that the Oklahoma Corporation Commission had authorized the wells and that plaintiff had not alleged any violations of the terms of the licenses for the wells. The court also found that the Commission had exclusive jurisdiction over injection wells. The court therefore concluded that it did not have jurisdiction to hear the case. ***Ladra v. New Dominion LLC***, No. CJ-2014-115 (Okla. Dist. Ct., filed Aug. 4, 2014; dismissed Oct. 16, 2014).

After Pennsylvania Federal Court Denied Energy Company's Motion for Summary Judgment, Parties Settled Private Nuisance and Negligence Suit. In September, the federal district court for the Middle District of Pennsylvania denied Southwestern Energy Production Company's (SEPCO's) motion for reconsideration of the court's denial of summary judgment in a case in which homeowners in Susquehanna County, Pennsylvania, alleged that SEPCO's drilling activities created an invasion of their private use and enjoyment of their homes. The homeowners alleged, among other things, that SEPCO's activities resulted in excessive noise and light and impacted the homeowners' well water. The homeowners also alleged a negligence claim. In denying reconsideration, the court said SEPCO had not satisfied its initial burden of demonstrating the absence of material factual issues. The court found that plaintiffs' water contamination claim and their excessive noise and light nuisance claims presented genuine issues of material fact. In October, the court dismissed the action after being notified that the parties had reached a settlement. ***Butts v. Southwestern Energy Production Co.***, No. 3:12-cv-1330 (M.D. Pa. summary judgment opinion Aug. 12, 2014; reconsideration opinion Sept. 15, 2014; order for dismissal Oct. 16, 2014).

Pennsylvania Court Rejected Attempt to Eliminate Strict Liability Claim in Well Pad Explosion Suit. In June 2014, the parents of a man killed in an explosion at a natural gas well pad in Pennsylvania commenced a personal injury lawsuit in the Pennsylvania Court of Common Pleas against the operator of the well. In October, the court overruled—in a one-sentence order—the operator's preliminary objections to the strict liability count in the complaint. ***McKee v. Chevron Appalachia, LLC***, GD No. 14-10554 (Pa. Ct. Common Pleas Oct. 7, 2014).

Aruba Petroleum Filed Notice of Appeal of $3 Million Judgment for Texas Family. On October 6, 2014, Aruba Petroleum, Inc. (Aruba) filed a notice of appeal of the final judgment that awarded more than $3 million to a family whose ranch and family home were located within two miles of more than 20 natural gas wells operated by Aruba. The jury found Aruba liable for private nuisance. In September, the trial court had denied without comment Aruba's motion for a new trial. ***Parr v. Aruba Petroleum, Inc.***, No. 11-01650-E (Dallas Co. Ct. at Law, notice of appeal Oct. 6, 2014; order on motion for new trial Sept. 11, 2014; final judgment July 9, 2014).

West Virginia Federal Court Granted Summary Judgment to Defendant in Water Well Contamination Case. The federal district court for the Northern District of West Virginia granted summary judgment to Columbia Gas Transmission, L.L.C. (Columbia) in a lawsuit alleging that Columbia's gas storage field caused methane contamination in plaintiff's water well. The court found that plaintiffs had failed to show more than a mere possibility that Columbia was the source of the gas in plaintiffs' well. The court noted that plaintiffs had not provided any evidence to counter defendant's expert's finding that the gas in their well was biogenic. ***Magers v. Chesapeake Appalachia, LLC***, No. 5:12-cv-49 (N.D. W. Va. Sept. 2, 2014).

Challenges to Municipal Action

New York High Court Denied Reargument in Local Preemption Case. The New York Court of Appeals denied a motion for renewal and reargument of its June 2014 ruling that state law did not preempt local authority to restrict oil and gas drilling activities. The bankruptcy trustee for Norse Energy Corp. USA (Norse)—which owned oil and gas interests in the Town of Dryden, a municipality that had enacted such restrictions—sought renewal based on the Colorado district court decision in *Colorado Oil and Gas Association v. City of Longmont*, which Norse said applied "persuasive precedent" from the Colorado Supreme Court to the question of conflict preemption under a Colorado state law similar to New York's Oil, Gas and Solution Mining Law. Norse also grounded its request for reargument in the Colorado case, saying that the Court of Appeals should have decided the conflict preemption issue rather than treating the case simply as one of express preemption. ***Matter of Wallach v. Town of Dryden***, Mot. No. 2014-867 (N.Y. Oct. 16, 2014).

