

# Energy and Natural Resources Litigation Committee Newsletter

Vol. 1, No. 1

February 2013

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## MESSAGE FROM THE COMMITTEE CHAIR

David Johnson

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2013 is upon us and with it, the end of interest in the Mayan predicted apocalypse. More importantly, 2013 brings with it a new era for ENRL publications. For the last few years, ENRL has jointly worked with other energy committees within SEER to co-develop newsletters. While that has resulted in great articles and well put-together newsletters, at times it has resulted in a bottleneck for the attorney-authors on the energy side of SEER. Simply put, there were too few opportunities to publish for too many of us highly motivated attorney-authors.

Going forward, ENRL will be publishing quarterly newsletters with the appropriately catchy title “Energy and Natural Resources Litigation Committee Newsletter.” For this quarter and our first of many newsletters, our theme is topics that generally discuss the concept of energy and natural resources litigation. For our next newsletter, which will be published near to April 20, 2013, which signals the third anniversary of the *Deepwater Horizon* oil spill, ENRL will be exploring the legal issues that have emerged from that spill. Submissions relevant to that topic can be sent to Brittany Tofinchio at [bktofinchio@aol.com](mailto:bktofinchio@aol.com) prior to March 8, 2013.

Finally, if any of you have ideas or suggestions for how ENRL can better serve your needs, I would be happy to discuss them with you. I can be reached at [dsjohnson@azwater.gov](mailto:dsjohnson@azwater.gov). Thank you and enjoy the new year.

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## THE STATUS OF AGGREGATION UNDER THE CLEAN AIR ACT

Jonathan Skinner

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On December 21, 2012, the U.S. Environmental Protection Agency (EPA) released a memorandum concerning the applicability of the Sixth Circuit Court of Appeals decision in *Summit Petroleum Corp. v. EPA*, which struck down EPA’s interpretation of its regulation outlining when stationary sources may be aggregated under the Clean Air Act (CAA). The case makes clear that EPA improperly expanded the term “adjacent” to include an analysis of facility interrelatedness. The EPA memorandum makes clear that EPA “does not intend to change its longstanding practice of considering interrelatedness” in jurisdictions outside of the Sixth Circuit. But what is not clear is how the ideological conflict between *Summit Petroleum* and the EPA memorandum will influence state and local permitting authorities going forward.

In practice, several state and local agencies are authorized to carry out the title V air permitting program pursuant to approved state implementation plans. These state and local agencies may consider EPA guidance memoranda to carry out their authorized air permitting programs, but the memoranda are not necessarily binding on state and local authorities. As a result, some state or local authorities may be more persuaded by *Summit*

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Committee Newsletter  
Vol. 1, No. 1, February 2013  
*Brittany Tofinchio, Editor*

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**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT,  
ENERGY, AND RESOURCES**

**CALENDAR OF SECTION EVENTS**

- February 26, 2013  
**Key Environmental Issues in US EPA Region 4**  
Atlanta, GA
- March 21-23, 2013  
**42nd Spring Conference**  
Grand America Hotel  
Salt Lake City, UT
- April 11-12, 2013  
**ABA Petroleum Marketing Attorneys' Meeting**  
Ritz Carlton Hotel  
Washington, DC
- April 18, 2013  
**ABA Public Land Law Symposium**  
University of Montana Law School  
Missoula, MT
- April 19-21, 2013  
**ABA SEER Spring Council Meeting**  
The Resort at Paws Up  
Greenough, MT
- June 5-7, 2013  
**31st Annual Water Law Conference**  
Red Rock Resort  
Las Vegas, NV
- August 8-13, 2013  
**ABA Annual Meeting**  
San Francisco, CA

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*continued from page 1*

*Petroleum*, leaving the oil and gas industry and other interested parties in a state of uncertainty.

This article addresses the case, *Summit Petroleum*, and the current status of aggregation under the CAA in light of the EPA memorandum, and insists that it may be time for EPA to clarify its aggregation policy through new rulemaking.

## **Background Facts and Title V Aggregation**

Summit Petroleum Corporation (Summit) produces natural gas and owns and operates a sweetening plant and approximately 100 sour gas production wells located over an area of about 43 square miles. Each of the wells is connected by pipeline to the plant at distances of 500 feet to eight miles. None of the wells share a common boundary with other wells or with the plant. The majority of the wells are located on Indian land, and Summit does not own the land between the wells or between the wells and the plant. Flares are used in plant operations to burn off natural gas waste in order to relieve pressure on the gas collection equipment. The closest flare to the plant is located approximately one-half mile away and remaining flares are each over one mile away.

The plant, wells, and flares emit pollutants regulated under the CAA, including sulfur dioxide and nitrogen oxides. The plant alone, however, emits just under 100 tons of sulfur dioxide and nitrogen oxides per year; each flare and well site emits far lower amounts of these pollutants per year. That said, if the emissions of sulfur dioxide from the plant and any well were combined, they would exceed 100 tons per year. This threshold is important because under the CAA, owners and operators of “major sources”—identified as any building, structure, facility, or installation that “emits, or has the potential to emit, one hundred tons per year or more of any air pollutant”—are required to obtain a title V operating permit.

In 1980, in response to the D.C. Circuit decision in *Alabama Power v. Costle*, EPA promulgated

regulations which further defined “building, structure, facility or installation” as all of the pollutant-emitting activities which (1) belong to the same industrial grouping, (2) are located on one or more contiguous or adjacent properties, and (3) are under common ownership or control. *See* 40 C.F.R. § 71.2. This three-factor test clarified EPA’s intent to combine, or aggregate, certain sources into a single stationary source based on a “common sense notion” of a plant. In practice, EPA appeared to emphasize, in certain cases, the functional relationship between separate facilities over physical proximity. It was this exercise that gave rise to *Summit Petroleum*.

In *Summit Petroleum*, EPA determined that Summit’s plants and wells constituted a single stationary source, and were therefore a major source, under title V. EPA emphasized that the “nature of the relationship between the facilities” and the “degree of interdependence between them” were important factors in assessing adjacency. *Summit Petroleum*, slip op. at 9. The court disagreed. *Id.* at 25.

The court explained “that EPA’s interpretation of the requirement . . . that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity.” *Id.* at 15. Accordingly, the case was remanded to EPA for a reassessment of Summit’s title V source determination.

## **The Geographic Reach of Adjacency**

Here is the rub. Unfortunately, EPA has never established a specific distance between sources for determining “adjacency” under title V. At best, we know that the regulatory history preceding the 1980 regulations suggested that sources at least 20 miles apart would not be considered adjacent:

One commenter asked . . . whether EPA would treat a surface coal mine and an electrical generator separated by 20 miles and linked by a railroad as one “source,” if the mine, the generator, and the railroad were all under common control.

EPA confirms that it would not . . . the mine and the generator would be too far apart. 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980).

However, as described above, each of Summit’s wells is connected by pipeline to the plant at distances of 500 feet to eight miles, and its flares are anywhere between one-half mile to over one mile away. So, we are left with the question: how far is not too far?

According to some state agencies, the answer lies at a quarter mile. Some state agencies, including Louisiana, Oklahoma, and Texas, have adopted a presumptive standard that facilities located within a quarter mile are physically proximate and adjacent. Where facilities are located beyond a quarter mile apart, at least prior to *Summit Petroleum*, state regulators have considered other factors, including functional interdependency. But after *Summit Petroleum*, considerations of interdependency for sources located beyond a quarter mile apart may be vulnerable to legal challenges.

