IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE LAND, LLC, et al.

Petitioners, and

WEST VIRGINIA SURFACE OWNER'S RIGHTS ORGANIZATION,

Intervener/Petitioner,

v. Case No: 08-CAP-171

WEST VIRGINIA OIL AND GAS
CONSERVATION COMMISSION,
CHESAPEAKE APPALACHIA, LLC,
EASTERN AMERICAN ENERGY CORPORATION, and
PETROEDGE RESOURCES (WV), LLC,

Respondents.

REPLY BRIEF OF
INTERVENER/PETITIONER
WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION

Introduction.

An initial brief was filed by the Petitioners Blue Eagle et al. -- and WVSORO, the Intervener/Petition, also filed an initial brief on the 1000-foot spacing issue. Answering briefs were filed by the Commission, by Chesapeake, by Eastern American, by Quest/PetroEdge -- and WVSORO also filed an answering brief on the "deep well" jurisdictional issue. This is WVSORO's brief in reply to the answering briefs of the Commission, Chesapeake, Eastern American, and Quest/PetroEdge.

Jurisdiction/"Deep Well".

All the answering briefs took the position the wells in question are statutory deep wells subject to the jurisdiction of the Commission. WVSORO agrees with all of the other parties' answering briefs on that issue, although the reasoning of those briefs is not necessarily the same as WVSORO's.[1] WVSORO will not repeat in this brief the arguments on that issue that it made in its answering brief.

Spacing of 1500 Feet Would be Clearly Wrong/Arbitrary.

On the issue of whether the granting of 1000-foot spacing should be reversed, modified, remanded or affirmed, WVSORO's position differs from at least most of the answering briefs. Its initial arguments on that point are laid out in its initial brief and they will not, for the most part, be repeated here.

On the 1000-foot spacing issue, at least one of the answering briefs framed the issue in terms of "substantial evidence". The statutory grounds for a review of an agency decision speak in terms of the decision being "arbitrary" (W.Va. Code §29A-5-4(g)(6)) or not supported by "substantial evidence" (Paragraph (g)(5). WVSORO's earlier brief against the 1000-foot spacing rule primarily phrased the issue as one of "arbitrariness" (relying on that term which appeared in the record) although mentioning "clearly wrong" at time or two.

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[1]One answering brief criticized WVSORO's broader public policy issue arguments as insufficiently based in the proceeding below. However, judicial notice is authorized in proceedings under the Administrative Procedures Act (W.Va. Code §29A-5-2(d)); the West Virginia Rules of Evidence apply to proceedings in all courts (Rule 101) and allow judicial notice (Rule 201); and judicial notice is used in appeals (See *Alexander v. Hillman*, 1935, 56 S.Ct. 204, 296 U.S. 222, 80 L.Ed. 192; and *State ex rel. Thomas v. Board of Ballot Com'rs of Kanawha County*, 1944, 31 S.E.2d 328, 127 W.Va. 18).

There is hardly a distinction between the tests -- different instruments playing the same song. It is arbitrary, it is clearly wrong, and there is not substantial evidence when the evidence required by the Commission's promulgated Rule is simply not there. The Commission's Rule 39 C.S.R. 1-16 clearly states that before granting special field rules, the Commission "shall",

> 16.2. . . . require evidence from an applicant as follows:
>
> . . .
>
> 6.2.d. **Reservoir data** anticipated for an average proposed drilling unit within the spaced area; **and**
>
> 6.2.e. **A comparative economic evaluation of spacing patterns**, based on estimated production and rate of production of oil and/or gas of the average proposed drilling units within the spaced area. [Emphasis added].

None of that required evidence appeared in the record. The applicant/Chesapeake's witness admitted so in the hearing at Transcript pages 50-51. So there was not substantial evidence, and it was arbitrary, for the Commission to make an exception to the default 3000-foot well spacing in the Rule of the Commission.

The only evidence justifying 1500 foot spacing was that Chesapeake had not seen "communication" when drilling 1500 foot wells. Tr. 49. The testimony presented by Chesapeake's experts was not substantial enough to justify 1500-foot spacing as argued in WVSORO's initial brief, and it was arbitrary for the Commission to order it.

Spacing of 1000 Feet Is Arbitrary.

Even assuming, despite the lack of the evidence required by the Rule, that the above was enough evidence to justify the 1500 foot spacing, the Commission granted 1000-foot

spacing. The granting of spacing 500 feet closer than 1500 feet spacing was as arbitrary as the witness said it was. Tr. 48.

Chesapeake's brief takes the position that it was the 500-foot leeway between 1500 foot spacing they intended and the1000 foot alternative spacing is what was "arbitrary". Brief Page 10. And to say differently was out of context. Whether 1500 feet and 500 feet were both arbitrary, or whether 1500 feet was not arbitrary and 500 feet was arbitrary, there was a break in the chain. The result was arbitrary.

