



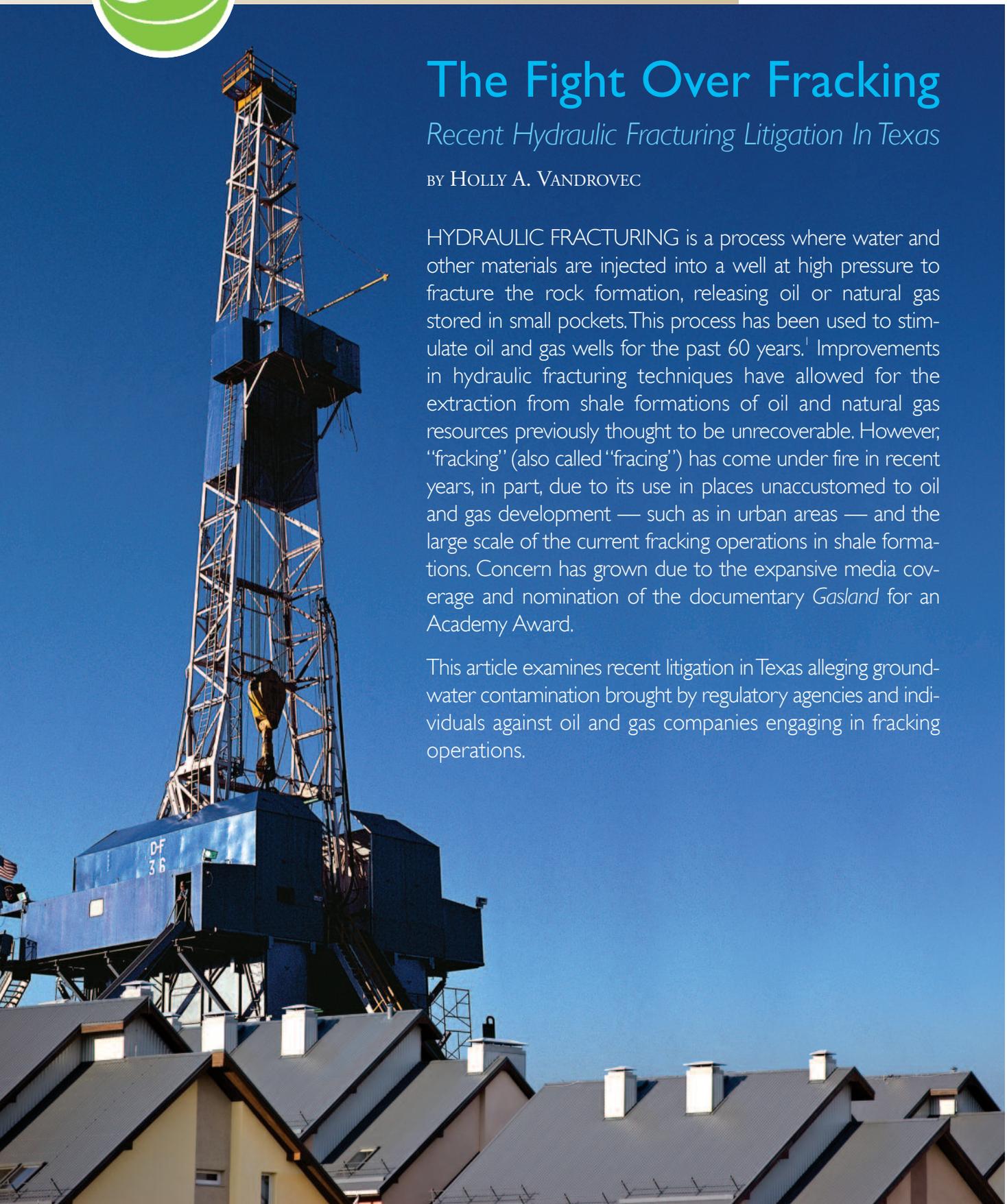
The Fight Over Fracking

Recent Hydraulic Fracturing Litigation In Texas

BY HOLLY A. VANDROVEC

HYDRAULIC FRACTURING is a process where water and other materials are injected into a well at high pressure to fracture the rock formation, releasing oil or natural gas stored in small pockets. This process has been used to stimulate oil and gas wells for the past 60 years.¹ Improvements in hydraulic fracturing techniques have allowed for the extraction from shale formations of oil and natural gas resources previously thought to be unrecoverable. However, “fracking” (also called “fracing”) has come under fire in recent years, in part, due to its use in places unaccustomed to oil and gas development — such as in urban areas — and the large scale of the current fracking operations in shale formations. Concern has grown due to the expansive media coverage and nomination of the documentary *Gasland* for an Academy Award.

This article examines recent litigation in Texas alleging groundwater contamination brought by regulatory agencies and individuals against oil and gas companies engaging in fracking operations.



Litigation Arising from Regulatory Action — EPA’s Emergency Administrative Order to Range Production Company²

EPA’s Emergency Powers Under the Safe Drinking Water Act

Section 1431 of the Safe Drinking Water Act (SDWA or Act) gives the U.S. Environmental Protection Agency (EPA) the power to issue emergency orders if a contaminant in an underground source of drinking water may present an imminent and substantial endangerment to public health.³

A much-debated exception to the SDWA excludes the underground injection of fluids (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities from the definition of the term “underground injection” — virtually excluding fracking activities from regulation pursuant to the SDWA.⁴ However, Section 1431 of the Act gives the EPA its emergency powers “[n]otwithstanding any other provision of this subchapter,” meaning that a violation of the statute is not required for the EPA to exercise emergency powers.

EPA Issues an Emergency Administrative Order to Range

On Dec. 7, 2010, the EPA issued an emergency administrative order, pursuant to Section 1431 of the Act, to Range Resources Corporation and Range Production Company (together, “Range”). The EPA order contains 41 findings of fact, including: (1) that certain contaminants in the two domestic water wells “may present an imminent and substantial endangerment to the health of persons,” (2) that the presence of one of these contaminants in the domestic water wells is “likely to be due to impacts from gas development and production activities in the area,” and (3) that two gas wells operated by Range “are the only gas production facilities within approximately 2,000 feet of the domestic wells.”