### The Sunoco Refineries in Pennsylvania

On September 24, 2012, an environmental group in Philadelphia filed an appeal of the Pennsylvania Department of Environmental Protection’s (DEP) decision to aggregate two Sunoco refineries that are located over 17 miles apart under a single title V permit. Sunoco had petitioned DEP to aggregate the refineries because they were “operationally interdependent,” which the environmental group argued was “counter to both the [DEP’s] position on aggregation as well as state and federal laws.” The decision to aggregate allowed one refinery to take advantage of emission offsets related to the shutdown of the second refinery, despite the physical distance between them. Notably, the same environmental group has repeatedly petitioned DEP to aggregate certain oil and gas operations in the Marcellus Shale region based on operational interdependence.

On October 6, 2012, however, DEP issued a guidance memorandum that further clarified the state’s aggregation policy. DEP, after considering the quarter-mile presumptive standard adopted by Louisiana, Oklahoma, and Texas, will apply the same presumptive

standard in Pennsylvania. Additionally, DEP will undertake a case-by-case analysis for sources located beyond the quarter-mile threshold. In such circumstances, DEP will take a “common sense approach” to source aggregation—that is, the approach which prompted the 1980 EPA regulations. But it is still unclear how DEP’s determination regarding the Sunoco refineries will be affected by the new guidance memorandum.

### Common Sense Rulemaking

In the 1980 regulations, EPA explicitly specified that “it does not intend ‘source’ to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one ‘source.’” 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980).

Notwithstanding these prior statements and the Sixth Circuit’s decision in *Summit Petroleum*, EPA has made clear that it intends to aggregate such activities under title V and will continue to consider functional interrelatedness. Accordingly, it may be time for EPA to propose new regulations through the rulemaking process. This would not only promote consistency across jurisdictions but would help eliminate the uncertainty created by the regulatory history of the 1980 regulations and by disparate or ambiguous state and local aggregation policies.

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## EFFECT OF THIRD-PARTY PARTICIPATION ON PHOSPHATE MINE PERMITTING IN FLORIDA

Susan L. Stephens, Shareholder, and  
Timothy M. Riley, Attorney

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### Overview

Phosphate deposits in Florida occur principally in an area of approximately 1.3 million acres in central Florida known as the Central Florida Mining District. Approval of an environmental resource permit (ERP), which allows for the disturbance of wetlands, and a conceptual reclamation plan (CRP), which addresses the post-reclamation vision for the property, are the two most significant requirements of the Florida Department of Environmental Protection (DEP), although other approvals are also needed. § 373.413-414, Fla. Stat. (2012); Rule 62-330.200(3), Fla. Admin. Code (F.A.C.) (2012); ch. 40D-4, F.A.C. All phosphate-mined lands are required to be reclaimed, and stringent wetland restoration requirements apply for reclamation of wetlands and streams. Rule 62C-16.0051, F.A.C. Additionally, a Department of the Army (DA) individual permit is needed from the U.S. Army Corps of Engineers (COE) for wetland impacts. 33 C.F.R. pts. 323, 332 (2011); 40 C.F.R. pt. 230 (2011).

### Recent Mine Challenges

Every significant phosphate mine permit over the last decade has been challenged as mining moves further and further south from its historic locus. Here is a look back at the significant cases involving phosphate mining in the last two years.

*Peace River/Manasota Regional Water Supply Auth. v. IMC Phosphates Company*, Case No. 03-0791 (Fla. Div. Admin. Hearings June 16, 2006), *aff'd*, *Charlotte County v. IMC Phosphate Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009).

This case involved a challenge to IMC's mining permits for its Ona Mine in Hardee County by three coastal counties, a water supply authority, and one non-governmental organization (NGO). This project

originally began as a 20,000 acre new mine (Ona), but ultimately was modified mid-challenge to seek mining only of the western one-third of the tract. The hearing process took three years, and the permits were ultimately issued with significant revisions and additional on-site avoidance. Separately, the COE permit is still pending, and mining is not under way. The sheer length and expense of this proceeding—published reports estimate it cost Charlotte County \$13 million since 2008—led to the creation of a summary hearing process for state mine permits that served to considerably shorten both timelines and discovery. *See* § 378.205(3), Fla. Stat. This case's findings over the industry's ability to reclaim certain wetlands and streams helped spur more detailed reclamation designs, modeling analysis to support the designs, and more reclamation demonstration sites. *Lee County v. Mosaic Fertilizer, LLC*, Case No. 08-3886 (Fla. Div. Admin. Hearings Dec. 18, 2008), *aff'd*, *Lee County v. Dep't Env'tl. Protection*, 29 So. 3d 301 (Fla. 2d DCA 2010) (per curiam).

This case involved a challenge by two counties to the state permits for the South Fort Meade-Hardee Mine Extension, a nearly 11,000-acre site in Hardee County. The permits were granted following the hearing, with minimal changes. The permitting timeline was considerably shortened due to new summary hearing procedures implemented earlier in 2010. Additionally, the weaknesses of prior permits were in large part remedied by the time of this challenge, and the detail in the documentation supporting the applications (and thus the permits) was substantial. The findings of fact were overwhelmingly in favor of the project.

The DA permit was issued on June 14, 2010, and challenged in federal district court by Sierra Club and other NGOs. The federal district judge, in a surprise move to some, twice ordered a halt to mining pending the outcome of the proceedings, which resulted in a shutdown of Mosaic's South Fort Meade mine operations. Mosaic entered into a settlement agreement with the plaintiffs in February 2012 to resume stalled operations. In exchange for dismissal, Mosaic agreed to additional on-site preservation and off-site land donation, among other concessions. The settlement agreement was approved by the court in

March 2012 and the case dismissed after adding three years to the permitting timeline. *Sierra Club, Inc. v. U.S. Army Corps of Eng's*, Case 3:10-cv-00564-HLA-JBT (M.D. Fla. Mar. 2012); Case No. 11-13277 (11th Cir. Mar. 28, 2012).

*FINR, II v. CF Industries, Inc.*, Case No. 11-6495 (Fla. Div. Admin. Hearings Apr. 30, 2012), *appeal filed*, Case No. 1D12-3309 (Fla. 1st DCA 2012).

The CF Industries' proposed South Pasture Extension, a 7500-acre extension to its existing South Pasture Mine, was challenged by an adjacent property owner arguing that mining was incompatible with its medical treatment facility. This case also proceeded as a summary hearing and was the first mine case brought since the evidentiary burden in challenges to DEP permits in the Florida Administrative Procedure Act was modified in 2011 by creating a statutory prima facie case of permit entitlement for the applicant and shifting the ultimate burden of persuasion to the challenger. § 120.569(2)(p), Fla. Stat. A final order approved the permits, and the matter is currently under appeal. The timeline from filing the initial application to final permit issuance was approximately three years, but the DA permit application is still pending (see below).

## Halftime: The Federal Study

In September 2010, the COE Jacksonville District directed staff to initiate the "Areawide Environmental Impact Statement on Phosphate Mining in the Central Florida Phosphate District" (AEIS). The COE's website is <http://www.phosphateaeis.org>. The lead agency for the AEIS is the COE; EPA Region 4 and DEP are cooperating agencies. Every local governmental and quasi-governmental entity in the affected watersheds is denoted as "participating agencies." The AEIS will encompass four pending projects, including the 20,000 acre Ona Mine and the South Pasture Extension. The processing of the AEIS has stopped issuance of all COE permits for phosphate mines. The Ona and CF South Pasture Extension projects noted above got caught in this net, while South Fort Meade Extension predated the decision to undertake the AEIS.

