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Litigation Over Groundwater Impacts of Natural Gas Wells

Last month, U.S. Magistrate Judge Martin C. Carlson in Harrisburg denied a request for a *Lone Pine* order in a natural gas migration case, *Roth v. Cabot Oil & Gas,* Civil Action No. 3:12-cv-898 (M.D. Pa. Oct. 15, 2012). That decision offers an opportunity to consider some issues arising from claims that shale gas development (fracking) in Pennsylvania has caused personal injury or property damage as the result of contamination of neighbors' water wells or other migration of natural gas to neighbors' property.

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Commentary

Last month, U.S. Magistrate Judge Martin C. Carlson in Harrisburg denied a request for a *Lone Pine* order in a natural gas migration case, *Roth v. Cabot Oil & Gas,* Civil Action No. 3:12-cv-898 (M.D. Pa. Oct. 15, 2012). That decision offers an opportunity to consider some issues arising from claims that shale gas development (fracking) in Pennsylvania has caused personal injury or property damage as the result of contamination of neighbors' water wells or other migration of natural gas to neighbors' property.

As described below, *Roth* came out in the plaintiffs' favor. Several other decisions over the past few years, as well as certain provisions of the amended Oil and Gas Act (Act 13) and the oil and gas regulations, would tend to make litigation against natural gas operators easier.

Since the 19th century, the Pennsylvania courts have recognized that natural gas development could pose a risk to neighboring water wells or surface water bodies. In *Collins v. Chartiers Valley Gas*, 18 A. 1012 (Pa. 1890), subseq. appeal, 21 A. 147 (Pa. 1891), the natural gas-bearing formation lay under a formation containing salty water — brines — and that, in turn, lay under the aquifer (that is, water-bearing formation) from which Nannie Collins' well drew her potable water. If one drilled down through the aquifer, through the brine-bearing formation and into the natural gas-bearing formation, the pressure of the gas would push the brines up into contact with the aquifer. However, if one cased off the aquifer by cementing a pipe to the inside of the natural gas well bore, one could protect the surrounding drinking water wells. The area

contained several natural gas wells, so the defendant knew, or should have known, all of this. It did not case its well. Therefore, Collins could recover on a negligence theory.

The plaintiffs in *Roth* claimed that various activities associated with drilling and completing Marcellus Shale wells near Dimock, Susquehanna County, caused their residential water wells to be contaminated with natural gas and chemicals. The defendants thought the claim was far-fetched and wanted to avoid extensive discovery obligations. The defendants therefore sought an order along the lines of *Lore v. Lone Pine,* 1986 N.J. Super. LEXIS 1626 (Nov. 18, 1986). *Lone Pine* orders stay all (or some) discovery until the plaintiff in a toxic tort case makes a preliminary prima facie showing of the elements of his or her claim.

In *Roth*, Carlson held that a *Lone Pine* order might be appropriate in a gas migration case, but not in this one.

In part, the *Roth* decision turns on the fact that the plaintiffs' claims were "straightforward and familiar." They pointed out that natural gas activity within 1,000 feet of a residence is presumed to cause groundwater contamination that materializes.

The presumption is statutory in Pennsylvania. Under the former Oil and Gas Act, the owner of a natural gas well was presumed to be responsible for any "pollution or diminution" of a "water source" — a well or surface water used as a water supply — within 1,000 feet of the natural gas well, per Pa. Stat. Ann. tit. 58, §601.208 (repealed). The person responsible for the natural gas well could rebut the presumption by showing based on sampling before commencement of the natural gas well that the water source was not polluted or diminished. The presumption only applied to pollution or diminution observed within six months of completion of the natural gas well.

The presumption appears to apply to any claim by any plaintiff against the person responsible for the natural gas well. However, the statute created a procedure under which the owner of a water source would complain to the Department of Environmental Protection, which would investigate for no more than 45 days and then would notify the person responsible for the natural gas well if it made a finding that the natural gas well was responsible for pollution of the water source. That finding could apply to a natural gas well farther than 1,000 feet from the water source.

