

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION,

Petitioner,

vs.

No. 08-AA-85 (Stucky)

WEST VIRGINIA OIL AND GAS CONSERVATION COMMISSION,
EASTERN AMERICAN ENERGY CORPORATION,
CHESAPEAKE APPALACHIA, L.L.C.,
PETROEDGE RESOURCES (WV) L.L.C.,
BLUE EAGLE LAND, L.L.C.,
COALQUEST DEVELOPMENT, L.L.C.,
CONSOLIDATED COAL COMPANY,
HORSE CREEK LAND AND MINING COMPANY,
NATIONAL COUNCIL OF COAL LESSORS, INC.,
PENN VIRGINIA OPERATING COMPANY, LLC,
POCAHONTAS LAND CORPORATION,
WPP L.L.C.,
WOLF RUN MINING COMPANY, and
THE WEST VIRGINIA COAL ASSOCIATION.

Respondents.

PETITIONER'S RESPONSE TO
RESPONDENTS' MOTION TO DISMISS

Comes now the Petitioner, the West Virginia Surface Owners' Rights Organization, in response to the motion to dismiss of the Respondents, and says:

Issue on appeal.

The issue in this appeal is how far apart Marcellus Shale gas well sites are to be "spaced" when they are drilled – in other words, the number of gas wells that should be

drilled on surface owners to produce the gas in a given area without drilling extra, unnecessary wells that will result in less total gas being produced.

Issue in the present motion.

The West Virginia Surface Owners Rights Organization (hereinafter "WVSORO") has hundreds of members in most counties of West Virginia, a number of states and three countries. Most own surface land, but own no interest in the minerals under them. The mineral owner and his lessee/gas operator may come onto the surface owner's land and do whatever is "fairly necessary" to explore for, drill for and produce oil or gas on the surface of those many citizens.

Please look at Exhibit #1 attached to this Response. It is an aerial photograph showing a Marcellus Shale well being drilled in Upshur County in the summer of 2008.

The Respondents take the position that surface owners, citizens upon whom wells like those in the photograph will be placed, do not have standing to question the spacing and number of these wells to be placed on their land. The Respondents move to dismiss the surface owners' appeal. This response to that motion takes the position that the surface owners upon whom the huge well sites illustrated in Exhibit #1 are drilled, well sites that may not even have been in the contemplation of the parties at the time of severance of the minerals from the surface, most certainly do have the right to file the appeal herein.

WVSORO Would be Prejudiced if this appeal is dismissed.

The motion of the Respondents states that dismissal of this appeal will not prejudice WVSORO because the Respondents filed an appeal of the same decisions in the Circuit

Court of McDowell County. WVSORO strenuously disagrees. It prays for relief in its present suit that is not prayed for by the parties in the McDowell County action.

If the Respondents would win the McDowell County appeal then Marcellus Shale gas wells would be statutory "shallow wells" and there would be no well spacing for most shallow gas wells. Only coal owners/operators of the tract being drilled could force well spacing and accompanying royalty sharing on the relatively few wells affecting them. And only coal operators/owners, and only coal operators/owners of the tract being drilled could do so, not coal owners of neighboring tracts. The "rule of capture" would apply to the vast majority of other statutory shallow wells that are drilled. So mineral owners whose gas is being drained by these highly productive wells located on neighboring lands could not force well spacing (and accompanying royalty sharing). Surface owners having un-contemplated, unnecessary, wasteful wells drilled on them, could not force well spacing and royalty sharing. The same for the investors in wells and the consumer public who would also be powerless to stop unnecessary, extra, wasteful wells.

And if Respondents would lose the McDowell county appeal, then instead of 3000 foot or 1500 foot spacing, the 1000 foot spacing ordered below would remain in effect – spacing that the applicant's own witness called "arbitrary". See Page 3 of the Transcript of the May 17, 2007, hearing on Docket No. 179, Cause No. 164, excerpts of which are attached as Exhibit #2 (hereinafter "Transcript").