After scoping meetings held in March 2011, notice of availability of the draft AEIS was published on June 1, 2012. Comments on the draft were officially accepted until August 1, and the COE has indicated its intention to publish notice of the final AEIS by March 1, 2013. Records of Decision for each of the pending DA permit applications for mining are expected to follow thereafter, although the timing may vary.

## Conclusion

Challenges to Florida phosphate mine permits have become the norm over the past decade. However, at the state level, recent legislative changes have streamlined and shortened the process, and multiple findings supporting permit issuance have arguably created a tougher litigation climate. At the federal level, however, the playing field is wide open, particularly given the pendency of the AEIS. While challenges to the Records of Decision resulting from the AEIS appear almost inevitable, it is unclear how the long and complex history of mine litigation in Florida will affect those challenges.

*Susan L. Stephens*, shareholder, and *Timothy M. Riley*, attorney, practice environmental and natural resource law at Hopping Green and Sams, P.A., in Tallahassee, Florida.



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## WIND POWER TAKES OFF

Maggie Palmer

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For the first time, the Department of the Interior and the Bureau of Ocean Energy Management (BOEM) announced that they would open large swaths of the Atlantic shoreline for offshore wind development. Press Release, U.S. Dep't of the Interior, Interior Announces First-Ever Renewable Energy Lease Sales on the Outer Continental Shelf (Nov. 30, 2012), <http://www.doi.gov/news/pressreleases/interior-announces-first-ever-renewable-energy-lease-sales-on-the-outer-continental-shelf.cfm>. The areas for lease, which are off the coast of Massachusetts, Rhode Island, and Virginia, have the potential to produce more than 4000 megawatts of energy; that is enough to power 1.4 million homes. *Id.*

The government plans to lease 277,550 total acres of federal water on the Outer Continental Shelf. *Id.* One area is 9.2 nautical miles off the coast of Rhode Island and comprises 164,750 acres. 77 Fed. Reg. 71,612, 71,614 (Dec. 3, 2012). It will be auctioned as two leases (the North Zone and the South Zone). *Id.* The remaining 112,799 acres lie 23.5 nautical miles off the southern shore of Virginia and will be auctioned as one unit. Proposed Sale Notice, 77 Fed. Reg. 71,621, 71,623 (Dec. 3, 2012).

While this is the first competitive lease sale for the Outer Continental Shelf, offshore wind enthusiasts will recall that two other offshore projects have already been given the go-ahead by the U.S. government. Cape Wind, on the Nantucket Sound, won the United States's first offshore wind lease in October of 2010. With 130 turbines, Cape Wind is projected to generate 174-420 megawatts of electricity, which is enough to power seventy-five percent of the electricity demand in Cape Cod and on Martha's Vineyard. CAPE WIND, <http://www.capewind.org/FAQ-Category4-Cape+Wind+Basics-Parent0-myfaq-yes.htm> (last visited Jan. 11, 2013). In October 2012, the BOEM and the Department of the Interior opened approximately 96,000 acres off the coast of Delaware for offshore wind development. Press Release, U.S. Dep't of the Interior, First Lease Under

Administration's "Smart from the Start" Offshore Wind Strategy Part of Effort to Expand American Made Energy (Oct. 23, 2012), <http://www.doi.gov/news/pressreleases/Interior-Announces-Commercial-Lease-for-Renewable-Energy-Offshore-Delaware.cfm>. This lease grants NRG Bluewater Wind Delaware the exclusive right to submit plans for offshore wind in the area. In its first proposal NRG Bluewater proposed a 450-megawatt project that is estimated to supply 100,000 Delaware homes with electricity. *Id.*

It is doubtful that the new leases will face heavy legal fire, in light of the effort wasted challenging Cape Wind. Cape Wind was challenged at the federal and state level in a string of lawsuits that burdened the project's development from its proposal in 2001, to its final approval in 2010. Dominic Spinelli, *Historic Preservation and Offshore Wind Energy: Lessons Learned from the Cape Wind Saga*, 46 GONZ. L. REV. 741, 742-43 (2010-2011); see *Ten Taxpayer Citizens Group v. Cape Wind Associates*, 373 F.3d 183 (June 28, 2004); *Alliance to Protect the Nantucket Sound v. U.S. Dep't of the Army*, 288 F. Supp. 2d 64 (D. Mass. 2003), *aff'd*, 398 F.3d 105 (1st Cir. 2005); *Alliance to Protect the Nantucket Sound v. Energy Facilities Siting Board*, 457 Mass. 663 (Aug. 31, 2010). These lawsuits challenged the permitting of a scientific tower and the approval of undersea transmission lines for Cape Wind. Iva Ziza, *Siting of Renewable Energy Facilities and Adversarial Legalism: Lessons from Cape Cod*, 42 NEW ENG. L. REV. 591, 610-18 (2008). Decisions in these cases solidified the federal government's jurisdiction over projects in federal waters and pushed Cape Wind toward actualization. Cape Wind was recently challenged by the Martha's Vineyard Fishermen's Association for violating federal laws that protect historic fishing grounds. However, on June 29, 2012, Cape Wind announced that Vineyard fishermen had dropped their lawsuit and issued a statement supporting Cape Wind. CAPE WIND, <http://www.capewind.org/news1261.htm> (last visited Jan. 11, 2013). The Alliance to Protect the Nantucket Sound has spent over \$24 million over the past ten years to fight Cape Wind and has lost the majority of its legal battles. Patrick Cassidy, *Cape Wind Opponent Still Raising Millions*, CAPE COD TIMES,

Nov. 17, 2012. The organization was approximately \$1 million in debt at the end of fiscal year 2011. *Id.* These lackluster results are hardly inspiring for those seeking to stop offshore wind. Furthermore, the United States's second offshore wind farm, which will be developed by NRG Bluewater off the coast of Delaware, has not received any legal challenges to date. It is possible that Cape Wind has left a bad taste in the mouth of those in opposition to offshore wind, and that NRG Bluewater and these soon-to-be-leased areas have nothing but smooth sailing ahead.

Bidders should ready their proposals in a hurry, as the qualification period for those hoping to compete at auction ends on February 1, 2013. Proposed Sale Notice, 77 Fed. Reg. 71,621, 71,622 (Dec. 3, 2012); Proposed Sale Notice, 77 Fed. Reg. 71,612, 71,613 (Dec. 3, 2012). The Proposed Sale Notices provide more detailed information about the areas available for leasing, proposed lease provisions, criteria for evaluating competing bids, and auction details. There is a 60-day comment period that ends February 1, 2013. *Id.*

The competitive lease sales are to be held sometime in 2013, but the government has been otherwise coy about the exact auction date. The time and date of the lease sale auctions will be published via Final Sale Notices in the *Federal Register*, and the sale will be held no earlier than 30 days after their publication date. *Id.* The BOEM has already conducted environmental assessments to look at the potential effects of issuing the leases. U.S. Dep't of the Interior, *Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore Rhode Island and Massachusetts—Environmental Assessment* (July 2, 2012), <http://www.boem.gov/Renewable-Energy-Program/Smart-from-the-Start/Index.aspx>; U.S. Dep't of the Interior, *Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore New Jersey, Delaware, Maryland, and Virginia Final Environmental Assessment* (Feb. 2012), <http://www.boem.gov/Renewable-Energy-Program/Smart-from-the-Start/Index.aspx>. It has yet to conduct a comprehensive National Environmental Policy Act review, but intends to do so. The review will include

opportunities for public comment on the construction of any proposed wind power facility.