⁵ It is interesting to note that the order does not contain a finding of fact that Range actually caused or contributed to the alleged contamination of the domestic water wells or to the alleged endangerment. Instead, the EPA includes that assertion as a *conclusion of law* in paragraph 46 of the order. The order specifically requires Range to:

- Provide, within 48 hours of receipt of the order, replacement potable water supplies for the consumers of water from the domestic water wells;
- Install, within 48 hours of receipt of the order, explosivity meters in the dwellings served by the domestic water wells;
- Submit, within five days of receipt of the order, a survey listing and identifying the location description of all private water wells within 3,000 feet of the wellbore track of one of Range’s gas wells and all of the Lake Country Acres⁶ public water supply system wells, along with a plan to sample those wells to determine whether they are contaminated;
- Submit, within 14 days of receipt of the order, a plan to conduct soil gas surveys and indoor air concentration analyses of the properties and dwellings served by the domestic water wells; and

- Develop and submit, within 60 days of receipt of the order, a plan to: (1) identify gas flow pathways to the Trinity Aquifer; (2) eliminate gas flow to the aquifer, if possible; and (3) remediate areas of the aquifer that are contaminated.⁷

Range was not provided notice or an opportunity for a hearing before the order requiring the above actions was issued.

The RRC Called Hearing and Resulting Discovery Litigation

On Dec. 8, 2010 — the day after the EPA issued its emergency order to Range — the Texas Railroad Commission (RRC or “Commission”) set a hearing to determine if Range was contaminating the water. To discover the basis of the allegations in the EPA’s order, Range obtained deposition commissions from the RRC for the EPA personnel responsible for preparing the Order. After the EPA refused to allow its personnel to testify or to produce documents and to participate in the RRC hearing to defend its order, Range filed suit against the EPA under the Administrative Procedure Act (APA), challenging its refusal to allow its employees to appear for deposition and to produce subpoenaed documents. Immediately after filing suit, Range filed a motion to compel deposition testimony and document production.⁸