Parties Ended Lawsuit Challenging City of Longmont's July 2012 Oil and Gas Ordinance; Court Said Longmont's November 2012 Fracking Ban Would Remain in Place During Appeal. There were

developments in two cases challenging the ability of City of Longmont, Colorado, to restrict oil and gas development within its borders. In one action, the Colorado Oil and Gas Conservation Commission (COGCC), the Colorado Oil and Gas Association (COGA), the City of Longmont, and the environmental groups Earthworks and Sierra Club filed a stipulation in the District Court for Boulder County agreeing to the dismissal of COGCC's lawsuit challenging Longmont's July 2012 ordinance regulating oil and gas development. The lawsuit was dismissed without prejudice, but the parties covenanted not to assert claims or counterclaims made in this action in any future case. (COGCC said that it had agreed to the dismissal of the lawsuit after Governor John Hickenlooper and Congressman Jared Polis announced an agreement for creation of a task force that would make recommendations to the State legislature for minimizing conflicts between oil and gas facilities and other land uses.) In the second action, which challenged Longmont's hydraulic fracturing ban, which voters approved in November 2012, the Colorado district court granted the City's motion for stay pending appeal. The court ruled in July 2014 that state law preempted the ban. The City and intervenor environmental groups have appealed the July ruling. TOP Operating Co. (TOP), which plans to use hydraulic fracturing in wells in Longmont and which intervened on the the plaintiffs' side, had asked for bond of approximately $20 million, but the court instead set a nominal bond of $100 (to be paid by the environmental groups). The court noted that if its July 2014 order was upheld on appeal TOP could still obtain revenue from drilling. ***Colorado Oil & Gas Conservation Commission v. City of Longmont***, No. 2012cv702 (Colo. Dist. Ct., stipulated dismissal of all claims and covenant not to sue Oct. 14, 2014); ***Colorado Oil and Gas Association v. City of Longmont***, No. 13CV63 (Colo. Dist. Ct. stay order & bond order Oct. 14, 2014).

Appeal of Unsuccessful Challenge to Temporary Moratorium on Oil and Gas Drilling Ruled Moot. The New York Appellate Division dismissed as moot the appeal of a ruling that upheld a one-year moratorium on certain natural gas and petroleum extraction, exploration, and production activities in the Town of Avon. The court said the expiration of the moratorium rendered the appeal moot, and that the appeal did not qualify for the exception to the mootness doctrine for "significant or important questions not previously passed on, i.e., substantial and novel issues" because the New York Court of Appeals in *Matter of Wallach v. Town of Dryden* had resolved all of the substantive issues raised by plaintiff. ***Lenape Resources, Inc. v. Town of Avon***, No. 14-00102 (N.Y. App. Div. Oct. 3, 2014).

Colorado Court Said City's Fracking Ban Could Not Apply Retroactively to Permits Previously Issued. A Colorado state court ruled that a fracking moratorium approved by voters in the City and County of Broomfield in November 2013 could not apply retrospectively to oil and gas exploration and extraction permits issued to Sovereign Operating Co. LLC (Sovereign). Earlier in 2013, Sovereign received the permits pursuant to the terms of a Memorandum of Understanding (MOU) approved by the Broomfield City Council. The MOU allowed Sovereign to proceed through an expedited permitting process but made Sovereign's activities subject to stricter requirements than federal or state law. The court said language in the MOU that provided for application of regulations enacted in the future to well sites governed by the MOU did not encompass ballot initiatives such as the moratorium. The court also ruled that applying the moratorium to the MOU would violate the constitutional prohibition against ex post facto laws. ***Sovereign Operating Co. LLC v. City and County of Broomfield, Colorado***, No. 2014CV30092 (Colo. Dist. Ct. Sept. 25, 2014).

Colorado Court Said Local Ban on Drilling Was Preempted. A Colorado district court ruled that the City of Lafayette's ban on oil and gas drilling and related activities was preempted by the Colorado Oil and Gas Conservation Act (OGCA). The court declined to apply an implied preemption framework, citing precedent finding that the state's interest in oil and gas activities was not "so patently dominant" over local interest in land use control as to warrant implied preemption. Instead, the court ruled that the voter-approved charter amendment that imposed the ban was preempted due to operational conflict. In support of its conclusion that there was preemption, the court noted the interest in statewide uniformity of oil and gas regulation, the prospect that the local law would have extraterritorial impacts due to oil and gas reserves extending across City boundaries, and the traditional regulation of oil and gas development by the Colorado Oil and Gas Conservation Commission. The court said there was "no way to harmonize" the charter amendment with the OGCA because the local interest in banning drilling was not reconcilable with state law's goals of production, prevention of waste, and protection of correlative rights. ***Colorado Oil and Gas Association v. City of Lafayette, Colo.***, No. 13CV31746 (Colo. Dist. Ct. Aug. 27, 2014).

Colorado Court Ruled That Local Moratorium on Fracking Was Preempted. A Colorado district court also ruled that the City of Fort Collins's five-year moratorium on hydraulic fracturing was impliedly preempted by the Colorado Oil and Gas Conservation Act (OGCA) because the moratorium substantially impeded a significant state interest in oil and gas development and production. The court further held that the moratorium also was preempted because it prohibited activities the OGCA expressly authorized the Colorado Oil and Gas Conservation Commission to permit. On September 23, 2014, the Fort Collins City Council directed the city attorney to file an appeal of the decision (Resolution No. 2014-082). ***Colorado Oil & Gas Association v. City of Fort Collins***, No. 2013CV031385 (Colo. Dist. Ct. Aug. 7, 2014).