Because of these new leases for offshore wind on the Outer Continental Shelf, 1.4 million homes can look forward to joining a small, but growing, section of the American population whose homes run on clean energy. The tides are turning against litigation, the government is moving forward, and the United States is three leases closer to harnessing the 4000 gigawatts of offshore wind potential on its shores. U.S. Dep't of Energy, [http://www1.eere.energy.gov/wind/news\\_detail.html?news\\_id=18918](http://www1.eere.energy.gov/wind/news_detail.html?news_id=18918) (last visited Jan. 11, 2013).

*Maggie Palmer* is an attorney advisor at the Federal Mine Safety & Health Review Commission. She can be reached at [mpalmer@fmshrc.gov](mailto:mpalmer@fmshrc.gov). The views presented in this article are solely those of the author and not necessarily the United States government.

## QUICK TELECONFERENCE

### U.S. EPA'S BOILER MACT AND CISWI RULES: WHAT YOU AND YOUR CLIENTS NEED TO KNOW FOR COMPLIANCE NOW THAT THE RECONSIDERATION PROCESS IS COMPLETE

**Wednesday, February 13, 2013**

12:00 p.m. – 1:30 p.m. Eastern Time

#### **Program Overview:**

U.S. EPA's air toxics standards for industrial boilers and incinerators have been a long time coming, starting with the initial rules in 2004, which were vacated and reissued by the Agency in March 2011, only to be immediately reconsidered and repropose at the end of 2011. EPA has now finalized its rules following reconsideration and compliance timelines are starting.

#### Moderator:

**Shannon S. Broome**, Katten Muchin Rosenman LLP, San Francisco Bay Area and Washington, DC

#### Panelists:

**Lisa Jaeger**, Bracewell & Giuliani LLP, Washington, DC  
**Robert Wayland**, U.S. Environmental Protection Agency, Research Triangle Park, NC

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## GLOBAL WARMING LAWSUITS GET CHILLY RECEPTION IN FEDERAL COURT

Dustin T. Till

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Over the past year, a series of decisions have made clear that courts are very reluctant to consider common law claims seeking to address climate change. Plaintiffs have advanced numerous common law claims in both federal and state court, including nuisance claims seeking emission abatement or monetary damages, as well as claims alleging violations of the public trust doctrine. The focal point of this litigation has been the Supreme Court's 2011 decision in *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*) in which the Court held that the Clean Air Act preempted federal common law nuisance claims seeking to abate greenhouse gas emissions. Advocacy groups continued to press nuisance claims seeking monetary damages, but the Ninth Circuit recently concluded that the Clean Air Act displaced all federal common law nuisance claims, regardless of the remedy sought. *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849 (9th Cir.). *Kivalina* left open the possibility that the plaintiffs could pursue their state common law claims in state court, but two federal court decisions over the past year suggest that such claims are similarly preempted. Finally, lawsuits alleging violations of the public trust doctrine have met similar fates. All told, it has become increasingly clear that the Clean Air Act has displaced both state and federal common law with respect to greenhouse gas emissions.

### I. Greenhouse Gas Nuisance Litigation

#### A. Abatement Actions—American Electric Power

In 2011, the Supreme Court held in *AEP* that the Clean Air Act displaced the federal common law of nuisance with respect to greenhouse gas emissions. The plaintiffs in *AEP* alleged that the greenhouse gas emissions attributable to four private electric utilities and the Tennessee Valley Authority constituted a public/interstate nuisance. The plaintiffs sought an injunction requiring the defendants to cap their carbon dioxide emissions and reduce them by a specified percentage each year.

In 2005, a federal trial court dismissed the lawsuit, ruling that it presented a nonjusticiable political question. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The court ruled that it could not grant the relief sought by the plaintiffs without making wide-sweeping initial policy determinations, including determining appropriate emission caps and calculating and scheduling emission reductions.

The Second Circuit reversed that decision in 2009, holding that the claims had political implications, but were nonetheless justiciable in the federal courts. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009). While acknowledging that the Environmental Protection Agency (EPA) or Congress could still issue regulations or adopt legislation that preempted the field, neither had done so at the time the Second Circuit was considering the matter. Therefore, the court held that the plaintiffs' public nuisance claims were not displaced by other federal law or regulation.

The Supreme Court, however, disagreed, and held that the plaintiffs' public nuisance claims were preempted. The Supreme Court rejected the Second Circuit's reasoning that federal common law is not displaced until EPA actually exercises its regulatory authority. Instead, the question for displacement purposes is "whether the field has been occupied, not whether it has been occupied in a particular manner." The Supreme Court concluded that Congress had indeed delegated to EPA the decision of whether and how to regulate greenhouse gas emissions from power plants via the Clean Air Act. The Court observed that, in the wake of *Massachusetts v. EPA*, 549 U.S. 497 (2007), Congress had indeed delegated to EPA the decision of whether and how to regulate greenhouse gas emissions from power plants:

We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally

plain that the Act “speaks directly” to emissions of carbon dioxide from the defendants’ plants.

As discussed below, other courts have relied on *AEP* when dismissing common law climate change claims—regardless of the remedy sought.

### **B. Monetary Damages—Kivalina**

While *AEP* made clear that federal courts would not entertain public nuisance lawsuits seeking emission abatement, it did not resolve the issue of whether claims seeking monetary damages were viable. The Ninth Circuit answered that question in *Kivalina*, holding that the Clean Air Act had also displaced the federal common law of nuisance with respect to actions seeking monetary damages.

The plaintiffs in *Kivalina* alleged that the greenhouse gas emissions from numerous oil, energy, and utility companies constituted a public nuisance. More specifically, the plaintiffs argued that the defendants’ emissions had exacerbated global warming, which in turn was melting sea ice and exposing a low-lying Native Alaskan village to more powerful storms and increased flooding. The plaintiffs sought compensation for the costs associated with moving the village to a more sheltered location.

The Northern District of California dismissed the plaintiffs’ lawsuit on grounds that the claims presented a nonjusticiable political question. *Native Village of Kivalina v. ExxonMobil Corp.*, 633 F. Supp. 2d 863 (N.D. Cal. 2009). Alternatively, the court ruled that the plaintiffs lacked standing because they could neither demonstrate a “substantial likelihood” that defendants’ conduct caused their alleged injury, nor that the alleged injury was “fairly traceable” to the defendants.

In September 2012, the Ninth Circuit affirmed. The court first acknowledged that “federal common law can apply to transboundary pollution suits” (such as *Kivalina*’s claims), and that such suits are generally “founded on a theory of public nuisance.” The court went on to explain that the right to assert such claims is limited: “[W]hen federal statutes directly answer the federal question [presented in a public nuisance claim], federal common law does not provide a remedy

because legislative action has displaced the common law.” The Ninth Circuit noted that the application of that test “can prove complicated,” and that determining whether a claim has been displaced by statute “is an issue-specific inquiry . . . [t]he salient question is whether Congress has provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of federal common law.” The court, however, declined to “engage in that complex issue and fact-specific analysis” on grounds that *AEP* had already concluded that the Clean Air Act displaced the federal common law with respect to greenhouse gas emissions.