The District Court hearing on Range’s motion to compel was held on Jan. 18, 2011. Although Judge Lee Yeakel did not order all four depositions requested by Range, he did grant one oral deposition, in the nature of a Federal Rule of Civil Procedure 30(b)(6) deposition, of an employee designated by the EPA.⁹

At the RRC hearing, Range argued that there is no evidence that Range’s fracking operations at its gas wells caused or contributed to the issues with the domestic water wells in Parker County. Neither the EPA nor the owners of the Parker County domestic water wells appeared at the hearing. The RRC left the record open so that it could be supplemented with information from the motion to compel.

Range deposed John Blevins, director of the Compliance Assurance and Enforcement Division of EPA Region 6, on Jan. 25, 2011. During the deposition, counsel for the EPA refused to allow Blevins to answer any questions regarding the basis for the EPA’s conclusions of law — including the conclusion of law asserting that Range caused or contributed to the alleged contamination or endangerment.¹⁰ In any case, Blevins could not have testified as to the technical issues concerning the alleged causation of the contamination.¹¹ Mr. Blevins testified that he was not a part of the “core group” of EPA scientists involved in making that determination.

After the deposition, Range supplemented the record at the RRC. On March 7, 2011, the RRC issued a proposal for decision (PFD) finding that Range’s operations have not caused or contributed to the contamination of either domestic water well.

EPA Sues to Enforce Its Emergency Order

On Jan. 18, 2011, the EPA sued Range in the Northern District, Dallas Division, to enforce its order. In the enforcement action, the EPA alleges that Range has violated provisions of the



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order and seeks: (1) a permanent injunction requiring Range to comply with the order and (2) entry of a judgment against Range for civil penalties of up to \$16,500 for each day of each violation of the order.¹² Range filed a motion to dismiss on March 21. In its motion, Range argues that the Order should not be considered “final” for purposes of an enforcement action and should be dismissed for lack of subject matter jurisdiction because the Order is not ripe for enforcement. Range argues, in the alternative, that the EPA’s complaint should be dismissed because the EPA failed to state a claim by not pleading the requisite elements necessary to satisfy due process or facts necessary to state a claim for relief that is plausible on its face. The EPA’s response to Range’s motion to dismiss is due on May 9, 2011.

Review of Emergency Administrative Orders Issued Under the SDWA

The Review Scheme Prescribed by the SDWA

Section 1448 of the SWDA prescribes the mechanisms for obtaining any review of agency actions.¹³ This section provides that “any other *final action* of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business that is directly affected by the action.”¹⁴

The applicable standard of review of a final agency action is whether the EPA’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁵ However, when the EPA brings an enforcement action in district court, it has the burden of proof by a preponderance of the evidence.

An important case interpreting a provision of the Clean Air Act (CAA) similar to Section 1431 of the SDWA held that the CAA provision is unconstitutional and that the order issued was not a final agency action.¹⁶ In that case, the EPA issued an administrative compliance order (ACO) to the Tennessee Valley Authority (TVA) under Section 113(a)(1)(A) of the CAA,¹⁷ alleging that the TVA had modified a number of its coal-fired electric power plants without first obtaining a permit.¹⁸

However, the Eleventh Circuit described this statutory scheme “in which the head of an executive branch agency has the power to issue an order that has the status of law after finding ‘on the basis of any information available,’ that a CAA violation has been committed,” as “repugnant to the Due Process Clause of the Fifth Amendment.”¹⁹ This is because noncompliance with an order “automatically triggers civil and criminal penalties,” such that respondents “never get an opportunity to argue before a neutral tribunal” that they did not violate the CAA provision or regulation at issue.²⁰ Rather, “[t]he EPA is the ultimate arbiter of guilt or innocence, and the courts are relegated to a forum that conducts a proceeding, akin to a show-cause hearing, on the issue of whether an EPA order has been flouted.”²¹ The EPA “can always avoid the arduous task of proving [a] violation in court,” “simply by issu[ing] an ACO based upon ‘any information.’”²²