Challenges to Agency Action

Collier County Agreed to Drop Administrative Challenge of Florida Department of Environmental Protection's Consent Order with Driller. Collier County and the Collier County Water-Sewer District agreed to withdraw their petition challenging the consent order between Florida Department of Environmental

Protection (FDEP) and Dan A Hughes Co., L.P. (Hughes). Hughes received a permit from FDEP in 2013 for an oil well in Collier County. FDEP and Hughes entered into the consent order in April 2014 to resolve FDEP's concerns regarding a "workover operation" conducted by Hughes at the well that involved an "enhanced extraction procedure" similar to hydraulic fracturing. FDEP revoked the permit in July 2014, alleging that Hughes had not complied with the consent order's terms. In exchange for the County's withdrawal of the petition, FDEP committed to take certain steps to investigate and monitor potential impacts of the well on groundwater resources. FDEP also said it would seek additional legislative authority to strengthen its oil program regulations. FDEP indicated that it expected the County to join FDEP's ongoing administrative and judicial enforcement actions against Hughes. ***Collier County v. Florida Department of Environmental Protection***, OGC File No. 14-0012 (Fla. Dep't of Envtl. Prot., stipulation Oct. 17, 2014; FDEP letter to County Sept 12, 2014).

Tribal Court in Michigan Ruled It Did Not Have Jurisdiction to Prevent Issuance of Water Withdrawal Permits. The Tribal Court of the Little Traverse Bay Bands of Odawa Indians (LTBB) in Michigan dismissed an action seeking to enjoin the governor of Michigan and others from issuing water withdrawal permits for fracking activities in violation of LTBB and Michigan law, the 1836 Treat of Washington, and the Intergovernmental Water Accord of 2004. The tribal court, on its own accord, ruled that it lacked subject matter jurisdiction because there was no authority granting petitioners a private right of action. ***LaCroix v. Snyder***, No. C-200-0914 (Little Traverse Bay Bands of Odawa Indians Trib. Ct. Oct. 2, 2014).

Federal Court in Nevada Dismissed NEPA Challenge to Oil and Gas Lease Sale as Premature. The federal district court for the District of Nevada rejected a request for a preliminary injunction and also *sua sponte* dismissed a lawsuit brought by a group of owners of farming and ranching land, water rights, and grazing rights in Nevada who challenged the U.S. Bureau of Land Management's (BLM's) issuance of oil and gas leases in Nevada. The group had challenged BLM's compliance with the National Environmental Policy Act (NEPA), including its failure to consider its actions' impacts on methane releases and increased emissions of greenhouse gases from fossil fuel combustion. The court concluded that it had no subject matter jurisdiction because there had been no final agency action since although BLM had conducted the lease sale, it had not yet decided whether to issue the leases. ***Reese River Basin Citizens Against Fracking, LLC v. Bureau of Land Management***, No. 3:14-cv-00338 (D. Nev. Sept. 8, 2014).

Government Enforcement Actions

New York Attorney General and Oil and Gas Companies Agreed to Disclosures of Fracking Financial Risks. On October 3, 2014, New York State Attorney General (NYAG) Eric T. Schneiderman announced that his office had reached agreements with natural gas development companies Anadarko Petroleum Corp. and EOG Resources, Inc. regarding disclosures to investors of financial risks associated with the development of unconventional natural gas resources. The NYAG's Office said the agreements closed investigations launched in 2011 under New York's Martin Act. Under the agreements, the companies agreed to include information in their Securities and Exchange Commission (SEC) filings regarding financial effects from present and probable future regulation of development of unconventional resources and from the environmental impacts of such development. The agreements also require the companies to disclose in their SEC filings the steps they are taking to minimize environmental impacts and their strategies for managing the financial effects of regulation, litigation, or environmental impacts related to unconventional natural gas extraction. In addition to the SEC disclosures, each company's agreement also requires it to make additional information available to the public about environmental impacts of unconventional drilling and actions taken to manage and reduce environmental impacts. ***In re Investigation by Eric T. Schneiderman, Attorney General of State of New York, of EOG Resources, Inc.***, Assurance No. 14-182 (Oct. 1, 2014); ***In re Investigation by Eric T. Schneiderman, Attorney General of State of New York, of Anadarko Petroleum Corp.***, Assurance No. 14-183 (Oct. 1, 2014).

Operator of North Dakota Injection Well Pleaded Guilty to Safe Drinking Water Act Violations and Related Felony Charges. An individual who operated a saltwater disposal well in North Dakota pleaded guilty to violations of the Safe Drinking Water Act, to conspiracy to violate the requirements of North Dakota's underground injection control (UIC) program, to making false statements and falsifying records, and to concealing and covering up a tangible object. The individual helped convert an oil well in North Dakota that had not produced oil to a saltwater disposal well for injection of drilling waste fluids; he then operated the well in violation of the requirements of the UIC program. The individual injected saltwater into the well without a field inspector having witnessed a mechanical integrity test and continued to inject saltwater after a North Dakota Industrial Commission ordered him to stop the injections and after the well failed the integrity test. ***United States v. Garber***, No. 1:14-cr-114 (D.N.D. minutes Sept. 26, 2014; plea agreement June 16, 2014).

