

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE LAND, LLC, a West Virginia limited liability company, **COALQUEST DEVELOPMENT, LLC**, a foreign limited liability company, **CONSOLIDATION COAL COMPANY**, a foreign Corporation, **HORSE CREEK LAND AND MINING COMPANY**, a West Virginia corporation, **NATIONAL COUNCIL OF COAL LESSORS, INC.**, a West Virginia Corporation, **PENN VIRGINIA OPERATING COMPANY, LLC**, a foreign limited liability company, **POCAHONTAS LAND CORPORATION**, a foreign Corporation, **WEST VIRGINIA COAL ASSOCIATION**, a West Virginia non-profit corporation, **WPP LLC**, a foreign limited liability company, and **WOLF RUN MINING COMPANY**, a West Virginia corporation,

Petitioners,

v.

Civil Action No. 08-CAP-171

WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, a state agency, **CHESAPEAKE APPALACHIAN, LLC**, a foreign limited liability Company, **EASTERN AMERICAN ENERGY CORPORATION**, a West Virginia corporation, and **PETROEDGE RESOURCES, (WV), LLC**, a foreign Limited liability company,

Respondents.

**BRIEF OF RESPONDENT
EASTERN AMERICAN ENERGY CORPORATION**

I.

INTRODUCTION

On or about June 26, 2008, Petitioners filed a Petition for Appeal of certain Orders issued by the West Virginia Oil and Gas Conservation Commission

(“Commission”) granting applications for Special Field Rules to certain of the Respondents with respect to the drilling of gas wells known as Marcellus Wells. The Marcellus formation lies directly above the Onondaga formation and is a “shallow” formation by statutory definition. The only reason the Commission has jurisdiction over these wells is because each of the Respondents requesting Special Field Rules desired to drill more than 20 feet into the top of the Onondaga formation. One of the Orders included in Petitioners’ Appeal is the Commission’s Order dated December 21, 2006 granting Eastern American Energy Corporation’s (“EAEC’s”) application for Special Field Rules covering approximately 30,000 acres in Boone, Lincoln and Logan Counties. The Order granting EAEC’s application for Special Field Rules permits EAEC to drill 75 feet into the top of the Onondaga formation to adequately log and stimulate the entire Marcellus formation, drill within 100 feet of any lease or unit boundary, and space wells no closer than 1000 feet apart. Although the Petitioners assert five errors committed by the Commission in their Petition for Appeal, the Petitioners’ brief in support of their appeal only addresses two errors: 1) the Commission did not have jurisdiction to grant the Special Field Rules because the wells subject to the Special Field Rules should be found to be shallow wells regulated by the Shallow Well Review Gas Board; and 2) the Commission violated the Due Process Clause of the United States Constitution and the West Virginia Constitution when it granted the application for Special Field Rules without giving the coal owners personal notice of the application.¹

¹ Because Petitioners have not addressed in their brief their asserted errors pertaining to special factual findings made by the Commission, EAEC concludes that Petitioners have dismissed or abandoned such points in this appeal, and EAEC will limit its response to those errors briefed by Petitioners. *See* W. Va. Code §29A-5-4(e) which provides in pertinent part, “Errors not argued by brief may be disregarded.”

Petitioners' asserted errors are without merit. First, as set forth more particularly in EAEC's Motion to Dismiss Petitioners' Appeal, Petitioners lack standing to appeal the Commission's Order. None of the Petitioners was a party in EAEC's proceeding before the Commission, nor did any of the Petitioners even participate in EAEC's proceedings before the Commission. Furthermore, the only Petitioner affected by the Commission's Order granting Special Field Rules to EAEC is Pocahontas Land Corporation, and EAEC and Pocahontas Land Corporation entered into an agreement with respect to the spacing of wells drilled on the 300 acre tract covered by the Special Field Rules within months of the Commission's Order. Thus, none of the Petitioners is adversely affected by the Order granting Special Field Rules to EAEC.²

Second, it is uncontested that in drilling the Marcellus Wells, which are the subject of the Order granting Special Field Rules to EAEC, EAEC drilled in excess of 20 feet into the Onondaga formation. EAEC's drilling of wells pursuant to the Special Field Rules exceeded the permissible depth set forth in the statutory definition of a shallow well. *See*, W.Va. Code §22-6-1(r). Accordingly, the Marcellus Wells, drilled to a depth in excess of 20 feet into the top of the Onondaga formation, pursuant to the Special Field Rules, are by definition "deep wells" and not shallow wells. The Commission had jurisdiction to grant EAEC's application for Special Field Rules, and Petitioners' Appeal must be denied, since the so-called Marcellus Wells are now by definition deep wells.