The Ninth Circuit rejected the plaintiffs’ argument that the Clean Air Act only displaced abatement actions but not damages actions, and held that the type of relief requested was irrelevant to the displacement analysis: “[D]isplacement of a federal common law right of action means displacement of remedies. Thus, *AEP* extinguished *Kivalina*’s federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions.”

*Kivalina* also argued that its claims were not displaced because the damages occurred before EPA had actually adopted enforceable greenhouse gas emissions standards. The Ninth Circuit rejected that argument, observing that Congress had, through the Clean Air Act, empowered EPA to regulate greenhouse gas emissions, even if the agency had not yet adopted applicable regulations—“Congressional action, not executive action, is the touchstone of displacement analysis.”

The Ninth Circuit concluded that “federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.” Because the plaintiffs did not present a justiciable claim, the Ninth Circuit found it unnecessary to address the issue of standing.

### **C. State Nuisance Claims—Comer**

*Kivalina* leaves open the issue of whether state law nuisance claims were displaced by the Clean Air Act;

indeed, the trial court declined to exercise jurisdiction over those claims, and the Ninth Circuit noted that the plaintiffs were free to refile their state law nuisance claims in state court. But at least two decisions reveal that state law nuisance claims are vulnerable to preemption arguments.

Earlier this year, the U.S. District Court for the Southern District of Mississippi ruled that state law nuisance claims were displaced by the Clean Air Act. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012). The *Comer* decision is the latest episode in a long-running saga over whether certain oil, refining, and chemical manufacturing companies could be held liable for damages arising from Hurricane Katrina. In 2007, the district court dismissed the plaintiffs' original lawsuit on grounds that they lacked standing because their injuries were not fairly traceable to the defendants' alleged actions. *Comer v. Murphy Oil USA, Inc.*, CIV 1:05-CV436LGRHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). The court also ruled that the case presented a nonjusticiable political question.

On appeal, the Fifth Circuit reversed, holding that while the case might be "political . . . in the broad sense, *i.e.*, that it has political implications or ramifications," that fact alone was not enough to render the case nonjusticiable, since federal courts routinely decide cases "that merely implicate[ ] a matter within the authority of a political branch," including judicial review of federal statutes and resolution of disputes regarding the limits of authority of the political branches. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). The defendants sought, and were granted, rehearing *en banc*. However, after rehearing was granted, a number of justices were recused due to conflicts, resulting in the loss of a quorum. Without a quorum, the Fifth Circuit was unable to "transact judicial business," and accordingly directed the clerk to dismiss the plaintiffs' appeal.

The plaintiffs filed a new class action lawsuit, once again seeking relief under both federal and state common law nuisance theories. In April 2012, the court ruled that plaintiffs' claims were barred by the principles of *res judicata* and collateral estoppel

because they involved the same litigants and same claims as the original *Comer* lawsuit. As it did in the original *Comer* case, the district court also ruled that the plaintiffs lacked standing to pursue their claims. Specifically, the court ruled that plaintiffs had failed to establish a causal connection between the defendants' emissions and their injuries.

Perhaps the most significant aspect of *Comer* is the court's dismissal of the plaintiffs' state law nuisance claims. In *AEP*, the Supreme Court declined to resolve the issue of whether state law nuisance claims were preempted by the Clean Air Act because the parties had not briefed that issue. The parties in *Comer*, however, addressed that issue head-on, and the court determined that state law nuisance claims were indeed displaced by the Clean Air Act.

A similar result was recently reached in *Bell v. Cheswick Generating Station* where a federal court ruled that the Clean Air Act displaced state common law nuisance claims. *Bell v. Cheswick Generating Station*, 2:12-CV-929, 2012 WL 4857796 (W.D. Pa. Oct. 12, 2012). As the court explained:

[T]he Clean Air Act represents a comprehensive statutory and regulatory scheme that establishes the standards with which the Cheswick Generating Station must abide. Plaintiffs' claims impermissibly encroach on and interfere with that regulatory scheme

. . . .

[T]he recovery sought—monetary damages and injunctive relief—is simply inconsistent with [the Clean Air Act]; [it] already provides a means to seek limits on emissions, and the Court will not create a parallel track.

### III. Public Trust Doctrine Lawsuits

A series of lawsuits filed by Our Children's Trust (OTC) have sought to enjoin greenhouse gas emissions under the public trust doctrine. OTC filed public trust lawsuits in at least twelve states and one lawsuit in federal court. The lawsuits are all premised on the same basic proposition—that the atmosphere is a commonly shared public trust resource, and that

various government entities failed to fulfill their fiduciary duties under the public trust doctrine to protect that resource by requiring power producers and industrial facilities to abate their greenhouse gas emissions. The courts have uniformly ruled that the Clean Air Act preempts public trust claims.

OTC's federal lawsuit, *Alex L. v. Jackson*, alleged that EPA and various other federal agencies had a fiduciary duty, as public trust custodians, to restore global atmospheric carbon dioxide concentrations to levels less than 350 parts per million, and that they had "wasted and failed to preserve and protect the atmosphere" as a public trust resource. *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012). The plaintiffs sought an order requiring the agencies to, among other things, take actions so that global carbon dioxide emissions from fossil fuels would peak by 2012, and would be reduced by at least six percent per year through 2050.

In reliance on *AEP*, the court ruled that even if the public trust doctrine had been a federal common law claim at one time, it had been displaced by the Clean Air Act. The plaintiffs attempted to distinguish *AEP*, arguing that the Supreme Court's holdings were limited to common law public nuisance claims (as opposed to plaintiffs' public trust claims). The court rejected that argument, noting that the Supreme Court did not limit its holdings to only common law nuisance claims; rather, the Supreme Court held that "any federal common law right" with respect to carbon dioxide emissions had been displaced by the Clean Air Act. The court went on to observe that the public trust lawsuit involved the same basic questions as the public nuisance lawsuit at issue in *AEP*. Both causes of action would require the court to make specific determinations as to the appropriate atmospheric concentrations of carbon dioxide, and mandate that federal agencies undertake specific regulatory activity—even if not required by statute. "These are determinations," the court ruled, "that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the primary

regulator of greenhouse gas emissions." The court accordingly dismissed the plaintiffs' claims.

OCT's state-level lawsuits have not fared any better. In April 2012, an Oregon trial court dismissed a similar public trust lawsuit. *Chernaik v. Kitzhaber*, Case No. 16-11-09273 (Or. Lane County Cir. Ct. Apr. 5, 2012). Like many states, Oregon has adopted greenhouse gas emission reduction goals. The plaintiffs in *Chernaik* alleged that those goals, and other measures adopted by the state, were inadequate and resulted in the state failing to adequately protect the atmosphere as a public trust.

The trial court rejected those claims on numerous grounds, including that the proposed remedy exceeded the court's authority under the Declaratory Judgment Act because it would require the court to "extend the law by creating a new duty rather than interpret[ing] a pre-existing law." Additionally, the court ruled that the separation of powers doctrine barred the plaintiffs' claims:

Whether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature's [greenhouse gas] emission goals are too weak, too stringent, or are altogether unnecessary is beside the point. These determinations are not judicial functions. They are legislative functions.

The court concluded that the plaintiffs' claims were barred by the political question doctrine: "Plaintiffs ask this Court to cap [greenhouse gas] emissions at the levels recommended by Plaintiffs, rather than those already established by the Legislature. That is a policy decision that has already been addressed by the Legislature. With the Legislature this decision should remain."