Some have sought those "208" letters to make the case that natural gas development poses real risks. The DEP has not been fully forthcoming. See *Department of Environmental Protection v. Legere,* 50 A.3d 260 (Pa. Commw. Ct. 2012) (the DEP must produce "208" letters to Scranton newspaper).

In 2011, the Environmental Quality Board rewrote the natural gas regulations found in Chapter 78 of Title 25 of the Pennsylvania Code. That revision elaborated on the Section 208 presumption, the process for investigating complaints, and the means of rebutting the presumption.

Earlier this year, Act 13 of 2012 amended and codified the Oil and Gas Act. Act 13 is more notorious for its provisions requiring uniform treatment of oil and gas development under local ordinances. See *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012), appeal pending, No. 63 MAP 2012 (Pa. argued Oct. 17, 2012). However, Act 13 also amended Section 208 and codified it as 58 Pa. Cons. Stat. §3218.

Section 3218 continues the original presumption and process of Section 208 for conventional oil and gas wells. "Unconventional" wells — including shale gas wells — are presumed responsible for pollution or diminution of water sources within 2,500 (not 1,000) feet that appears within one year (not six months). Further, Act 13 left the Chapter 78 regulations in place. These are not the only plaintiff-friendly provisions of the regulations, however. Section 78.89(a) provides:

"When an operator or owner [of a natural gas well] is notified of or otherwise made aware of a potential natural gas migration incident, the operator shall immediately conduct an investigation of the incident. The purpose of the investigation is to determine the nature of the incident, assess the potential for hazards to public health and safety, and mitigate any hazard posed by the concentrations of stray natural gas."

This provision appears to have no specific statutory authorization.

Section 78.89 applies to any stray gas incident, whether or not the gas pollutes a water well or a surface water. So, gas in a shed or a building would implicate Section 78.89, but not Section 3218 of the statute. Conversely, Section 78.89 only applies to stray gas, and Section 3218 of the statute applies to any pollution or diminution of a water supply. Salts, radioactivity, or fracking chemicals are not addressed by Section 78.89, but are subject to Section 3218. Moreover, Section 3218 covers incidents where a water well just goes dry, for example.

Section 3218 of the statute and Section 78.51 of the regulations only require an operator to take steps to address pollution or diminution of a water supply if either the gas well is presumed to have affected the water supply or the DEP makes a finding after an investigation that the gas operation has affected the water supply. Section 78.89 contains no similar requirement of a finding or a presumption.

Section 78.89 cannot literally mean what it says. If one notifies any owner or operator of a gas well of a gas migration incident, that cannot impose a duty on that owner or operator to investigate the incident, no matter how distant.

On the other hand, Section 78.89 does seem to create a duty at least to investigate gas migration upon receipt of notice, and the DEP does not have to be the source of the notice. While only the DEP can set the specific requirements of the investigation that Section 78.89 requires and while only the DEP may require additional actions, the obligation to investigate at all seems to arise merely upon receipt by the gas well operator of notice from any person of a potential gas migration incident. If that regulation is enforceable, then it has to be read to require an investigation without a finding by the DEP of a causal connection between the gas operation and the gas migration.

In addition to these plaintiff-friendly rulings, rules and statutory provisions, one must also mention the possibility — as yet unresolved — that the courts will hold natural gas development to be an abnormally dangerous activity subject to strict liability. See *Fiorentino v. Cabot Oil & Gas,* 750 F. Supp. 2d 506 (M.D. Pa. 2010); see also *Kamuck v. Shell Energy Holdings GP*, 2012 U.S. Dist. LEXIS 59093 (M.D. Pa. Apr. 27, 2012); *Berish v. Southwestern Energy Production*, 763 F. Supp. 2d 702 (M.D. Pa. 2011).

Some criticize the current Pennsylvania administration for being too friendly to natural gas development. That may be true in some spheres. Pennsylvania law, though, is not uniformly easy on natural gas operators that cause groundwater contamination. •

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