WVSORO's appeal now under consideration asks not only that Marcellus Shale wells continue to be determined to be statutory "deep wells" subject to forced well spacing. It also

asks that the spacing be set at 3000 feet, or at least 1500 feet instead of 1000 feet because, in part, the expert witness for those seeking the spacing said that the 1000 foot spacing was "arbitrary". Transcript pages 47 and 48. If WVSORO cannot file that appeal, then that relief cannot possibly be granted.

WVSORO has standing.

Respondents take the position that WVSORO has no standing to file this appeal because WVSORO was not a "party" below although, Respondents concede, WVSORO was present and did participate in at least one hearing below. West Virginia Surface Owners Rights Organization did in fact appear below at the hearing for one of the applications that is on appeal. Counsel is noted under "APPEARANCES" on Transcript page 3 (in which Chesapeake sought special field rules for an astonishing 427,000 acres in five counties). And on Transcript page 28 Counsel made brief inquiry of one witness. Although there is no named party attached to his noted appearance, there is none to that of any other lawyers whose appearance is noted.

There is no limit on who can appear at hearing before the Commission and no process to become a party – no application to do so is required. According to W. Va. Code § 22C-9-10. "Hearing procedures", "All interested parties shall be entitled to be heard at any hearing conducted under the provisions of this article." The phrase "interested parties" is nowhere defined in the relevant statutes. Someone upon whom a well such as the well pictured in Exhibit #1 can be drilled is very, very interested.

No limits on who can appeal.

Even if WVSORO had not been a “party” below, that does not necessarily limit their ability to appeal the result if they were interested – interested in the number of Marcellus Shale gas well sites to be placed on their land. West Virginia Code 22C-9-11(a) states that, “Any party adversely affected by an order of the commission shall be entitled to judicial review thereof.” The Respondents cite no authority that a party that is affected, in order to qualify to file an appeal, has to have been a “party” to the proceeding below. In the case the Respondents do cite, the party who appeared at the hearing was given the right to appeal. See *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997). If a party is affected by an administrative proceeding, that party should be able to appeal. They may not have had the benefit of helping to make the record below, but that handicap does not mean that they should be excluded. Requiring every affected coal owner or lessee, oil and gas owner or lessee, farmer, investor etc. affected to become a “party” to the hearing below in order to preserve their right to appeal an “arbitrary” determination would be the height of judicial *ineconomy*.

The Respondents question whether WVSORO was a “party” to the proceedings below, but it is unclear from the Respondents related appeal in McDowell County that all of them were “parties” to all of the proceedings they themselves are appealing. “The Petitioners learned of the application only two days before the hearing and several of the Petitioners were able to object to the application.” So “several”, but not all of the Petitioners were able to object in that proceeding. See paragraph 18 of “Petition for Appeal from the West Virginia Oil and Gas Conservation Commission and the West Virginia Supreme Court” No.

08-C-171-M, Circuit Court of McDowell County, Judge Murensky, attached as Exhibit 3. And that same McDowell County appeal also complains of an Eastern American Energy proceeding below, Docket 175, Cause 160, that the Respondents did not become aware of until months after the hearing at which it had been approved. And the Respondents have objected to a motion on other grounds for that application to be dismissed from the McDowell County suit!

The Respondents complained in their application for a Writ of Prohibition in the West Virginia Supreme Court, and in its subsequent appeal filed in McDowell County, that the limited notice that Respondents got of the proceedings below was unconstitutionally infirm. They state that they only got two days' actual notice of one hearing, and no actual notice of another hearing until months afterward. And now they ask the Court to dismiss WVSORO's appeal because they perceive that WVSORO did not get all of its's i's and t' dotted and crossed properly. This Court should spend its time considering the merits of these appeals, not procedural issues.