The first paragraph of the statement of facts in Chesapeake's answering brief states,

> By definition, special field rules dictate spacing requirements based on reservoir characteristics and the protection of correlative rights between producers of gas. The spacing required in a special filed rule order is not based upon an arbitrary distance limitation. Rather, it is based upon the particular conditions in a field . . ."

The only conditions in the field in evidence was non-communication at 1500 feet. Yet the Commission granted them 1000 foot spacing. Why? The rationale for that is arbitrary indeed.

Chesapeake's answering brief takes the position that, "Chesapeake intended and agreed to drill on 1,500 foot spacing . . . ". Brief p 10. But that is not what the Commission's orders say. The orders all say 1000-foot spacing.

Again to Chesapeake's brief. The 500 foot narrower 1,000-foot minimum spacing "was requested and 'arbitrarily' selected, *only as an alternative* to allow some flexibility, [Emphasis added.]" Brief, p. 10. And they want that flexibility for themselves in case they run into, among other things, "topography issues" and "surface owner issues". Tr. 46.

It is unclear what is meant by a topography issue. Does Chesapeake want to save a little money by drilling in a surface owner's bottom although the better spacing for every other interest would put the site on a somewhat more expensive hillside or hilltop site? Or is it that the slope where it might go is so steep that to prevent erosion it is better to move to the top or the bottom? Is a surface owner issue the proper accommodation of a surface use under the fairly necessary rule[2] -- something WVSORO would appreciate? Or is a surface owner issue avoiding a surface owner consent issue or a contentious surface owner and putting the well on a different surface owner, but opening up extra space on the other side resulting in unnecessary wells. Or are these really because there is a gap in Chesapeake's leased land?

These are not issues that should be left to Chesapeake. The order does not say 1500-foot spacing unless there is an impossible topography. It says 1000-spacing, even though 1500-foot spacing is more appropriate, so Chesapeake can do as it pleases, as argued at greater length in WVSORO's initial brief. It is arbitrary of the Commission to give Chesapeake the leeway to be arbitrary.

Eastern American states in its answering brief that possible improvement in technology in the future is not a basis to modify or overturn the Commission's decision. Brief p. 14. By the same token, Chesapeake's possible need in the future for a variance from 1500-foot spacing should not be a basis to allow 1000-foot spacing for all wells as the Commission ordered. The ability of Chesapeake to drill wells closer than 1500 feet apart for any reason they want to is arbitrariness at its peak.

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[2]*Disturbing Surface Rights: What does "Reasonably Necessary" mean in West Virginia*, 85 West Virginia Law Review 817 (1983).

WVSORO's Interest.

Finally, one answering brief took the position that WVSORO's brief should be disregarded. This Court has already allowed WVSORO to intervene, and the arguments made in favor of intervention in briefing the motion will not be repeated. However, several answering briefs made the observation that the orders of the Commission state that if a coal owner objects, the 1000 foot spacing will be governed by West Virginia Code 22C-8-8 which has a minimum spacing of 1500 feet. As each well is drilled they argue, if a coal owner is actively mining or has recorded a coal declaration in the County record room, the coal owner will get a notice, and can make some objection.

This makes the Commissions orders in this case more crucial to surface owners than for anyone else. In any given area (or special field rule territory) the more distant the spacing, the fewer total wells can be drilled on the surface owners. Yet the surface owners cannot object to the spacing. Only the coal owners. In fact the surface owners cannot "object" at all. They can only "comment". W.Va. Code §22-6-9 and 10. And the surface owners' comments can only lead to denial or conditioning of the permit for very limited reasons. Surface owners' comments can only lead to denial or conditioning of the permit (W.Va. Code 22-6-11) if,

> (1) The proposed well work will constitute a hazard to the safety of persons; or
> (2) The plan for soil erosion and sediment control is not adequate or effective; or
> (3) Damage would occur to publicly owned lands or resources; or
> (4) The proposed well work fails to protect fresh water sources or supplies.

So the results of this appeal are more important to surface owners, and others, than they are to the Petitioners.

Conclusion.

The Conservation Commission should be held to have jurisdiction because the wells in question are statutory "deep wells". The 1000-foot minimum spacing should be denied and the 3000-foot spacing left in place or modified to 1500-foot spacing only temporarily, or the matter should be remanded for more evidence.

Respectfully submitted:

West Virginia Surface Owner Rights Organization.
Intervener/Petitioners
By Counsel

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CERTIFICATE OF SERVICE

I, David McMahon, do hereby certify that I have served a true and exact copy of the foregoing brief upon all counsel of record by e-mailing a true copy in Portable Document Format (.pdf) on the 27th day of July, 2009, to:

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