Energy Company's Settlement of Clean Water Act Claims Involving West Virginia Sites Included $3-Million Penalty. In September, EPA, the U.S. Department of Justice, and the West Virginia Department of Environmental Protection announced a settlement with Trans Energy, Inc. to resolve alleged violations of the Clean Water Act and West Virginia state law. The U.S. and the State had charged that in the course of construction of natural gas facilities, the company discharged dredged or fill material to the waters of the United States at 15 sites without authorization. Under the terms of a consent decree lodged in the federal district court for the Northern District of West Virginia, Trans Energy will pay a $3 million penalty, divided equally between

the United States and West Virginia. Trans Energy must also restore and monitor all sites where restoration is feasible and also perform compensatory mitigation, likely through purchase of wetland mitigation bank credits. In addition, Trans Energy will provide Clean Water Act training to employees, contractors, and affiliates and will integrate a Clean Water Action Section 404 compliance protocol into its operating procedures in West Virginia. ***United States v. Trans Energy, Inc.***, No. 5:14-cv-00117 (N.D. W. Va. consent decree & complaint Sept. 2, 2014).

Owner of Oil and Gas Services Company Sentenced to 28 Months in Prison for Clean Water Act Violations. The federal district court for the Northern District of Ohio sentenced the owner of a company that provided services to oil and gas companies to 28 months in prison and ordered him to pay a $25,000 fine. The defendant pleaded guilty in March 2014 to violations of the Clean Water Act in connection with his ordering 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. ***United States v. Lupo***, No. 4:13-cr-00113-DCN (N.D. Ohio Aug. 5, 2014).

Oil & Gas Lease Disputes

North Dakota Supreme Court Ruled Oral Misrepresentations Could Be Introduced to Support Oil and Gas Lessors' Fraudulent Inducement Claims. The North Dakota Supreme Court ruled that a district court had erred when it concluded that oil and gas lessors' fraudulent inducement claims against their lessee were barred as a matter of law. The lessors said they were induced to sign leases by the lessee's material misrepresentations regarding its qualifications and plans for drilling and operating wells on their property. The Supreme Court said that the district court had misconstrued the parol evidence rule as barring the alleged misrepresentations because they contradicted the leases' terms. The Supreme Court held that the rule did not bar consideration of the alleged oral promises and misrepresentations where the issue was whether the parties freely consented to the terms of the agreement, not interpretation of the agreement itself. The Supreme Court also held that the alleged misrepresentations went beyond mere sales talk, puffery, and opinion. The court remanded the lessee's quiet title action and the lessors' counterclaims for rescission or cancellation of the leases. ***Golden Eye Resources, LLC v. Ganske***, No. 20130219 (N.D. Sept. 23, 2014).

Federal Court Ruled Against West Virginia Landowners Who Sold Oil and Gas Rights for Low Prices. The federal district court for the Northern District of West Virginia ruled in favor of defendants in a case brought by property owners in Preston County, West Virginia, against companies that had acquired (or assisted in the acquisition of) oil and gas rights from the property owners in 2007 and 2008 at relatively low prices. (Plaintiffs leased oil and gas rights for $25 per acre and later learned that other lessors had received more than $2,000 per acre; the company that initially purchased the oil and gas leases sold its interests to another defendant in 2010 and realized a profit of approximately $1,666 per acre.) The court found that there was no fraud in the inducement because plaintiffs could not reasonably have relied on alleged statements by defendants that if plaintiffs did not enter into leases, defendants would still be able to extract gas from under plaintiffs' land. The court called this "a blatant misrepresentation of the law of trespass and conversion" that was "unreasonable to believe." Moreover, the fraud in the inducement claims were barred by the statute of limitations. The court also said that civil conspiracy claims were not supported by evidence. The court also declined to rescind the leases, ruling that the restoration rule barred rescission since plaintiffs had retained their $25-per-acre payments, and that the leases were not substantively or procedurally unconscionable. The court said the rescission claims were also barred under the doctrine of laches. ***Barber v. Magnum Land Services, LLC***, Nos. 1:13-cv-33 to 1:13-cv-100, 1:13-cv-113 to 1:13-cv-115 (N.D. W. Va. Oct. 14, 2014).

Court of Federal Claims Ruled Against Oil and Gas Leaseholders in Southwestern Wyoming Where Oil and Gas Development Was Suspended Due to Concerns About Compatibility with Trona Mining. In a case involving 26 oil and gas leases covering 26,000 acres of federally owned land in southwestern Wyoming where the federal government had suspended oil and gas development indefinitely since 2000, the Court of Federal Claims ruled against the leaseholders. Oil and gas development was suspended due to concerns about whether it was compatible with the mining of trona—the hard component of sodium—on the same lands. The court said the leaseholders' taking claims were unripe because they had not taken the first step towards obtaining a permit by submitting an Application for Permit to Drill (APD) and had not established the futility of seeking a permit. The court also dismissed breach of contract claims by three of the four plaintiffs for lack of standing because they lacked a contractual relationship with the U.S. With respect to the fourth plaintiff, the court ruled that the U.S. had not repudiated its contractual obligations because it had not unequivocally refused to review an APD. ***Barlow & Haun, Inc. v. United States***, No. 08-847L (Fed. Cl. Sept. 26, 2014).