If the statutes and rules did not provide the Respondents with the right to appeal, then the West Virginia Constitution does. In *Snyder v. Callaghan*, 168 W.Va. 265, 264 S.E.2d 241 (1981) the state issued a "certificate" which was needed before the Stonewall Jackson Dam and its resulting lake could be built. The Snyders and the Upper West Fork Watershed Association asked the State for an appeal of the granting of the certificate. They were downstream riparian owners. The Snyders were one half mile down from the proposed dam. The appeal being sought was to an administrative hearing rather than the Circuit Court, but

an appeal nonetheless was denied. The West Virginia Supreme Court said that citizens and their organization had the right to an appeal under Article 3, Section 10 of the West Virginia Constitution. In this case surface owners are not down stream riparian owners and do not live a half a mile away. The wells will be drilled right squarely on them, through their water table, and in many instances, using water from their land.

The West Virginia Supreme Court required WVSORO to be heard.

When it sent this case to Circuit Court, the West Virginia Supreme Court of Appeals ordered that the WVSORO should be given the opportunity to “assert its interests and views” at the Circuit Court level. The Respondents point out the placement of a prepositional phrase in the footnote that ordered this, and argue that WVSORO should be limited to “amicus” status. Filing amicus briefs is not much of a way to assert WVSORO's constitutionally protected interests and views. Amicus generally do not get oral argument, a crucial part of this kind of proceeding. Worse, WVSORO prayed for 3000 or 1500 foot spacing in its present appeal, relief that the other parties have not prayed for in the McDowell appeal, and which they could not get if the present appeal is dismissed. Worst, an amicus would have no right to appeal. So if a Circuit Court result, or a settlement, pleases the coal interests and the gas interests who are “parties”, but goes instead against the interest of the mineral owners, surface owners, investors, etc. there can be no appeal. Citizens who have the damage done to them as in the picture should be more than a potted plant with a word processor.

Provide a just, speedy, and inexpensive determination.

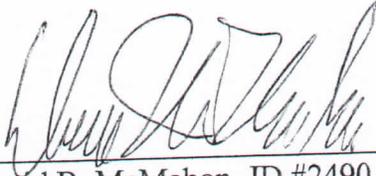
The issues presented in this appeal need a just, speedy, and inexpensive judicial determination. The issues affect the drilling of thousands and thousands of gas wells to be drilled upon hundreds and hundreds of thousands of acres. The parties affected include surface owners, mineral owners, investors, and maybe even gas consumers generally. The parties affected also include the coal operators and oil and gas operators who actually appeared in the proceedings below. The parties affected include lots of other coal operators and oil and gas operators who did not appear below, including those to be affected by similar applications waiting below on the outcome of these Circuit Court appeals.

The entire history of these proceedings is somewhat irregular. The West Virginia Supreme Court cut through the procedural distractions and has tried to provide for the just, speedy, and relatively inexpensive determination of the issues involved in this action. It even ignored statutory time limitations etc. generally applicable to these appeals. Whatever Circuit Court ends up deciding the issue should do the same. Get all the input that it can from all the parties it can to make the best decision.

Prayer

Do not dismiss this action. Await Judge Murensky's decision on consolidation and if it is consolidated in Kanawha County, proceed to a decision on the merits, for all.

West Virginia Surface Owner Rights Organization
Petitioner,
By Counsel



David B. McMahon, JD #2490
Counsel for Petitioner.
1624 Kenwood Rd.
Charleston, WV 25314
304-415-4288
wvdavid@wvdavid.net



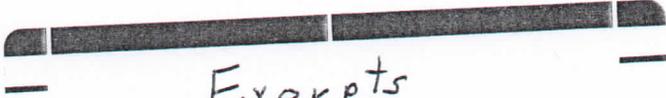
tabbles®
EXHIBIT
1
@ WWSRO

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF WEST VIRGINIA

IN RE: Chesapeake Appalachia, L.L.C.
Special Field Rules

Docket No. 179

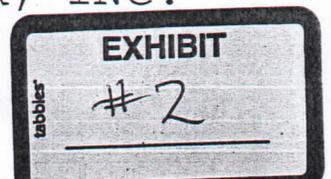
Cause No. 164


Exerpts

Transcript of proceedings taken on the
17th day of May, 2007, at 9:00 a.m., before the Oil and Gas
Conservation Commission, located at 601 57th Street,
Charleston, West Virginia, before Pamela Wood, Certified
Court Reporter, duly certified by the West Virginia Supreme
Court of Appeals, and Notary Public in and for the State of
West Virginia.