Finally, the Commission did not violate the Due Process Clause of the United States Constitution and the West Virginia Constitution when it granted EAEC's application for Special Field Rules. While individual notice was not given to coal owners

² It should also be noted that no other coal company is affected by the Order granting Special Field Rules to EAEC; EAEC also resolved all issues with Massey Energy Corporation with respect to its coal properties prior to filing its application for Special Field Rules.

or operators whose coal properties would be affected by the Special Field Rules, notice of the hearing on EAEC's application for Special Field Rules was published in newspapers of general circulation in Logan, Boone and Lincoln Counties. Furthermore, a coal operator or owner is given actual written notice of an application for a permit to drill a deep well, including a deep well proposed to be drilled pursuant to the Special Field Rules. Accordingly, any objections a coal owner or operator may have as to the location or spacing of wells on its property may be asserted in connection with the permit application. Accordingly, no action taken by the Commission violated the Due Process Clause of the United States Constitution and the West Virginia Constitution.

II

STATEMENT OF RELEVANT FACTS

1. In 2006, EAEC had drilled numerous wells in Boone, Lincoln and Logan Counties, West Virginia. The majority of these wells were permitted as shallow wells and in the course of drilling four (4) of those wells EAEC drilled the same to depths in excess of twenty feet (20') into the Onondaga formation.

2. On March 31, 2006, the West Virginia Division of Environmental Protection issued violations to EAEC for the drilling of these four (4) shallow gas wells to depths in excess of twenty feet (20') into the Onondaga formation without securing deep well permits.

3. EAEC and the Oil and Gas Conservation Commission entered into a Consent Order dated August 17, 2006 pursuant to which the violations were to be abated and EAEC was to pay an administrative fine.

4. In response to the Commission's actions regarding the Consent Order, on November 9, 2006, EAEC filed an application for Special Field Rules covering approximately 30,000 acres in Boone, Lincoln and Logan Counties, West Virginia as outlined in the Introduction.

5. A prehearing conference and hearing on EAEC's application for Special Field Rules was scheduled. EAEC published notice of the time, place and purpose of the prehearing conference and hearing in newspapers of general circulation in Logan, Boone and Lincoln Counties. EAEC also sent written notice of the prehearing conference and hearing to all known gas operators of any lands directly or immediately affected by its application.

6. No objections to EAEC's application for Special Field Rules were filed.

7. A hearing on EAEC's application was held on December 6, 2006 at which time EAEC presented evidence in support of its application. No person protested the application nor presented evidence in opposition to the application.

8. By Order dated December 21, 2006, the Commission found that while EAEC intended to produce only from shallow formations, it proposed to drill up to seventy five feet (75') into the Onondaga formation. The Commission held that since the proposed wells would be drilled in excess of twenty feet (20') into the Onondaga formation, they were deep wells.

9. The Commission concluded that it had jurisdiction over the subject matter and the interested persons to grant the prescribed relief.

10. The Order granting the Special Field Rules to EAEC allowed EAEC to drill wells to a depth not to exceed seventy five feet (75') into the Onondaga formation

and requires that each well drilled under the Special Field Rules would be located a minimum of one thousand feet (1,000') from each well covered by the Order and one hundred feet (100') from a lease line or unit boundary. The Order further requires EAEC to submit a deep well permit application for each well covered by the Special Field Rules.

11. One of the Petitioners, Pocahontas Land Company, owns coal reserves under a portion of the area covered by EAEC's Special Field Rules. Pocahontas Land Company advised EAEC that it was concerned that the granting of the Special Field Rules by the Commission might deprive Pocahontas Land Company of its statutory right to object to the spacing of wells drilled by EAEC pursuant to the Special Field Rules. EAEC and Pocahontas Land Company subsequently entered into an agreement that provides that if Pocahontas Land Company, or one of its lessees on the 300 acres owned by Pocahontas Land Company in the area covered by EAEC's Special Field Rules, objects to the spacing of any well drilled by EAEC under the Special Field Rules, then the Director of the Division of Environmental Protection through the Office of Oil and Gas could utilize the terms and provisions utilized to settle such disputes by the Shallow Gas Well Review Board.

12. On September 28, 2007 Petitioners filed a Petition for Writ of Prohibition with the West Virginia Supreme Court alleging that the Commission has no jurisdiction over wells drilled more than twenty feet into the Onondaga formation where such wells are not also completed in, and producing from, deep formations. The Petition was filed more than eight (8) months after EAEC received its Order granting the Special Field Rules.