Range’s Petition for Review in the Fifth Circuit

Although the EPA did bring an enforcement action, Range filed a petition for review in the Fifth Circuit. This action was necessary because the EPA’s order states: “This Order *constitutes a final agency action* for purposes of SDWA §1448.”²³ In the petition, Range asserts that the order does not constitute a final agency action and that, in the enforcement action brought by the EPA in district court, the EPA has the burden of proving the essential elements of a claim under the SDWA and that Range has the right to assert any applicable defenses and constitutional challenges. Range asks that, after full briefing, the Fifth Circuit issue an opinion holding that the order is not a final agency action and is not subject to review under Section 1448 of the Act. The EPA’s response is due on May 9, 2011.

Litigation Brought by Private Citizens

Four Texas cases involve contamination of water wells allegedly caused by exploration and production activities. Hydraulic fracturing is specifically mentioned in each complaint. All plaintiffs allege nuisance, trespass, and negligence, and request punitive damages.

*Scoma v. Chesapeake Energy Corp*²⁴

Jim and Linda Scoma originally filed their petition in Johnson County district court; however, the defendants (collectively referred to as “Chesapeake”) removed the case to the Northern District, Dallas Division.²⁵ The plaintiffs have not contested removal and filed their second amended complaint on Aug. 8, 2010, requesting a jury trial and alleging that Chesapeake’s drilling activities (including hydraulic fracturing) contaminated their water well. The plaintiffs describe the effects of the contamination as an intermittent orange/yellow coloring of the water, bad taste, and foul odor. The plaintiffs tested their wells in 2008 and 2009 and allege that the results show an increase in the concentration of “harmful petroleum byproducts, such as benzene (a well-known cancer-causing agent), toluene, ethylbenzene, xylene, barium, and iron.”²⁶



The plaintiffs assert the causes of action of nuisance, trespass, and negligence. They also claim that the continuing tort doctrine tolls the statute of limitations for these causes of action.²⁷ The continuing tort doctrine has not been adopted by the Texas Supreme Court and courts of appeals have held that the doctrine does not apply to permanent injury to land.²⁸

To date, Chesapeake has filed an answer and affirmative defenses (Docket No. 12) and the parties are working through discovery disputes and have filed competing protective orders.

Mitchell v. Encana Oil & Gas (USA), Inc.

Grace Mitchell filed her complaint with jury demand against Encana Oil & Gas (USA), Inc. (“Encana”), Chesapeake Operating, Inc., and Chesapeake Exploration, LLC (together, “Chesapeake” and collectively “defendants”)²⁹ on Dec. 15, 2010.³⁰ The complaint alleges that Mitchell’s well water began to feel slick to the touch and give off an oily, gasoline-like odor in May 2010.³¹ The complaint states that testing results indicated that the well water contained “various chemicals, including C-12-C28 hydrocarbons, similar to diesel fuel.”³²

In addition to the nuisance, trespass, and negligence claims common to all three Texas cases, Mitchell asserts a cause of action for fraud and fraudulent concealment alleging that the “[d]efendants failed to warn [the plaintiff] of and have con-

cealed the dangers of the diesel range organic discharges into ground water.”³³ Mitchell asserts a cause of action for strict liability due to ultra-hazardous and abnormally hazardous activities, which Mitchell identifies as “[p]etroleum drilling and hydraulic fracking bore holes.”³⁴ Texas, however, does not recognize a cause of action of strict liability for ultrahazardous or abnormally hazardous activities.³⁵ Finally, Mitchell seeks medical monitoring damages.³⁶ The Western District has held that the Texas Supreme Court would not recognize a cause of action for medical monitoring, so it will be interesting to see how this part of the case is handled.³⁷