PHYLLIS HAYNES EDENS, CCR, INC.

CERTIFIED COURT REPORTERS
Post Office Box 13337
Charleston, West Virginia 25360
(304) 984-3531 WEST VIRGINIA (800) 248-3531



BEFORE THE BOARD OF COMMISSIONERS:

Barry Lay
James Martin
Bob Radabaugh
Anthony Gumm

APPEARANCES:

KEITH E. MOFFATT
SENIOR ATTORNEY
900 Pennsylvania Avenue
Post Office Box 6070
Charleston, West Virginia 25362-0070

RICHARD L. GOTTLIEB, ESQUIRE
Lewis, Glasser, Casey & Rollins
Suite 700, One Valley Square
Post Office Box 1746
Charleston, West Virginia 25326

NICHOLAS S. PRESERVATI, ESQUIRE
Preservati Law Offices
Post Office Box 1431
300 Capitol Street, Suite 1018
Charleston, West Virginia 25325

JEFFREY L. KEIM, CPL
Regional Land Manager
Cabot Oil & Gas Corporation
900 Lee Street East, Suite 1500
Charleston, West Virginia 25301

DAVID B. MCMAHON, ESQUIRE
1031 Quarrier Street, Suite 200
Charleston, West Virginia 25301

KENNETH E. TAWNEY, ESQUIRE
Jackson Kelly
1600 Laidley Tower
Post Office Box 553
Charleston, West Virginia 25322

I N D E X

WitnessExamination

BRETT LOFLIN

8 (Moffatt)
12 (Gottlieb)
12 (Preservati)
14 (Sullivan)

ED ROTHMAN

15 (Moffatt)
24 (Gottlieb)
26 (Preservati)
28 (MacMahon)
28 (Comm. Martin)
31 (Comm. Radabaugh)
32 (Comm. Lay)
38 (Moffatt)

ROB SCHINDLER

39 (Moffatt)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

E X A M I N A T I O N

BY MR. MCMAHON:

Q When you said spaced out, if these are considered deep wells, that would be subject to the adjoining owner's right to, of course, pool some of the resources. Would that be also correct?

A (No response.)

Q You don't know the answer to that?

A Yeah, I really don't know the answer to that one.

COMMISSIONER LAY: Other questions? Questions from the Commission?

E X A M I N A T I O N

BY COMMISSIONER MARTIN:

Q Mr. Rothman, you made a comment about how you arrived at this boundary, and I think it was something to the effect that it's an area you anticipate being active in the future. Can you elaborate on that anymore in terms of the geology behind that, picking that actual boundary?

A It's been a very productive area for Chesapeake and its predecessor companies. We have a number of wells, producing wells, in the area right now. We do have space to drill additional wells, and we get good

1 the Marcellus.

2 Q As you drill more Marcellus wells, is it
3 possible -- will you obtain new information which may lead
4 you to space these wells closer than 1,500 feet?

5 A Potentially.

6 MR. MOFFATT: I have no further questions for
7 Mr. Cable.

8 COMMISSIONER LAY: Any cross?

9 COMMISSIONER RADABAUGH: I've got a question.
10 I'm a little confused here.

11 E X A M I N A T I O N

12 BY COMMISSIONER RADABAUGH:

13 Q On the request, you request spacing to be
14 a 1,000 feet, or a variance of 1,000 feet. Earlier, we had
15 talked about when some studies had been done a few years
16 ago, you had done your estimates on 1,500 foot spacing,
17 when you came up with 1,700 potential well sites in the
18 future. Has Chesapeake's view of the spacing that they
19 need changed for some reason between the 1,500 feet that
20 you was working off of a few years ago and 1,000 feet now
21 that you're looking at?

22 A Well, the 1,500 is our current practice
23 and while we try to maintain that, we can't always get

1 1,500 feet on all sides. So, we picked 1,000 feet as a
2 number. We didn't know if it would be 14, 13, 1,200 feet.
3 So, we picked 1,000 feet to accommodate that flexibility.