Ohio Appellate Court Ruled Against Landowners Who Claimed Leases Were Void as Contrary to Public Policy. The Ohio Court of Appeals reversed a trial court and ruled against landowners who had entered into oil and gas leases with Beck Energy Corp. The landowners had successfully argued to the trial court (and been granted summary judgment on the merits) that the leases contained terms and conditions contrary to public policy and that Beck Energy had breached its implied covenant to reasonably develop. The appellate court ruled that the trial court had incorrectly concluded that the leases were no-term and perpetual and therefore void as contrary to public policy. Among other things, the appellate court noted that continuation of a lease for so long as the premises were "capable of production" required that a well be capable of producing, not merely that the land be capable of production. The court also said that the trial court erred in finding that the leases

were subject to implied covenants, including the implied covenant to reasonably develop. ***Hupp v. Beck Energy Corp.***, 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11 (Ohio Ct. App. Sept. 26, 2014).

Second Circuit Certified Oil and Gas Lease Questions to New York Court of Appeals. The Second Circuit Court of Appeals certified two questions to the New York Court of Appeals concerning the interpretation of oil and gas leases. A federal district court had granted summary judgment to landowners in Tioga County who sought a declaration that defendant energy companies' oil and gas leases had expired at the ends of their five-year primary terms despite the de facto moratorium in New York on high-volume hydraulic fracturing combined with horizontal drilling. The energy companies contended the moratorium was a force majeure event that extended the primary term of the leases. The Second Circuit asked the Court of Appeals to weigh in on (1) whether the moratorium constituted a force majeure event in the context of an oil and gas lease and (2) whether the force majeure clause modified the habendum clause (which established the period of time during which the energy companies could exercise their drilling rights) and extended the primary term of the lease. The Second Circuit said that although the case turned on these "questions of contract interpretation that may not be the typical material for certification," it would certify the two questions "because the dispute arises in a relatively underdeveloped area of law and because it implicates matters of public policy integral to the economic and environmental wellbeing of the State of New York." With respect to the first question, the Second Circuit noted that whether the moratorium was a force majeure event depended on whether barring all "commercially viable" drilling but not all drilling constituted such an event. With respect to the second question, the Second Circuit indicated that New York law did not clearly indicate whether the force majeure provision modified the term established in the habendum clause where the habendum clause was not expressly subject to other terms in the lease. ***Beardslee v. Inflection Energy, LLC***, 12-4897-cv (2d Cir. July 31, 2014).

Other Land Use and Property Rights Disputes

Pennsylvania Appellate Court Said True Owner of Oil and Gas Rights Was Entitled to All Revenues from Production. The Pennsylvania Superior Court ruled that a husband and wife who purchased oil, gas, and mineral rights (OGMs) in 2003 from a company that did not own the OGMs were liable to plaintiff for bad-faith trespass. Plaintiff was the actual owner of the OGMs. This ruling reversed the trial court's finding that the trespass had been in good faith until the husband realized during a meeting with plaintiff several years after acquiring the purported OGMs that he and his wife had been producing on the 66 acres that plaintiff said he owned. (The husband and wife continued to drill wells on the 66 acres after the meeting.)The appellate court said that the husband and wife had "willfully elected" not to conduct a full title search, and that they were on constructive notice of plaintiff's interest in the property since the conveyance of the OGMs to plaintiff in 1997 had been duly recorded as required by Pennsylvania's constructive notice statute. Because the husband and wife were not good-faith purchasers, they were not entitled to offset their costs of production from damages, and plaintiff was entitled to the entirety of revenues derived from their production on his OGMs. The court rejected the husband and wife's arguments that the owners of the surface rights over the OGMs who purported to lease the OGMs were indispensable parties, and that their absence from the action left the trial court without subject matter jurisdiction. The appellate court also said that the action was not time-barred. The appellate court said the discovery rule applied and upheld the trial court's finding that a "reasonably prudent landowner exercising reasonable efforts" would not have discovered defendants' oil and gas production activities involving his property. ***Sabella v. Appalachian Development Corp.***, No. 722 WDA 2013 (Pa. Super. Ct. Oct. 20, 2014).

Court Ruled That Seneca Resources Corp. Could Drill Horizontally Under Pennsylvania Game Commission Lands From Adjacent Property. The Pennsylvania Commonwealth Court ruled on the rights of Seneca Resources Corp. (Seneca) to extract oil and gas beneath property owned by the Commonwealth of Pennsylvania, Pennsylvania Game Commission (Commission) pursuant to a 1928 deed. The court said Seneca had the right under the 1928 deed to horizontally extract its oil and gas from adjacent land. The court said that it was not clear whether the 1928 deed precluded Seneca from extracting oil and gas using technologies not available in 1928 such as hydraulic fracturing from the surface of the Commission's property. The court ordered a hearing on the issue of whether the 1928 deed restricted Seneca's extraction methods from the Commission property's surface to "ordinary means" in use in 1928. ***Commonwealth of Pennsylvania, Pennsylvania Game Commission v. Seneca Resources Corp.***, No. 89 M.D. 2013 (Pa. Commw. Ct. Oct. 6, 2014).

