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ENVIRONMENTAL LAW

Disputes Over Marcellus Shale Move to the Courtroom

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Special to the Legal

It should be no surprise that the promise of financial windfalls through natural gas production coupled with concerns that gas exploration and development methods pose a risk to property and the environment have led to the courthouse. The multiple civil actions filed during the past month may constitute the tip of the iceberg, and their resolution will almost certainly have significant implications for potential future litigation.

The claims have reflected various legal theories under both statutory and common law. In early November, an individual landowner, George Zimmerman, filed suit against Atlas Energy Inc., alleging that Atlas' hydraulic fracturing methods had caused property damage to Zimmerman's land. Zimmerman alleges that groundwater testing at several on-site wells revealed the presence of chemicals above EPA screening levels, and further alleges that Atlas' drilling methods are responsible for the release of these chemicals to his groundwater. Atlas has denied the allegations and reports that it will vigorously defend the suit.

On the heels of the Atlas suit, a group of residents in Dimock Township, Susquehanna County, filed suit against Cabot Oil & Gas for property damage allegedly associated with impacts arising from Cabot's drilling techniques. Cabot has specifically denied that its operations caused any such impacts to groundwater or specific wells.

Of course, such suits are not unique to Pennsylvania, with several similar actions recently filed in New York. One such action involves a \$5 million claim against Gas Field Specialists Inc., a gas drilling services company. In this case, the complaint is



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based upon nuisance theories, alleging that the defendant's drilling-related operations create a constant source of noise, fumes and other objectionable effects. Weeks earlier, Schlumberger Technology Corp. was the target of another suit in the same region. This separate suit generally alleges adverse environmental effects resulting from Schlumberger's operations, but generally also follows nuisance theories.

Publicity associated with the hydraulic fracturing technique, commonly known as "fracing," has given rise to many claims that such drilling techniques are causing property damage and releasing chemicals to groundwater. The technical evidence supporting such claims is extremely limited, but this does not preclude such allegations from prompting lawsuits.

Causation will continue to prove a significant obstacle to plaintiffs' claims of property damage and groundwater impact, especially since available information concerning the composition of frac chemicals does not generally support allegations of material concentrations of carcinogenic or otherwise toxic compounds. Further, as with all claims concerning alleged subsurface environmental contamination, plaintiffs' ability to isolate an

alleged source and establish a causal link is technically challenging.

Among the significant issues that distinguish the suit against Cabot with the New York litigation is the inclusion of statutory claims against Cabot. Specifically, plaintiffs allege that Cabot has violated the Pennsylvania Hazardous Sites Cleanup Act in causing the release of hazardous substances. The complaint alleges that statutory violation triggers the obligation to initiate remediation and take affirmative steps to prevent further releases.

Undoubtedly significant in prompting this lawsuit, the Pennsylvania Department of Environmental Protection, or PADEP, has alleged that drilling activity in this region may have caused the release of methane into local groundwater. On Nov. 4, the DEP had assessed a fine of \$120,000 against Cabot, for allegedly causing or allowing the release of methane into the local drinking water supply.

Reliance upon statutory claims under state and federal environmental statutes creates a significant avenue for a potential suit. Among other considerations, certain state and federal statutes include citizen suit provisions authorizing private citizens to bring claims against alleged violators of statutory obligations, effectively as "private attorneys general," in the absence of adequate enforcement activity by the relevant regulatory agency. (See, e.g., Pennsylvania Hazardous Sites Cleanup Act at 35 Pa. Cons. Stat. §6020.1115.) Such claims do not support recovery of damages but under certain circumstances may allow recovery of attorney fees and the assessment of civil penalties against the alleged violator. When such statutory claims are coupled with common law theories seeking damage recovery, they can provide a compelling legal theory as supplemental causes of action.

Proponents of natural gas drilling in Pennsylvania continue to insist that their techniques are safe and protective of the environment and satisfy all applicable regulatory standards. Demonstration of compliance with such standards will enhance a company's defense against private claims alleging adverse environmental effects, particularly in Pennsylvania. Unlike many jurisdictions in which natural gas drilling is well established, existing Pennsylvania environmental regulations impose numerous requirements on natural gas drilling, development and distribution. These requirements extend to water withdrawal and wastewater management, but also earth disturbance, stormwater control, residual waste management and even air regulation to the extent that certain compressors and engines may be utilized at individual facilities.

As companies pursuing gas development in Pennsylvania position themselves to limit their liability for potential private actions, understanding the scope and extent of these environmental requirements proves critical. A company's ability to demonstrate that it has secured all necessary permits and complied with all applicable operating standards established by environmental regulation may forestall (or make more difficult) statutory claims or common law theories based in negligence per se. Further, given the array of environmental standards in Pennsylvania, compliance with these applicable standards provides enhanced defenses to claims sounding in nuisance and negligence.

In addition, in order to perfect "citizen suit" claims under most federal and state statutory provisions, plaintiffs must satisfy various notice and other procedural requirements and demonstrate that the relevant environmental agency is not otherwise diligently pursuing enforcement. The courts confronted with the question have reached different conclusions regarding the extent of enforcement activity required of regulatory agencies to meet the diligent prosecution standard. (*Contra. Arkansas Wildlife Fed'n v. ICI Americas Inc.*, imposing a limited requirement for state enforcement to constitute diligent prosecution, with *McAbee v. City of Ft. Payne*, holding that state enforcement must

proceed under authority comparable to federal authority in order to preclude citizen suit.) In many circumstances, defendants confronting potential citizen suit litigation for alleged noncompliance with environmental statutory requirements prefer to resolve such claims directly with the regulatory authority, and hopefully preclude a private citizen action. In such cases, companies have elected to negotiate an administrative consent agreement with the regulatory agency to establish a corrective action program and otherwise resolve claims of environmental

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noncompliance. However, the 3rd U.S. Circuit Court of Appeals has suggested that a citizen suit under federal environmental law will not be precluded by agency enforcement action, unless such action is equivalent to a "court proceeding," and administrative enforcement does not typically rise to such level. (See *Student Public Interest Research Group of New Jersey Inc. v. Fritzsche Dodge & Olcott Inc.*)

As referenced above, most statutes establishing citizen suit provisions impose

notice requirements on private plaintiffs. To the extent that a company engaged in natural gas drilling activities receives such notice letter from a prospective plaintiff, the company is afforded a limited opportunity to pursue alternative actions to blunt or possibly forestall such private suit. Many strategic factors influence this decision making, including the apparent strength of the complainant's claims concerning noncompliance with environmental standards, the extent (if any) to which regulatory authorities have identified compliance considerations or even initiated formal or informal enforcement activity and the available opportunity to implement corrective action to achieve compliance prior to the filing of any such suit. In all cases, familiarity with both the environmental regulatory standards applicable to the company's operations and the procedural and jurisdictional considerations governing any statutory citizen suit can prove instrumental in limiting the company's liability to a private cause of action. •