4 And, also, these existing wells that will
5 be drilled deeper, some of them are within 1,500 foot
6 spacing.

7 Q Okay. So, basically, what you're asking
8 for is to have a minimum of 1,000 feet, but it doesn't mean
9 that all of your wells are going to be on a 1,000 foot
10 spacing?

11 A That's correct.

12 COMMISSIONER RADABAUGH: Okay.

13 COMMISSIONER LAY: Other crosses?

14 E X A M I N A T I O N

15 BY MR. TAWNEY:

16 Q I was kind of wondering where you got
17 that 1,000. You just kind of picked a number for the
18 1,000?

19 A It's arbitrary. We don't plan right now
20 on going down to 1,000 foot spacing, but there could be
21 occasions where we could get crowded on one side. If I
22 picked 1,500, then we would have to come in and get a
23 spacing exception if it was closer to 1,500.

**Exhibit #3 was a copy of
the McDowell County appeal
filed by the Coal Association and others.
Not repeated here to save space.**

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION,

Petitioner,

vs.

No.

WEST VIRGINIA OIL AND GAS CONSERVATION COMMISSION,
EASTERN AMERICAN ENERGY CORPORATION,
CHESAPEAKE APPALACHIA, L.L.C.,
PETROEDGE RESOURCES (WV) L.L.C.,
BLUE EAGLE LAND, L.L.C.,
COALQUEST DEVELOPMENT, L.L.C.,
CONSOLIDATED COAL COMPANY,
HORSE CREEK LAND AND MINING COMPANY,
NATIONAL COUNCIL OF COAL LESSORS, INC.,
PENN VIRGINIA OPERATING COMPANY, LLC,
POCAHONTAS LAND CORPORATION,
WPP L.L.C.,
WOLF RUN MINING COMPANY, and
THE WEST VIRGINIA COAL ASSOCIATION.

Respondents.

CERTIFICATE OF SERVICE

I, David McMahon, do hereby certify that I have served a true and exact copy of the foregoing **Petitioner's Response to Respondent's Motion to Dismiss** upon all counsel of record by certified mail on the 14 day of November, 2008, addressed as follows:

West Virginia Oil & Gas Conservation Commission

Christie S. Utt, Esq.
WV Office of the Attorney General
Capitol Complex, Bldg. 1, Room E-26
Charleston, WV 25305

and

c/o Office of Oil and Gas

W. Va. Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304-2345

Chesapeake Appalachia, LLC

Timothy Miller, Esq.
Robinson & McElwee, PLLC
Post Office Box 1791
Charleston, WV 25326

Eastern American Energy Corporation

Suzanne Trowbridge, Esq.
Goodwin & Goodwin LLP
Post Office Box 2107
Charleston, WV 25328

PetroEdge Resources (WV), LLC

Kenneth E. Tawney, Esq.
Jackson Kelly PLLC
P.O. Box 553
Charleston, WV 25322-0553

Blue Eagle Land, L.L.C.
Coalquest Development, L.L.C.
Consolidated Coal Company
Horse Creek Land and Mining Company
National Council of Coal Lessors, Inc.
Penn Virginia Operating Company, LLC
Pocahontas Land Corporation
WPP L.L.C.
Wolf Run Mining Company
The West Virginia Coal Association

Nicholas G. Preservati
Joseph L. Jenkins
Preservati Law Offices, PLLC
Post Office Box 1431
Charleston, WV 25325

and

E. Forrest Jones
Jones & Associates, PLLC
Post Office Box 1989
Charleston, WV 25327

Independent Oil and Gas Association of West Virginia

405 Capitol Street, Suite 808
Charleston, WV 25301

West Virginia Oil and Natural Gas Association.

P.O. Box 3231
Charleston, WV 25332

West Virginia Land and Mineral Owners Council

PO Box 761
Charleston, WV 25323-0761



David McMahon, J.D. #2490
Counsel for Petitioner.
1624 Kenwood Rd.
Charleston, WV 25314
304-415-4288
wvdavid@wvdavid.net