13. The West Virginia Supreme Court issued a Rule to Show Cause on November 7, 2007, and the matter was briefed and argued before the Supreme Court. By Order the Supreme Court found that a Writ of Prohibition was not the appropriate vehicle to address the jurisdictional matters because it did not have a factual record upon which the Court could adequately evaluate the contentions of the parties, particularly the details of the wells in question. *State ex rel. Blue Eagle Land, LLC v. West Virginia Oil & Gas Commission*, 664 S.E.2d 683, 686 (2008). The Supreme Court dismissed the case but granted Petitioners leave to file an appeal of the Commission's Orders in Circuit Court.

14. The Petitioners filed this appeal on June 26, 2008.

III ARGUMENT

A. The Commission Has Jurisdiction Over Wells Drilled More Than 20 Feet Into The Onondaga Group Even Though Such Wells May Only Be Completed In And To The Marcellus Shale Formation Which, by Definition, is a Shallow Formation.

Jurisdiction over various aspects of drilling natural gas wells in West Virginia is vested in three agencies. The Division of Environmental Protection, Office of Oil and Gas oversees the permitting, drilling, and operation and abandonment of all natural gas wells. W.Va. Code §22-6-1, *et seq.* The Shallow Gas Well Review Board exercises jurisdiction over drilling and spacing requirements for shallow wells as defined by statute. W.Va. Code §22C-8-1, *et. seq.* The Commission has jurisdiction over the exploration for or production of oil and gas from deep wells, including drilling and spacing of deep wells. W.Va. Code §22C-9-1, *et seq.* The Commission has specific authority to “make and enforce reasonable rules and orders reasonably necessary to prevent waste, protect correlative rights, govern the practice and

procedure before the Commission and otherwise administer the provisions of this article.” W.Va. Code §22C-9-4(f)(2).

EAEC agrees with Petitioners that the Marcellus Shale formation is by definition a shallow formation. However, it is clear under the statutory definitions that once a well is drilled more than 20-feet into the Onondaga Group it becomes a deep well.

The Legislature defined shallow wells as follows:

“Shallow well” means any gas well drilled and completed in a formation above the top of the uppermost member of the “Onondaga Group.” *Provided, that in drilling a shallow well the operator may penetrate into the “Onondaga Group” to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the “Onondaga Group” formation be otherwise produced, perforated or stimulated in any manner.*

W. Va. Code §§ 22-6-1(r) (emphasis added).

A deep well is defined as: “*any well other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the “Onondaga Group.”*”

W. Va. Code §22-6-1(g) (emphasis added).

These same definitions are employed in defining the jurisdiction of the Shallow Gas Well Review Board (W. Va. Code §22-C-8-2(21), (8)) and the Commission. W. Va. Code §22-C-9-2(11), (12)).

In the definition section of Chapter 22C, Article 9, governing the Commission, the Legislature declared: Unless the context clearly indicates otherwise, the use of the word “and” and the word “or” shall be interchangeable, as, for example, “oil and gas” shall mean oil or gas or both. W. Va. Code §22C-9-2(b). The Legislature clearly stated that “and” and “or” were interchangeable, and Petitioners have failed to submit anything to support its claim that the definition of a deep well requires that a well be drilled and

completed below the uppermost portion of the Onondaga Group. Accordingly, the Commission has acted completely within its lawful jurisdiction.

Petitioners argue that a shallow well is one that is drilled and completed above the uppermost member of the Onondaga Group, regardless of whether or not it is drilled to a depth in excess of 20 feet in the Onondaga Group. Petitioners' argument rewrites the definition of shallow well by ignoring the statutory drilling depth restriction contained in the definition. An operator is only permitted to drill twenty feet into the Onondaga Group; once that twenty-foot limitation is exceeded, the well, by definition, is a deep well.

Under Petitioners' interpretation of the definition of a shallow well there is no limitation as to drilling depths. An oil and gas operator could drill a well to any depth, and as long as it was not completed in a formation below the top of the Onondaga Group such well would be defined as a shallow well. If Petitioners' assertions are followed, an operator drilling to a depth in excess of twenty feet into the Onondaga Group would not have to comply with the following deep well obligations provided it never completed a formation below the top of the Onondaga Group:

- i) locating the well at least 400 feet from a lease boundary (39 C.S.R. 1-4.2)
- ii) Spacing the well 3,000 feet from other existing or permitted deep wells (Id.)
- iii) Filing a safety plan (39 C.S.R. 1-4.4(e))

Surely the Legislature didn't intend for such a result to occur.

- B. Notice of Applications for Special Field Rules is Given and Coal Operators and Owners Receive Actual Written Notice of Application for Permits to Drill a Deep Well.