Freedom of Information Lawsuits

Administrative Appeal Under Pennsylvania's Right-to-Know Law Results in Decision Against the Governor's Office. The Pennsylvania Office of Open Records (OOR) largely granted an appeal under the Right-to-Know Law (RTKL) by a member of the Pennsylvania House of Representatives who had sought records from the Office of the Governor concerning the plan to raise funds by allowing "non-surface impact" drilling on land owned by the Commonwealth. OOR said the governor's office had not met its burden of showing that records were shielded from disclosure by the attorney-client privilege or by the exemption for draft of bills, resolutions, regulations, statements of policies, and similar types of documents. OOR also found that the majority of records held back as exempt under the RTKL's exemption for internal, predecisional deliberations did not qualify for the exemption, citing, among other things, the withholding of communications between an employee of the governor's office and an officer of a private corporation. OOR also said the

governor's office had unreasonably restricted the scope of the request to apply it to only 13 members of the office's executive staff. OOR said the unreasonableness of this narrowing was demonstrated by the absence of Governor Corbett from the list of the 13 people to whom the request applied. ***Vitali v. Pennsylvania Office of the Governor***, No. AP 2014-0903 (Pa. Office of Open Records Oct. 6, 2014).

Contract Disputes

Ohio Federal Court Denied Reconsideration of Production Company's Duty to Indemnify Drilling Company. In April 2014, the federal district court for the Southern District of Ohio ruled that a drilling contract between Warren Drilling Co., Inc. (Warren) and Equitable Production Co. (EQT) required EQT to defend and indemnify Warren in a tort suit brought by property owners for water contamination and to pay Warren's attorney fees in the instant action. On August 26, 2014, the court denied EQT's motion for reconsideration in part and granted it in part. The court said it had properly looked at provisions of the drilling contract that dealt specifically with indemnification for pollution and contamination claims rather than the general indemnification and insurance provisions on which EQT based its arguments. The court ruled, however, that the drilling contract did not require EQT to pay Warren's attorney fees because there was no express language including such fees within the scope of the indemnification obligation. Because EQT had stipulated that the amount of Warren's settlement with the plaintiffs in the water contamination tort action ($40,000) and its attorney and expert fees and costs in that action (totaling approximately $155,000) were reasonable, the court also found that the amounts were reasonable and entered final judgment. EQT filed a notice of appeal on September 4, 2014. On October 3, 2014, the district court granted EQT's request for a stay but required it to post bond in the full judgment amount. ***Warren Drilling Co., Inc. v. Equitable Production Co.***, No. 2:12-cv-00425 (S.D. Ohio mot. for reconsideration granted in part, denied in part Aug. 26, 2014; motion for stay granted in part, denied in part Oct. 3, 2014).

Federal Court in Texas Ordered Insurer to Pay $5.75 Million Under Well Control Policy, Plus Interest. The federal district court for the Northern District of Texas entered final judgment in favor of the policyholder in a dispute over coverage under a well control policy for costs and expenses incurred after an out-of-control well incident at a well owned and operated by the policyholder. Judgment was entered 12 days after a jury found that the insurer had not proved by a preponderance of the evidence that the policyholder failed to exercise due care and diligence in its well operations. The court ordered the insurer to pay actual damages of $5.75 million, including more than $2.2 million for control-of-well and pollution costs; almost $90,000 for care, custody, and control costs; more than $1.3 for plugging and abandonment costs; and $2 million in redrill costs. The court also held that the policyholder had established the insurer's liability under its prompt payment claim pursuant to the Texas Insurance Code and ordered payment of more than $2 million in interest in connection with that claim as well as payment of prejudgment interest of more than $600,000. The court also said the policyholder was entitled to attorney fees and other costs. In September, the insurer filed a motion for judgment as a matter of law and reconsideration of the court's earlier partial summary judgment rulings and a motion for a new trial. ***Eagle Oil & Gas Co. v. Travelers Property Casualty Co. of America***, No. 7:12-cv-00133-O (N.D. Tex. mot. for new trial & renewed mot. for JMOL & reconsideration of partial summ. j. rulings Sept. 17, 2014; final judgment Aug. 20, 2014; jury verdict Aug. 8, 2014).

Constitutional Claims

U.S. Supreme Court Denied Certiorari in Mineral Rights Holders' Takings Case Against City of Houston. The U.S. Supreme Court declined to entertain an appeal from the Texas Supreme Court's denial of review of the Texas Court of Appeals' rejection of regulatory takings claims by mineral rights owners against the City of Houston. The lower appellate court had held that the City's ordinance barring drilling in the vicinity of Lake Houston did not constitute a compensable taking. The mineral rights owners had argued in their petition for certiorari that the Court should take on the case to make clear that government must pay compensation for the taking of private property even when the government takes action for a legitimate public purpose such as the protection of water resources. ***Trail Enterprises, Inc. d/b/a Wilson Oil Co. v. City of Houston***, No. 13-1374 (U.S., cert. denied Oct. 6, 2014).