The Chesapeake defendants have filed a motion to dismiss the Mitchell complaint.³⁸ Chesapeake argues that Mitchell’s nuisance, trespass, and negligence claims should be dismissed because they fail Fed. R. Civ. P. 8’s plausibility test, citing *Ashcroft v. Iqbal*.³⁹ Chesapeake argues that Mitchell’s fraud/fraudulent concealment claims should be dismissed because they were not pleaded with specificity, do not contain facts showing that Chesapeake had a duty to disclose, and do not contain the necessary elements for a fraud by nondisclosure claim.⁴⁰ Finally, Chesapeake argues that Mitchell’s strict liability claim should be dismissed because Texas does not recognize the abnormally dangerous activities doctrine as a basis for strict liability.⁴¹

Encana also filed a partial motion to dismiss the fraud/fraudulent concealment claims and the strict liability claim for the same reasons set out in the Chesapeake brief.⁴²

Harris v. Devon Energy Production Company, L.P.

The Harris’ filed their complaint with jury demand against Devon Energy Production Company, L.P. (Devon) on Dec. 15, 2010, in the Northern District, Dallas Division.⁴³ The case was later transferred to the Eastern District, Sherman Division. The complaint alleges that water from two wells on their property became contaminated with a gray sediment, rendering it unusable in April 2008.⁴⁴

In addition to the nuisance, trespass, and negligence claims, the Harris’ pleaded a fraud and fraudulent concealment action based on a failure to warn the plaintiffs of the dangers of fracking and the chemicals used in the process.⁴⁵ Devon has moved to dismiss this cause of action based on the failure to plead the fraud allegation with particularity.⁴⁶ Devon has also moved to dismiss the strict liability claim alleged by the plaintiffs. The complaint also contains a request for medical monitoring damages.⁴⁷

Parr v. Aruba Petroleum, Inc., et al.

The Parr family (including a minor child) filed an original petition in the Dallas County Court at Law on March 8, 2011, against nine companies, alleging that the oil and gas exploration and service companies caused releases of various materials resulting in personal injury to the Parr family, injury to their animals and livestock, property damage, and emotional distress, among other damages.⁴⁸

The plaintiffs assert the causes of action of assault, intentional infliction of emotional distress, negligence, gross negli-



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gence, negligence per se, private nuisance, trespass (including subsurface trespass), and strict liability for abnormally dangerous activity. Similar to the other cases, the Parr family also claims that the continuing tort doctrine tolls the statute of limitations for these causes of action.

In addition to monetary damages, the Parr family requests exemplary damages, remediation, injunctive relief “precluding current and future drilling and fracking activities near Plaintiffs’ land,” and medical monitoring damages.

Conclusion

Fracking litigation will continue to evolve. The EPA will be conducting a new hydraulic fracturing study focusing on potential impacts of fracking in natural gas wells on drinking water sources. In 2004, the EPA published a study evaluating the impacts of hydraulic fracturing of coal-bed methane wells on underground sources of drinking water.⁴⁹ The EPA concluded that the injection of fracking fluids into coal-bed methane wells poses little or no threat to underground water sources. However, this 2004 study did not include hydraulic fracturing practices for petroleum-based oil and gas production. The EPA released a plan for the new study, which is now under review by the EPA’s Science Advisory Board. Initial research results are expected by the end of 2012, and the agency hopes to have a final report in 2014.⁵⁰

On Jan. 31, 2011, Democrats from the U.S. House of Representatives Committee on Energy and Commerce issued a letter to Lisa Jackson, administrator of the EPA, stating that oil and gas services companies continued to use diesel fuel in their hydraulic fracturing fluids after the use was banned under the Safe Drinking Water Act in 2005.⁵¹ The letter alleges that between 2005 and 2009, 32.2 million gallons of diesel fuel or fracking fluid containing diesel fuel were injected in wells in 19 states.

Local and state governments across the country are also taking the issue of fracking into their own hands. The New York State Assembly passed legislation placing a temporary ban of hydraulic fracturing last November that will be in effect until May 15, 2011. Several municipalities in Pennsylvania have also attempted to regulate fracking operations; however, those efforts have been overturned by Pennsylvania courts as preempted by the Pennsylvania Oil and Gas Act.⁵² Texas lawyers will be closely monitoring how Texas handles the interplay between the litigation and efforts to further regulate hydraulic fracturing.