Lawsuits in Alaska and Washington have also been dismissed on similar grounds. *See Kanuk v. Alaska Dep't of Nat. Res.*, Case No. 3AN-11-0747CI (Alaska Super. Ct. Mar. 16, 2012); *Stivak v.*

Washington, Case No. 11-2-16008-4 SEA (King County Super. Ct. Feb. 29, 2012).

#### IV. Conclusion

*Kivalina* may be the last blow for parties that are seeking to address climate change via the federal common law. The opinion makes clear that both abatement actions and monetary damage actions pertaining to greenhouse gas emissions have been displaced by the Clean Air Act. Although the Ninth Circuit left open the possibility that the plaintiffs could refile their nuisance claims in state court, the weight of authority suggests that the Clean Air Act has also displaced state claims.

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## HYDRAULIC FRACTURING FRENZY: WHAT'S UP?

Barclay R. Nicholson

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### Introduction

The future energy plans of the United States rest firmly on the development of the estimated large volumes of natural gas found in shale formations, through the use of horizontal drilling and hydraulic fracturing. Hydraulic fracturing involves the injection of highly pressurized fluids and proppants into shale or other nonporous hydrocarbon formations in order to increase production of oil and natural gas wells. Hydraulic fracturing utilizes large volumes of water and creates large volumes of “flowback” fluids or “produced water” which must be handled either by injecting the fluids into a “Class II Well,” treating the water and disposing of it, or treating and recycling the water.

Although hydraulic fracturing has been utilized in the United States for decades, within the past several years, hydraulic fracturing has received increasing scrutiny from the media, the U.S. Environmental Protection Agency (EPA), Congress, environmental and citizens groups, and state and local regulatory agencies. Concerns have been raised about the reduction of citizens’ water supplies due to the large volume of water used in the fracturing process, the alleged contamination of aquifers that supply drinking water, and the appropriate disposal or recycling of the flowback fluids. At the heart of these concerns are the additives used in fracturing fluids, which some argue, contain potentially toxic substances such as benzene, toluene, xylene, and methanol.

This article presents a brief overview of shale plays in the United States and current issues relating to hydraulic fracturing, including regulation on federal and state levels, disclosure of fracking fluids, studies and research relating to water contamination and earthquakes, and litigation implicating fracking in personal injuries and property damage.

### Shale Plays in the United States

According to the U.S. Energy Information Administration (EIA), there are approximately 862 trillion cubic feet of shale resource in the continental

United States. *See* <http://www.eia.gov/analysis/studies/worldshalegas/>. Across the United States, there are at least 20 geographic basins that are recognized as sources of shale gas. Each of these shale basins has unique exploration criteria and operational challenges. There are five regions capable of producing large quantities of natural gas: Northeast (Marcellus with 63% of the U.S. resources), Gulf Coast (Haynesville and Eagle Ford Shale, 13%), Southwest (Barnett and Barnett/Woodford, 10%), Mid-Continent (Fayetteville and Woodford, 8%), and Rocky Mountain (Mancos and Lewis, 6%). *See* Department of Energy, “Review of Emerging Resources: U.S. Shale Gas and Shale Oil Plays,” *available at* <ftp://ftp.eia.doe.gov/natgas/usshaleplays.pdf>.

## Regulation of Hydraulic Fracturing

*Federal Level.* At present, hydraulic fracturing is not regulated at the federal level, but proposed statutes and rules from various federal agencies are making their way through the legislative process. The Federal Safe Drinking Water Act (SDWA) directs the U.S. Environmental Protection Agency (EPA) to promulgate regulations that will protect drinking water sources from contamination. Congress has proposed to amend the SDWA to govern fracking, but past attempts to do so have failed to achieve a consensus.

On May 4, 2012, the EPA released its draft guidance to clarify how oil and gas companies can comply with the SDWA to obtain an Underground Injection Control (UIC) permit where diesel fuel is used as a fracturing fluid. The guidance recommends that the operator provide a variety of documents, including maps showing locations of nearby sources of groundwater and a detailed chemical plan describing the proposed fracturing fluid composition by volume and range of concentrations for each constituent. *See* EPA, “Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels—Draft: Underground Injection Control Program Guidance #84,” *available at* <http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hfdieselfuelsguidance.pdf>.

In April 2012, the EPA issued regulations aimed at reducing toxic air pollution from fracking operations and emissions from compressors and oil storage tanks. Under these regulations, operators of fractured and refractured wells may use flaring until January 1, 2015, after which, “green completions” (technologies that capture harmful emissions) must be used. *See* <http://www.gpo.gov/fdsys/pkg/FR-2012-08-16/pdf/2012-16806.pdf>.

On May 4, 2012, the Department of the Interior’s Bureau of Land Management proposed new rules and standards for fractured wells on roughly 756,000,000 acres of public and Indian lands. These proposed rules include new guidelines for casing wells and require that (1) all chemicals used in hydraulic fracturing be publicly disclosed upon completion of fracking and (2) water management and disposal plans be submitted and approved prior to drilling. *See* [http://www.blm.gov/wo/st/en/info/newsroom/2012/june/NR\\_06\\_25\\_2012.html](http://www.blm.gov/wo/st/en/info/newsroom/2012/june/NR_06_25_2012.html).

*State Level.* Hydraulic fracturing is regulated at the state level through oil and gas well permitting and integrity rules promulgated by state regulatory agencies. Some states require permits to be issued before hydraulic fracturing can be used. Other states have moratoriums on using hydraulic fracturing. In New York, an updated environmental impact study must be completed before it will allow fracturing to resume. *See* New York Executive Order No. 41: Requiring Further Environmental Review, *available at* <http://www.governor.ny.gov/archive/paterson/executiveorders/EO41.html>. Maryland has a de facto moratorium in place and is not approving any new permits for activities using hydraulic fracturing. *See* Maryland Executive Order No. 01.01.2011.11: The Marcellus Shale Safe Drilling Initiative, *available at* <http://www.governor.maryland.gov/executiveorders/01.01.2011.11.pdf>.

On May 19, 2012, Vermont became the first state to ban hydraulic fracturing and to prohibit the storage or treatment of hydraulic fracturing wastewater anywhere in the state. *See* <http://www.leg.state.vt.us/docs/2012/bills/Passed/H-464.pdf>. There has never been a productive oil or gas well in Vermont, and the last dry

hole was drilled 28 years ago. *See* <http://www.anr.state.vt.us/dec/geo/oilandgas.htm>.

## **Disclosure of Hydraulic Fracturing Fluids**

In April 2011, members of the U.S. House of Representatives' Committee on Energy and Commerce concluded that the chemicals used in hydraulic fracturing were not widely disclosed. The FracFocus website (<http://fracfocus.org>) was launched by the Ground Water Protection Council and Interstate Oil and Gas Compact Commission to provide the public with objective information on hydraulic fracturing, the chemicals used, the purposes they serve, and the means by which groundwater is protected.

Currently there are seventeen states (Arkansas, Colorado, Idaho, Indiana, Louisiana, Michigan, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, West Virginia, and Wyoming) that have disclosure regulations in force while several others (California, Illinois, and Massachusetts) are working on regulations. Several states require that the disclosures be made public on the FracFocus.org website; others require disclosure to state agencies. The level of disclosure often depends on the extent to which the state allows trade secret protections. Some states require disclosure before fracking begins; others require disclosure within a certain number of days after well completion; and still others require disclosure both before and after. In addition, a few states require the submission of Material Safety Data Sheets for certain chemicals.