Petitioners assert that the Commission violated the Due Process Clause of the United States Constitution and West Virginia Constitution because it lowered the spacing requirements between wells without requiring Respondents to personally serve coal operators with notice of the hearings on the application for Special Field Rules. As stated above, EAEC published notice of the time and place of the prehearing conference and hearing before the Commission in newspapers of general circulation in Boone, Logan and Lincoln Counties in compliance with 39 C.S.R. 1-b.1(a). That is all the notice that is due. The granting of EAEC's application for Special Field Rules did not deprive any of the Petitioners of any property right. The Special Field Rules do not abrogate EAEC's obligation to apply for a permit to drill a deep well. As such, Petitioners are not deprived of their statutory right to object to the spacing or location of Macellus Wells drilled pursuant to the Special Field Rules.³

A coal operator or owner is given actual written notice of an application to drill a deep well, including a deep well proposed to be drilled pursuant to the Special Field Rules. An application for a deep well permit must be filed with the Office of Oil and Gas. The application must contain the following:

- (1) The names and addresses of (i) the well operator, (ii) the agent required to be designated under subsection (e) of this section, and (iii) every person whom the applicant must notify under any section of this article together with a certification and evidence that a copy of the

³ As stated above, EAEC has entered into an agreement with Pocahontas Land Corporation regarding the spacing of wells on the 300 acre tract affected by EAEC's Special Field Rules.

application and all other required documentation has been delivered to all such persons;

- (2) The name and address of every coal operator operating coal seams under the tract of land on which the well is or may be located, and the coal seam owner of record and lessee of record required to be given notice by section twelve, if any, if said owner or lessee is not yet operating said coal seams;
- (3) The number of the well or such other identification as the director may require;
- (4) The type of well;
- (5) The well work⁴ for which a permit is requested;
- (6) The approximate depth to which the well is to be drilled or deepened or the actual depth if the well has been drilled;

* * * *

- (13) Any other relevant information which the director may require by rule.

W. Va. Code § 22-6-6.

In addition, before drilling a well on a site above a seam or seams of coal, the well operator must also provide each and every coal operator operating beneath the tract of land and the coal seam owner of record and lessee of record, if the coal seam owner or lessee is not yet operating the coal seams, with a plat prepared by a licensed land surveyor or registered engineer showing the proposed location of the well. W. Va. Code § 22-6-12. The coal operator operating the seams beneath the tract of land or coal owner or lessee of record if said owner or lessee is not yet operating the coal seams has fifteen

⁴ "Well work" means the drilling, redrilling, deepening, stimulating, pressuring by injection of any fluid, converting from one type of well to another, combining or physically changing to allow the migration of fluid from one formation to another or plugging or replugging of any well." *W. Va. Code, §22-6-1(v)*.

days to file written objections to the proposed drilling. If an objection is filed by the coal operator, or if the director objects to the proposed drilling, the coal operator and gas well operator are given written notice of the time and place to consider the objections to the permit application.⁵ At such time the parties may agree upon the location as filed or may agree to move the location to a site which is satisfactory to all parties and the director. If the parties are unable to resolve the objections informally then a formal hearing is conducted by the director. The coal operator or owner has the right to participate in the hearing and to examine witnesses and present evidence and testimony in opposition to the proposed location of the well. In issuing his decision, the director must take into consideration the following:

- (1) Whether the drilling location is above or in close proximity to any mine opening or shaft, entry, travelway, airway, haulageway, drainageway or passageway, or to any proposed extension thereof in any operated or abandoned or operating coal mine or coal mines already surveyed and platted, but not yet being operated;
- (2) Whether the proposed drilling can reasonably be done through an existing or planned pillar of coal, or in close proximity to an existing well or such pillar of coal, taking into consideration the surface topography;
- (3) Whether a well can be drilled safely, taking into consideration the dangers from creeps, squeezes or other disturbances due to the extraction of coal; and
- (4) The extent to which the proposed drilling location unreasonably interferes with the safe recovery of coal, oil and gas.

W. Va. Code § 22-6-15.

⁵ Objections to deep well permits are referred to the Chief of the Office of Oil and Gas.

Pursuant to these notice and hearing provisions, Petitioners' property rights are duly protected.

- C. There is No Evidence to Support Petitioners' Assertion that the Application of EAEC's Special Field Rules Will Have a Significant Impact on Petitioners' Coal Reserves.