Notes

1. Carl T. Montgomery and Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, available at: www.jptonline.org/index.php?id=481 (last accessed April 8, 2011). (This article notes that, although a variation of fracking with explosives began in the 1860s, Standard Oil introduced modern fracking techniques in the late 1940s.)
2. Kelly Hart & Hallman, L.L.P. is one of several firms representing Range in this matter.
3. 42 U.S.C. §300i(a).
4. 42 U.S.C. §300h(d)(1)(B).
5. Emergency Administrative Order, Docket No. SDWA-06-2010-1208 (hereafter, Order) at ¶¶11, 27, 41.
6. “Lake Country Acres” is the subdivision wherein the domestic water wells are located.

7. Order at ¶50.
8. See, Civil Action No. 1:11-CV-11 in the Western District of Texas, Austin Division, Docket No. 1 (Complaint) and Docket No. 4 (Motion to Compel).
9. See, Civil Action No. 1:11-CV-11, Docket No. 32.
10. Jan. 25, 2010, Deposition Transcript at 91:8-25.
11. Deposition Transcript at 99:16-24, 198:5-8, and 210:2-3.
12. *U.S. v. Range Prod. Co. & Range Resources Corp.*, Civil Action No. 3:11-CV-00116-F, in the Northern District of Texas, Dallas Division, Docket No. 1.
13. 42 U.S.C. §300j-7.
14. 42 U.S.C. §300j-7(a)(2) (emphasis added).
15. 5 U.S.C. §706(2)(A).
16. *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1239 (11th Cir. 2003).
17. 42 U.S.C. §7413(a)(1)(A) (2003).
18. *TVA*, 336 F.3d at 1244.
19. *Id.* at 1258 (emphasis added).
20. *Id.* at 1243.
22. *Id.*
22. *Id.* at 1250.
23. 42 U.S.C. §300j-7 (emphasis added).
24. Kelly Hart & Hallman represents Chesapeake in this matter.
25. *Scoma v. Chesapeake Energy Corp., et al.*, Civil Action No. 3:10-CV-1385-N, in the Northern District of Texas.
26. Second Amended Complaint, Cause No. 3:10-CV-01385-N, Docket No. 9 at 4.
27. *Id.* at 4–5.
28. *Markwardt v. Texas Industries, Inc.*, 325 S.W.3d 876, 893-94 (Tex. App. — Houston [14th Dist.] 2010, no pet.) (citing cases).
29. *Mitchell v. Encana Oil & Gas (USA), Inc., et al.*, Civil Action No. 3:10-CV-02555-L, in the Northern District of Texas.
30. Original Complaint, Cause No. 3:10-CV-02555-L, Docket No. 1.
31. Docket No. 1 at 4.
32. *Id.*
33. *Id.* at 7.
34. *Id.*
35. *Prather v. Brandt*, 981 S.W.2d 801, 804 (Tex. App. — Houston [1st Dist.] 1998, pet. denied).
36. Docket No. 1 at 8–9.
37. *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006).
38. Docket No. 7.
39. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Docket No. 7 at 3.
40. *Id.* at 6–8.
41. *Id.* at 10.
42. Docket No. 10.
43. *Harris v. Devon Energy Production Company, L.P.*, Civil Action No. 4:10-CV-00708-MHS-ALM, in the Eastern District of Texas.
44. Original Complaint, Cause No. 4:10-CV-00708-MHS-ALM, Docket No. 1 at 3.
45. *Id.* at 7.
46. Docket No. 7 at 3.
47. Complaint, Docket No. 1 at 8.
48. *Parr v. Aruba Petroleum, Inc., et al.*, No. 11-01650-E (County Court at Law No. 5 of Dallas County, filed March 8, 2011).
49. Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs Study (2004), available at: water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_coalbedmethanestudy.cfm (last accessed April 8, 2011).
50. See water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/index.cfm (last accessed April 8, 2011).
51. Available at: democrats.energycommerce.house.gov/sites/default/files/documents/Jackson.EPADieselFracking.2011.1.31.pdf (last accessed April 8, 2011).
52. *Hunley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009); *Range Resources-Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa. 2009).



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