NEW CASES AND FILINGS

Challenges to Municipal Action

Two Lawsuits Challenged City of Denton's Fracking Ban. A day after voters in the City of Denton, Texas, approved a measure banning hydraulic fracturing within City borders, two lawsuits were filed challenging the ban. In one, the Texas Oil and Gas Association (TXOGA) alleged that the ban was preempted by Texas state law and therefore was unconstitutional. TXOGA said Denton's ban undermined the State's "comprehensive" system regulating oil and gas development and "second-guesses and impedes this state regulatory framework." In the other lawsuit, the Commissioner for the Texas General Land Office—which manages "oil and gas leases for state-owned mineral interests and state-owned lands within the City of Denton, including free royalty lands dedicated to the funding of our public schools, lands owned by the Texas Department of Aging and Disability Services, and Texas highway right-of-way lands"—charged that the ban could not apply to

State-owned lands and that the ban was preempted by State law and was arbitrary, capricious, and unreasonable. ***Texas Oil & Gas Association v. City of Denton***, No 14-08933-431 (Tex. Dist. Ct., filed Nov. 5, 2014); ***Patterson v. City of Denton***, No. D-1-GN-14-004628 (Tex. Dist. Ct., filed Nov. 5, 2014).

Property Owners in Denton, Texas, Challenged Local Moratorium on Gas Drilling Activities. Two months before City of Denton voters approved a fracking ban, property owners filed a lawsuit in Texas state court against the City. The property owners alleged that the City had failed to prepare the Takings Impact Assessment required under the Texas Private Real Property Rights Preservation Act in connection with ordinances establishing a moratorium on gas drilling and production activities. The property owners also alleged takings under both the Texas and U.S. Constitutions, and alleged that Texas state law preempted local regulation of gas drilling. On October 3, 2014, the City removed the action to the federal district court for the Eastern District of Texas on the ground that it raised federal constitutional issues. ***Arsenal Minerals and Royalty v. City of Denton, Texas***, No. 14-07262-431 (Tex. Dist. Ct., filed Sept. 12, 2014; amended pet. filed Sept. 22, 2014); No. 4:14-cv-00639-ALM (E.D. Tex., notice of removal Oct. 3, 2014).

Oil and Gas Company Challenged Pennsylvania Town's Ban on Drilling Waste Disposal. Pennsylvania General Energy Company, L.L.C. (PGE), and oil and gas exploration and production company, challenged Grant Township's adoption of an ordinance (the Community Bill of Rights Ordinance) that prohibited the disposal of waste from oil and gas extraction and invalidated state and federal permits for such disposal. The Community Bill of Rights Ordinance also provided that corporations that violated its provisions would not be deemed to be "persons" and would not possess the "rights, privileges, powers, or protections," including the power to assert that state or federal law preempted the ordinance or that the municipality lacked authority to adopt the ordinance. PGE alleged that the ordinance violated the U.S. Constitution's Supremacy and Contract Clauses and the First Amendment, and that it constituted violations of PGE's equal protection, substantive due process, and procedural due process rights. PGE also asserted that the ordinance also alleged that the ordinance was an impermissible exercise of police power under state law as well as preempted by state law, and that it was invalid as exclusionary. ***Pennsylvania General Energy Co., L.L.C. v. Grant Township***, No. 14-cv-209 (W.D. Pa., filed Aug. 8, 2014).

Challenges to Agency Action

BLM Said Environmental Review Process for California Oil and Gas Leases Will Take Two Years. The U.S. Bureau of Land Management and the Center for Biological Diversity and Sierra Club filed a joint status report in the environmental organizations' lawsuit challenging BLM's leasing of federal lands in California for oil and gas development. In March 2013, the federal district court for the Northern District of California said that BLM had unreasonably refused to consider drilling projections that included hydraulic fracturing. In its October 2014 status report, BLM indicated that it had completed the public scoping process for its environmental impact review, published a Scoping Summary Report, funded a review of scientific and technical information on well stimulation technologies by the California Council on Science and Technology, and awarded a contract for preparation of the Resource Management Plan Amendment and environmental impact statement. BLM said that it anticipated that it will take two years to complete the review process and tentatively scheduled issuance of the record of decision for October 2016. The status report was filed three months after the parties reached a settlement pursuant to which this action was stayed and a related case, which challenged a plan for the sale of oil and gas leases for 18,000 acres in California, was dismissed. ***Center for Biological Diversity v. Bureau of Land Management***, No. 11-cv-06174 (N.D. Cal., joint status report Oct. 16, 2014; order granting joint mot. to stay); ***Center for Biological Diversity v. Jewell***, No. 13-cv-1749 (N.D. Cal. joint stipulation of dismissal without prejudice July 17, 2014).