## **Studies Concerning Hydraulic Fracturing and Water Contamination**

EPA is studying groundwater in Colorado, North Dakota, Texas, and Louisiana, with initial results due in 2013 and a final report in 2014. *See* [http://www.epa.gov/hfstudy/ProgressUpdate02\\_2012.pdf](http://www.epa.gov/hfstudy/ProgressUpdate02_2012.pdf). Various universities and environmental agencies have conducted research projects that involved studying water quality in wells and streams located near fracked gas wells. Pennsylvania State University researchers concluded in a 2011 report that there was no

statistically significant link between shale gas drilling and methane contamination in the water wells tested because methane was present before any drilling began. *See* [http://www.rural.palegislature.us/documents/reports/Marcellus\\_and\\_drinking\\_water\\_2011\\_rev.pdf](http://www.rural.palegislature.us/documents/reports/Marcellus_and_drinking_water_2011_rev.pdf). Duke University's 2011 study found no evidence of well water contamination from chemicals used in the fracking process. *See* <http://www.nicholas.duke.edu/hydrofracking/Osborn%20et%20al%20%20Hydrofracking%202011.pdf>. The Pennsylvania Department of Environmental Protection monitored in-stream water quality near fracking operations and found no higher-than-normal levels of naturally occurring radioactive materials. *See* <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=%2016532%20&typeid=1>.

## **Studies Concerning Hydraulic Fracturing and Earthquakes**

Unusual earthquake activity has recently occurred in Arkansas, Ohio, Oklahoma, Texas, and West Virginia near hydraulic fracturing operations. The U.S. Geological Survey (USGS) has recommended care in selecting locations for deep injection wells, namely "the desirability of high permeability and porosity in the injection zone and a site situated away from known fault structures," which would make the possibility of "induced earthquakes . . . less likely." *See* Craig Nicholson and Robert L. Wesson, "Earthquake Hazard Associated with Deep Well Injection—A Report to the U.S. Environmental Protection Agency," *available at* <http://pubs.usgs.gov/bul/1951/report.pdf>.

In April 2012, a USGS geophysicist presented the results of a study relating to whether increased seismicity was natural or man-made, concluding that, "[w]hile the seismicity rate changes described [in the study] are almost certainly manmade, it remains to be determined how they are related to either changes in extraction methodologies or the rate of oil and gas production." *See* William Ellsworth, "Are Seismicity Rate Changes in the Midcontinent Natural or Manmade?" *available at* [http://www2.seismosoc.org/FMPro?-db=Abstract\\_Submission\\_12&-sortfield=PresDay&-sortorder=ascending&-](http://www2.seismosoc.org/FMPro?-db=Abstract_Submission_12&-sortfield=PresDay&-sortorder=ascending&-)

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On June 15, 2012, the National Research Council (NRC) issued its report concerning induced seismicity (earthquakes attributable to human activities) relating to fluid-injection technologies, such as shale gas recovery, the use of hydraulic fracturing, and the disposal of wastewater. The NRC concluded that (1) the process of hydraulic fracturing, as presently implemented, does not pose a high risk for inducing seismic events and (2) the injection for disposal of waste water into the subsurface does “pose some risk for induced seismicity, but very few events have been documented over the past several decades relative to the large number of disposal wells in operation . . .” See “Induced Seismicity Potential in Energy Technologies,” found at <http://dels.nas.edu/Report/Induced-Seismicity-Potential-Energy-Technologies/13355>.

## Litigation Involving Hydraulic Fracturing

*Overview.* Since August 2009, more than 40 lawsuits complaining of alleged groundwater contamination from hydraulic fracturing have been filed by landowners in Arkansas, Colorado, Louisiana, New York, Ohio, Pennsylvania, Texas, and West Virginia against oil and gas companies. Nearly all the plaintiffs in these suits are landowners who leased oil and gas rights to the companies, landowners who only own surface rights, or landowners who reside in close proximity to where hydraulic fracturing operations have been conducted.

Plaintiffs have alleged a variety of causes of action, including nuisance, negligence, trespass, strict liability, breach of contract, fraud or fraudulent concealment or misrepresentation, premises liability, assault, intentional infliction of emotional distress, medical monitoring trust fund, violations of state environment statutes, and injunctive relief to stop or limit drilling.

*Selected Lawsuits.* A quick overview of several lawsuits will put the claims being made by plaintiffs into perspective. The first hydraulic fracturing lawsuits were filed in Pennsylvania in 2009. In *Zimmermann v. Atlas America, LLC*, No. 2009-7564 (Pa. Ct. Com. Pl. Sept. 21, 2009), the plaintiffs own the surface and surface rights to approximately 500 acres on which they operated a Heirloom Tomato farm. In 2008, plaintiffs consented to Atlas accessing the property to construct and operate equipment, erect pipelines, drill and frack vertical and horizontal wells, dig and construct ponds and pits to store fracking fluids, and cut down woods and timber. Plaintiffs claim that these activities have destroyed their land and its natural water aquifers and that these activities exceed plaintiffs’ consent by drilling more wells than anticipated, injecting a “toxic cocktail” of fracking fluids into their land, constructing a tank farm and numerous pits and ponds for the containment of fracking fluids, and extracting natural gas.

In 2010, 13 families filed a lawsuit claiming that beginning in 2008, the defendants’ hydraulic fracturing and horizontal drilling within 700 to 1700 feet of their water wells caused the groundwater to become contaminated. *Berish v. Southwestern Energy Production Co., et al.*, No. 3:10-cv-01981 (M.D. Pa. Sept. 29, 2010). For their negligence claim, plaintiffs allege that defendants failed to use sufficient cement casing, to plan, train, and supervise the workers at the wells, and to take reasonable precautions to prevent or mitigate the releases and spills.

Texas lawsuits involving hydraulic fracturing began to appear in 2010. The Scoma family filed a lawsuit claiming that their water well was contaminated by drilling and fracturing waste stored by defendants near their property. *Scoma v. Chesapeake Energy Corp., et al.*, No. 3:10-cv-01385 (N.D. Tex. July 15, 2010). The Scomas claimed that defendants caused a nuisance by interfering with and invading the family’s private interest in their land by contaminating their only source of drinking water, offending their senses, preventing them from using their property, and inconveniencing their comfort on their own property.



A second 2010 Texas lawsuit was *Sizelove v. Williams Production Co., LLP, et al.*, No. 2010-50355-367 (367th Dist. Ct., Denton County, Tex. Nov. 3, 2010). Defendants installed a drill water collection site and a gas compressor station 250 feet from the Sizelove residence, a gas pipeline 400 feet from the home, and eight gas wells within a 3/4 mile radius. Plaintiffs complained of loss of market value of their land, sickness, annoyance, discomfort, bodily harm, injury to personal property, and mental anguish. Plaintiffs allege that defendants wrongfully cut down 30 trees and allowed workers to use their land as a toilet. Also, plaintiffs state that defendants failed to properly maintain wellbores, adequately inspect wellbores, set sufficient surface casing, inspect and maintain surface and down-hole casing and tubing, properly cement wellbores, timely repair leaks, and operate in accordance with prudent operating industry standards.

The Strudley family in Colorado filed a lawsuit in 2011 claiming that defendants' drilling operations within one mile of their home and water supply caused toxic hydrocarbons and hazardous pollutants to be discharged into the air, ground, and aquifer near their property, causing them health injuries and loss of use and value of their property. *Strudley v. Antero Resources Corp., et al.*, No. 2011-cv-2218 (Denver County Dist. Ct. Mar. 23, 2011). On November 10, 2011, the court ordered plaintiffs to make a prima facie showing of exposure, injury, and specific causation by providing expert affidavits. On February 23, 2012, the plaintiffs presented their prima facie evidence; but the Court found that the evidence failed to show causation. Plaintiffs' claims were dismissed with prejudice on May 9, 2012. This dismissal is now being appealed.

