

Anti-fracking suits face formidable hurdles

Each plaintiff has to present credible scientific evidence of injury and a causal connection to a specific fracking operation.

BY KENNETH M. KLEMM
AND TYLER L. WEIDLICH

Hydraulic fracturing, widely known as “fracking,” has no doubt revolutionized the development of oil and gas in the United States. Yet, at the same time, the practice has generated immense controversy centered around the environment, garnering attention from the media and, more recently, even the film industry. Against this contentious backdrop, it comes as no surprise that the oil and gas industry faces increased litigation (coupled with already burgeoning regulations) as fracking operations expand throughout the country and adverse public perception heightens.

Ongoing speculation is that fracking litigation, especially related to environmental contamination, may evolve into the next body of mass tort claims, flooding court dockets and exacting enormous litigation costs on oil and gas companies. Recent empirical studies and case law, however, cast considerable doubt that these concerns will be realized in the end.

Fracking has been used in the development of oil and gas since the 1940s. But the industry only recently began fracking in deep wells (approximately 10,000 to 15,000 feet) with horizontal bores. This process allows developers to extract minerals from tight rock formations previously thought to be impenetrable.



Many view fracking as the key to unlocking the door to energy independence. According to recent estimates, the United States is currently positioned to produce more crude oil than Saudi Arabia in only five years, due in large part to the increased production from America’s shale plays facilitated by fracking. And, by 2035, fracking technology may enable the United States to obtain total energy self-sufficiency.

However, the environmental controversy associated with fracking is equally well known. Fracking fluid, comprised of more than 98 percent water and sand, with less than 2 percent chemical additives, has been

blamed for contaminating water in almost every state with shale formations. Fracking operations also emit methane and other volatile organic compounds into the atmosphere and has raised potential concerns with air quality.

Environmental organizations, government agencies and universities are sponsoring numerous studies to determine if a causal link exists between the alleged environmental contamination and fracking operations. The findings from these studies (at least preliminarily) are mostly inconsistent with the contamination claims. For example, a recent study conducted by Duke University tested 426 samples from

groundwater aquifers in six counties in the Marcellus Shale in Pennsylvania and found no water contamination from fracking. Similar conclusions were drawn in recent studies sponsored by Los Angeles County, the city of Fort Worth, Texas, and the University of Texas at Austin.

Significantly, the U.S. Environmental Protection Agency (EPA) is also conducting a comprehensive study regarding the potential impacts of hydraulic fracturing on water quality. A first progress report is expected in late 2012, while a final report will be released to the public in 2014.

Some shale states, largely in response to public pressure and despite contrary findings in recent studies, have implemented aggressive regulations in an attempt to curb perceived environmental threats from fracking. In May, Vermont became the first state to ban the practice altogether, although the regulation appears largely symbolic as there is believed to be little to no recoverable minerals in the state. New York and California, states with more appreciable deposits of oil and gas, also are current regulatory battlegrounds contemplating a complete ban of fracking.

Most other shale states have promulgated softer regulations requiring operators to disclose the contents, including all chemical additives, in fracking fluid.

The majority of the suits center on allegations of environmental contamination and advance the full gamut of tort and related theories of liability. In 2009, the wave of litigation apparently began in the Marcellus Shale regions of New York and Pennsylvania, where local residents and landowners started suing well owners and operators, alleging that chemical additives in fracking fluid polluted their freshwater aquifers and wells. See, e.g., *Fiorentino v. Cabot Oil & Gas Corp.*, No. 3:09-cv-2284 (M.D. Pa. 2009) (involving 19 families). Indeed, one plaintiff sued owners and operators of 20 separate wells within a two-mile radius of his property alleging widespread water contamination. *Maring v. Nalbene*, No. 1001499 (Chautauqua Co., N.Y., Sup. Ct. August 27, 2009).

Similar cases followed suit in other shale states throughout 2010 and 2011, and class actions were soon filed in Arkansas, Colorado and Louisiana. See, e.g., *Scoma v. Chesapeake*, No. 3:10-cv-01385 (N.D. Texas 2010); *Baker v. Anschutz Exploration Corp.*, No. 2011-1168 (Chemung Co., N.Y., Sup. Ct. February 11, 2011). And the number of lawsuits has continued to grow (albeit slowly) as 2012 comes to a close. See, e.g., *William Boggs v. Landmark 4 LLC*, No. 12-0614 (N.D. Ohio 2012).

Thus, in most states where exploration and production in shale formations exist, the legal systems are now burdened with significant environmental litigation and other lawsuits arising from hydraulic fracking and related operations.

Few of the lawsuits filed since 2009 have reached final judgment, although many have settled amicably out of court. In cases in which dispositive rulings have been rendered, the rulings confirm that many plaintiffs face the same hurdles present in most environmental contamination cases: an exacting evidentiary burden of proving that their injuries or damages were caused by the defendants' conduct.

A recent state court decision in Colorado provides a good illustration. In *Strudley v. Antero Resources Corp.*, No. 2011-CV-2218 (Denver Co., Colo., Dist. Ct. March 23, 2011), the plaintiffs alleged various health issues caused by water and air contamination from the defendant's fracking operations. Observing the significant discovery and cost burdens that would be associated with the case, the court entered a *Lone Pine* order requiring the plaintiffs to make a prima facie showing of exposure and causation. The evidence demonstrated the existence of certain gases and compounds in the plaintiffs' home; however, the plaintiffs could not adduce expert analysis or other evidence reflecting any level of probability that a causal connection existed between plaintiffs' injuries and the alleged exposure. Therefore, on May 9, the court dismissed the case in its entirety with prejudice.

Similarly, in *Hagy v. Equitable Production Co.*, No. 10-01372 (S.D. W.Va. 2012), the

plaintiffs sued several owners and operators alleging that fracking operations contaminated their well water and caused injuries from toxic exposure. In doing so, the plaintiffs vaguely questioned a number of fracking-related operations conducted by the defendants, including failing to properly seal the wellbore with cement and using "old pumps" to maintain well pressure. The court dismissed the case with prejudice, finding that the plaintiffs failed to adduce sufficient evidence, by way of expert testimony or otherwise, that the defendants' fracking operations and related activities caused harm.

WHAT'S NEXT?

Fracking litigation continues to develop and evolve, making trends difficult to predict with certainty. For instance, heightened chemical disclosure requirements and results from the EPA's groundwater contamination studies may significantly affect the viability of claims and the general litigation climate moving forward.

Yet the resolution of each suit will undoubtedly be resolved on a case-specific (or well-specific) basis. Each plaintiff will have to present credible evidence of being exposed to and sustaining injury from a harmful chemical and also will have to establish a causal connection to a defendant's operations at each specific well. Hence, while oil and gas companies may face vigorous litigation in more isolated contexts, it seems unlikely that they will face industrywide litigation crises like other industries targeted for mass tort claims.

Kenneth M. Klemm is a shareholder in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, where he maintains a practice primarily focused on oil and gas litigation. Tyler L. Weidlich is an associate in that office, where he also primarily focuses on oil and gas litigation.