Delaware Riverkeeper Network Challenged Well Permits in Pennsylvania. In October, Delaware Riverkeeper Network, the Clean Air Council, and a number of individuals appealed the Pennsylvania Department of Environmental Protection's (PaDEP's) issuance of permits for six unconventional gas wells in Butler County to the Pennsylvania Environmental Hearing Board. Appellants contended that the well pad was only a few hundred feet from residential development and water wells. Appellants said the PaDEP violated the Environmental Rights Amendment of Pennsylvania's Constitution by failing to consider local conditions, zoning, and planning and by failing to fulfill its own independent obligation to confirm that the well is suitably located. Appellants also charged that PaDEP had permitted a nuisance in violation of Pennsylvania's Oil and Gas Act and had relied on the permittee's "deficient and conclusory summaries of the risks and hazards posed by the proposed wellsite" rather than conducting its own analysis. In August, Delaware Riverkeeper Network and various individuals appealed permits issued by PaDEP for another well pad. Appellants argued that the well pad was less than 1,000 feet from existing water wells in violation of state law, and that PaDEP had violated the Environmental Rights Amendment, the Clean Streams Law, the Oil and Gas Act, and other laws by failing to evaluate the impacts on groundwater and surface water resources, impacts on public trust resources and environmental rights, and local zoning and planning issues. After the appeal was filed, the permittee, XTO Energy, Inc., withdrew its request for coverage under the stormwater permit, rendering some portions of the appeal moot. ***Delaware Riverkeeper Network v. Commonwealth of Pennsylvania, Department of Environmental Protection***, No. 2014-142-B (Pa. Envtl. Hearing Bd., filed Oct. 13, 2014; 1st amended notice of appeal Nov. 3, 2014); ***Delaware Riverkeeper Network v. Commonwealth of Pennsylvania, Department of Environmental Protection***, No. 2014-101 (Pa. Envtl. Hearing Bd., filed July 30, 2014; order Oct. 14, 2014).

Challenges to State and Federal Laws and Regulations

Delaware Riverkeeper Network Challenged Pennsylvania Plan to Lease State Forest and Park Land for Shale Gas Development. Delaware Riverkeeper Network and an individual who serves as the Delaware Riverkeeper (a full-time, privately funded ombudsman responsible for the protection of the Delaware River watershed) filed an action in Pennsylvania Commonwealth Court contesting Pennsylvania's plan to balance its budget by leasing state park and forest land for shale gas development. Petitioners alleged that the Commonwealth, Governor Corbett, and the Department of Conservation and Natural Resources violated the Environmental Rights Amendment of the Pennsylvania's Constitution. They sought declaratory judgments that both Governor Corbett's executive order allowing further leasing and Pennsylvania Fiscal Code legislation that requires leasing of state forest and park land violated the Environmental Rights Amendment, and also sought a declaratory judgment that further leasing of state forest and park land would violate the Environmental Rights Amendment and injunctions prohibiting both further leasing of such lands and the permitting of wells that use high-volume hydraulic fracturing and directional drilling on such lands. ***Delaware Riverkeeper Network v. Governor Corbett***, No. 573 MD 2014 (Pa. Commw. Ct., filed Oct. 30, 2014).

Government Enforcement Actions

Pennsylvania Department of Environmental Protection Sought $4.5-Million Penalty for Flowback Fluid Leaks; In Earlier Lawsuit, Respondent Attacked Legal Basis for Penalty Demand. The Pennsylvania Department of Environmental Protection (PaDEP) filed an administrative complaint before the Pennsylvania Environmental Hearing Board (PaEHB) seeking civil penalties against EQT Production Co. (EQT). PaDEP alleged violations of the Clean Streams Law in connection with unauthorized releases of flowback fluid from a six-million-gallon impoundment at a natural gas well facility in Tioga County. PaDEP sought more than $4.5 million and said that the amount saved by EQT as a result of the violations also should be added to the penalty. EQT preemptively filed a declaratory judgment action in Pennsylvania Commonwealth Court on September 19, 2014, after receiving a proposed consent assessment of civil penalty from PaDEP in May 2014. EQT said that PaDEP had based its penalty demand on an interpretation of the Clean Streams Law under which every day that contaminants from the impoundment remained in the soil or passively entered ground or surface water was a "continuing violation" subject to a separate civil penalty. EQT said this interpretation was at odds with the statute's plain meaning and therefore unlawful. On October 28, 2014, the PaEHB denied EQT's motion for a stay of its proceedings pending resolution of the declaratory judgment action. The PaEHB said EQT's action was not an appropriate substitute for an enforcement proceeding before the PaEHB. ***Commonwealth of Pennsylvania, Department of Environmental Protection v. EQT Production Co.***, No. 2014-140-CP-L (Pa. Envtl. Hearing Bd., filed Oct. 7, 2014; stay denied Oct. 21, 2014; opinion in support of stay denial Oct. 28, 2014); ***EQT Production Co. v. Department of Environmental Protection of Commonwealth of Pennsylvania***, No. 485 MD 2014 (Pa. Commw. Ct., filed Sept. 19, 2014).

Constitutional Claims

Mineral Interest Owners Sue Illinois for Failure to Issue Permits for Fracking. Owners of oil and gas mineral rights in Wayne County, Illinois, filed a class action lawsuit against Governor Pat Quinn and the Director of the Illinois Department of Natural Resources. Plaintiffs alleged that defendants' refusals to issue them or their lessees permits to conduct planned horizontal drilling and fracking operations constituted takings without just compensation. On November 6, the Illinois legislature's Joint Committee on Administrative Rules approved the State's fracking regulations, a development that will allow permits to be issued. ***Pollard v. Quinn***, No. __ (Ill. Cir. Ct., filed Oct. 17, 2014).

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

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.