On March 23, 2011, Jacob Sheatsley filed a class action lawsuit claiming that central Arkansas has seen an unprecedented increase in seismic activity occurring in the vicinity of wastewater disposal injection wells. *Sheatsley v. Chesapeake Operating, et al.*, Case No. 2011-28, in the Circuit Court of Perry County, Arkansas, 16th Division, removed to the U.S. District Court for the Eastern District of Arkansas, Western Division, Case No. 4:11-cv-00353-JLH9 (Apr. 4, 2011). According to the Arkansas Geological Survey, there had been 599 seismic events in Guy, Arkansas,

between September 20, 2010, and the date of the lawsuit. The largest earthquake measured 4.7 in magnitude. Mr. Sheatsley alleged causes of action for public nuisance, private nuisance, absolute liability, negligence, and trespass, all based on the interference with the use and enjoyment of property and on the risk of serious personal harm and property damage from earthquakes. Four additional class action complaints were filed based on the same allegations. These cases have been consolidated and are set for a class certification hearing in March 2013, with a trial scheduled for March 2014.

## Conclusion

Shale drilling and the use of hydraulic fracturing are hot topics throughout the United States and the world. Fueled by the media, discussion and lawsuits concerning hydraulic fracturing fluids, water contamination, air emissions and pollution, and earthquakes in areas where fracking occurs are on the increase. Legislators and regulators are taking actions with new or revised permitting, disclosure, and environmental rules, regulations, and controls. However, it takes many years for research to be completed, for court decisions to be made, for agency regulations to be promulgated, and for laws to pass. When will the final word on the impact of shale gas production and hydraulic fracturing on the environment be made? That is anyone's guess, but it will be an interesting roller-coaster ride over the next few years.

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## DISTRICT COURT JUDGE DISMISSES SUITS CHALLENGING DELAWARE RIVER BASIN COMMISSION'S PROPOSED HYDRAULIC FRACTURING REGULATIONS

Benjamin Lowenthal

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On September 24, 2012, U.S. District Court Judge Nicholas Garaufis dismissed three consolidated cases brought by the state of New York, Damascus Citizens for Sustainability, Inc., and other environmental groups, including Riverkeeper, Inc., and the National Parks Conservation Association. The plaintiffs brought the suits to contest proposed regulations that would authorize natural gas development, specifically hydraulic fracturing, within the Delaware River Basin, and result in 15,000 to 18,000 natural gas wells. *See New York v. U.S. Army Corps of Engineers*, 2012 WL 4336701 (E.D.N.Y. Sept. 24, 2012), Complaint at 2; *New York v. U.S. Army Corps of Engineers*, 2012 WL 4336701 (E.D.N.Y. May 31, 2011) (No. CV11-2599). Hydraulic fracturing, or “hydro-fracking,” is a drilling well stimulation technique used to maximize the extraction of energy resources, such as oil and gas, by fracturing underground rock formations to allow for the increased flow of the resources. *See* U.S. ENVTL. PROT. AGENCY, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES PROGRESS REPORT 5 (2012), available at <http://epa.gov/hfstudy/pdfs/hf-report20121214.pdf>. Currently, the federal government does not regulate hydraulic fracturing unless extraction companies use diesel fuels in the fracturing process. *See* Safe Drinking Water Act, 42 U.S.C. § 300(h)(d), as amended by Energy Policy Act of 2005, Pub. L. No. 109-58, § 322, 119 Stat. 694 (2005).

In these suits, the plaintiffs challenged the proposed regulations of six federal agencies, including the Army Corps of Engineers, Department of the Interior, and Environmental Protection Agency, along with the Delaware River Basin Commission (DRBC) for noncompliance with the National Environmental Policy Act’s (NEPA) environmental impact assessment requirement. *See* 42 U.S.C. §§ 4321–70H (2006). NEPA obligates federal agencies to consider the

environmental impacts of any major federal action “significantly affecting” the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18(a). Furthermore, NEPA requires federal agencies to prepare an environmental impact statement (EIS), which consists of listing all environmental impacts of, and alternatives to, the proposed action. *See* 42 U.S.C. § 4332(2)(C). The plaintiffs argued that during the process of drafting and considering regulations that would permit hydraulic fracturing in the Delaware River Basin, NEPA required the DRBC and the federal agencies to prepare, and make available for public comment, a draft EIS.

Finding for the DRBC and the federal agencies, Judge Garaufis dismissed the suits for lack of subject matter jurisdiction, holding that the “plaintiffs did not allege an injury-in-fact, and therefore lacked standing to challenge the federal agencies’ drafts of proposed regulations,” and that the suits were “not prudentially ripe for judicial review.” *New York*, 2012 WL 4336701, at \*11. He based his decision to dismiss the suits on the determination that the mere existence of proposed regulations was “not sufficient to allow th[e] court to say Plaintiffs’ interests [were] at risk.” *Id.* Although Judge Garaufis dismissed these cases for challenging *proposed* regulations, his opinion did shed light on how federal courts might decide NEPA challenges for *final* hydraulic fracturing regulations.

Judge Garaufis believed that regulations could not be expected to have any effect if they were not final; “[t]he line between proposed regulations and final regulations may be subtle, but the court believes it is real.” *New York*, 2012 WL 4336701, at \*11. Language used by the judge strongly suggests that if these regulations were final, and not merely proposed, he would have, minimally, imposed a preliminary injunction on the defendants.

Plaintiffs appear to believe, if Defendants are not forced to comply with NEPA now, their interests will be placed at risk immediately. The courts will be available if and when the DRBC adopts final regulations permitting natural gas development, and are more than capable of preliminarily enjoining any development so that no wastewater is created

are more than capable of preliminarily enjoining any development so that no wastewater is created before the courts have evaluated whether the DRBC and the Federal Defendants are obligated to follow NEPA in this instance.

*Id* at \*12.

Will Judge Garaufis’s decision have any effect on current proposed hydraulic fracturing regulations in the Delaware River Basin or elsewhere? At this point, only time will tell. However, at the very least, the decision hints at how one federal judge might view a final hydraulic fracturing regulation without an environmental impact statement.

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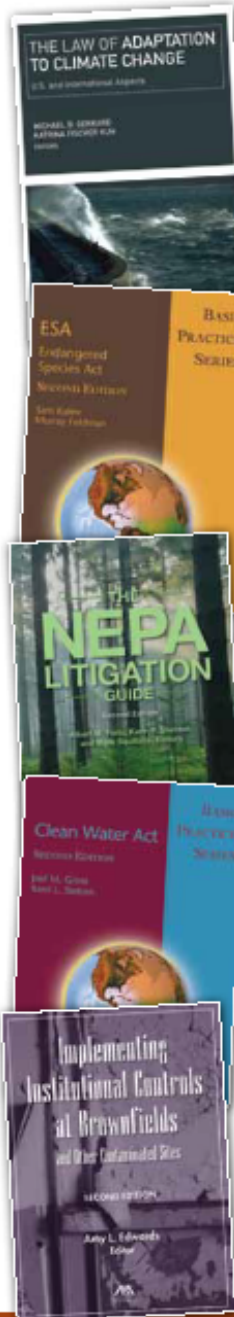
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