Petitioners assert that the application of the Special Field Rules and the 1000 foot spacing limitation will have a significant impact on Petitioners' coal reserves. Such assertion is unfounded, and no evidence was presented before the Commission, nor has any evidence been submitted to this Court in support of such claim. Petitioners' contention that the 1000 foot spacing limitation will result in millions of dollars of sterilized coal is sheer speculation and hyperbole. As stated above, the Commission Order granting EAEC's Special Field Rules affects 300 acres owned by Petitioner, Pocahontas Land Corporation, and EAEC and Pocahontas Land Corporation have reached an agreement regarding the spacing of wells on that acreage. Moreover, as described above, Petitioners have the right to object to applications for deep well permits and can object to the location of the well and present evidence concerning the impact of such well on Petitioners' coal reserves during the permitting process.

- D. There is No Evidence in the Record on EAEC's Application for Special Field Rules to Support the Positions Asserted by the West Virginia Surface Owners' Rights Organization ("WVSORO").

The WVSORO does not contest that the Marcellus Wells drilled in excess of 20 feet into the top of the Onondaga formation are deep wells and thus subject to the jurisdiction of the Commission. Instead, the WVSORO alleges that the Commission's spacing requirement of not less than 1000 feet between wells is arbitrary and clearly wrong. The WVSORO cites to no evidence or testimony in the record pertaining to

EAEC's application to support its position that the Commission's finding is arbitrary or clearly wrong. Instead, the WVSORO "arbitrarily" points out that "the well spacing granted should only have been 1500 foot spacing (or more) and that spacing should only be temporary. Brief of WVSORO at p. 7. The WVSORO even argues that it is likely that there will be information in the future or new technology in the future that will permit spacing to be 3000 to 4000 feet apart, or perhaps even 8000 feet. Brief of WVSORO at p. 11. Possible improvements in technology in the future is not a basis to modify or overturn the Commission's decision. In administrative appeals the scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner. *Adkins v. West Virginia Dept. of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an administrative agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002). EAEC's Application for Special Field Rules was supported by substantial evidence, and the Commission properly considered such evidence in granting its Application.

IV.

CONCLUSION

In summary, Petitioners' Appeal of the Commission's Order granting EAEC's application of Special Field Rules should be dismissed because none of the Petitioners was a party to the proceeding before the Commission, and none of the Petitioners is

adversely affected by the Commission Order. Any concerns raised by the Petitioners were resolved by agreement with EAEC long before Petitioners filed their Petition for Writ of Prohibition in 2007. Moreover, Petitioners have raised the very same arguments in this appeal as argued before the West Virginia Supreme Court. The Supreme Court noted that there was not a sufficient factual basis to address the jurisdictional arguments. Petitioners have offered no additional facts to support their claims. The wells at issue in EAEC's application for Special Field Rules were not shallow wells, and accordingly, the Shallow Gas Well Review Board has no jurisdiction over them. Wells that are "not shallow wells" are by definition within the specific jurisdiction of the Commission. The Commission's Order granting EAEC's application for Special Field Rules should be affirmed.

Respectfully Submitted,
EASTERN AMERICAN ENERGY
CORPORATION
By Counsel



SUSAN C. WITTEMEIER (WVSB #4104)
Goodwin & Goodwin LLP
P.O. Box 2107
300 Summers Street, Suite 1500
Charleston, West Virginia 25328-2107
(304) 346-7000/(304) 344-9692

CERTIFICATE OF SERVICE

I, Susan C. Wittemeier, one of counsel for the Defendant, do hereby certify that the foregoing **Brief of Respondent Eastern American Energy Corporation** has been served by mailing a true and exact copy thereof addressed as follows, this 14 day of July, 2009 to:

Nicholas S. Preservati
Preservati Law Offices, PLLC
P.O. Box 1431
Charleston, WV 25325

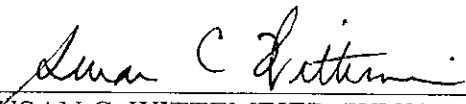
E. Forrest Jones
Jones & Associates, PLLC
P.O. Box 1989
Charleston, WV 25327

Christie S. Utt, Esquire
West Virginia Oil & Gas Conservation Commission
WV Office of the Attorney General
Capitol Complex, Building 1, Room E-26
Charleston, WV 25305

Timothy M. Miller, Esquire
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326-1791
Counsel for Chesapeake Appalachia, LLC

Kenneth Tawney, Esquire
Jackson & Kelly PLLC
P. O. Box 553
Charleston, WV 25322-0553
Counsel for Petroedge Resources

David B. McMahon, Esquire
1624 Kenwood Road
Charleston, WV 25325


SUSAN C. WITTEMEIER (WVSB # 4104)
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301-1678
(304) 346-7000
Fax: (304) 344-9692