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ENERGY AND NATURAL RESOURCES

Navigating the Pitfalls of Parallel Challenges to Shale Development

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Special to the Legal

The growth of the domestic shale industry has presented new challenges and opportunities. Despite the industry's consistent pursuit of environmental stewardship, it has faced lawsuits on multiple fronts—both in courts and before state administrative environmental appeal bodies. The unique qualities of these tribunals and the commonality of strategic considerations among parallel proceedings merit a practical assessment of the challenges and opportunities for effective coordination and advocacy.

Environmental challenges to shale development have spanned multiple venues and covered a variety of issues, such as leasing activity, the permitting and approval process, air quality, water quantity and quality, methane gas migration and waste management.

Due to the availability of multiple venues, parallel proceedings involving substantially identical subject matter and parties have become commonplace. For example, landowners pursuing toxic tort claims in state or federal court against an oil and gas operator for alleged contamination may also file state administrative appeals claiming inadequate enforcement by the state environmental agency or seeking to invalidate the operational permits.


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The tribunals where parallel proceedings are initiated vary considerably. State and federal courts hear cases from a broad range of issues and legal actions and generally do not possess specific expertise in environmental regulation. By contrast, state administrative bodies such as the Environmental Hearing Board in Pennsylvania, the Environmental Quality Board in West Virginia and the Environmental Review Appeals Commission in Ohio are specialized, quasijudicial bodies. Typically, these bodies hear appeals of final actions by the state environmental agency, including challenges to permit decisions, enforcement actions and new regulations.

Counsel confronted with litigation in parallel proceedings must be aware of nuanced differences between the forums' rules and requirements related to procedure, evidence and standards of review, as well as the potential impact the proceedings could have upon each other. Counsel should not attempt to defend each action as if it were a standalone proceeding. Instead, defenses and strategies need to be carefully developed in close coordination with all other parallel proceedings.

Each forum presents a different set of strategic considerations. What may be a good strategic move in one forum may be ill-advised in another. Moreover, counsel must never lose sight of the client's larger goals and priorities when deciding among different strategic options.

In many respects, the rules of these quasijudicial agencies parallel the state civil procedure rules. However, in many significant respects, the rules can differ. For instance, the administrative scope of review is generally de novo—meaning the tribunal can reach its own conclusions by substituting its own discretion for that of the agency. It can hear new evidence that the agency did not consider when making its original decision, including consideration of new evidence presented at the time of the hearing. It

thereby acts as a separate and independent body, not as a traditional appellate court that bases its decisions on the record generated below. For an example, see Warren Sand & Gravel v. Department of Environmental Resources, 341 A.2d 556, 565 (Pa. Commw. Ct. 1975).

Thus, in Pennsylvania, if the Environmental Hearing Board, with whatever facts it has before it, concludes that the Department of Environmental Protection abused its discretion in issuing a permit to drill, the board has the authority to substitute its own discretion and invalidate the permit. Related litigation in other forums, however, may involve more limited scopes of review. Familiarity with these potential differences when preparing for litigation will allow counsel to successfully and competently maneuver through the complexities inherent in parallel proceedings.

Parties involved in parallel proceedings also must carefully consider the potential preclusive effect that a finding of fact, judgment or court-approved settlement in one proceeding might have on the others. Generally, collateral estoppel, or issue preclusion, bars successive litigation of an issue of fact or law already litigated by the parties and resolved in a valid court determination, as in Commonwealth v. Hude, 425 A.2d 313, 322 (Pa. 1980), and Barnes v. Buck, 346 A.2d 778, 782 n.10 (Pa. 1975).

Likewise, an unfavorable ruling in one forum may influence the analysis and decision in the parallel proceeding even if the issue is not technically precluded. Thus, an unfavorable finding in one forum can have devastating impacts on the other proceeding. The potential consequences of collateral estoppel should be a critical consideration in the overall case management, including determining whether to seek a stay of litigation, the scope of discovery, the timing and nature of dispositive motions and whether to settle the litigation, including on what terms and the effect (if any) of settlement on the parallel proceeding.

Other practical considerations must be taken into account when navigating through parallel proceedings. For instance, there must be consistency in the client's narrative both in each proceeding and in the press. Counsel must coordinate among themselves and with the client to avoid cross-contamination of the proceedings. This is particularly true if the proceedings have garnered media attention. Counsel should develop a media strategy and ensure that the press consistently hears the same facts and theme. Communication is key, not only with the client, but among counsel, especially in a situation where there are two or more sets of outside counsel, each representing the client in a different tribunal with potentially differing goals. There is no room for territorialism or egos. All counsel must focus their energies on effectively collaborating, while at the same time focusing on what is most important: the client's interests. Regularly scheduled coordination meetings or calls may be necessary.

The nature of parallel proceedings introduces unique opportunities for counsel. For instance, as a result of the more expansive discovery inherent in a de novo review proceeding, an administrative case can be a tool for discovery that may not be possible in parallel litigation. Counsel may be well positioned in the administrative proceeding to gain access to pertinent information with fewer procedural hurdles or that may be difficult to obtain in the other proceeding. This can enable counsel to more effectively and efficiently shape the scope of discovery requests in the parallel litigation. Likewise, an opponent's discovery requests in an administrative proceeding may also provide valuable insight into the potential issues and arguments that may be developed in the other proceeding.

Lastly, parallel discovery schedules may provide counsel an opportunity to supplement its repository of case materials and obtain an enhanced understanding of the facts by using the commonality of facts and issues in the proceedings to get a second bite of the apple after the discovery deadline may have concluded in one proceeding. That said, counsel should be wary of attendant discovery abuses and arbitrary fishing expeditions.

As the development of domestic shale resources marches onward, parallel proceedings are on the rise as opponents challenge shale development along multiple fronts. As the foregoing illustrates, counsel must appreciate the interrelated risks as well as the potential opportunities that arise from parallel proceedings. Compared to more traditional actions in a single forum, parallel proceedings typically demand a higher level of big-picture thinking, broader understanding of the client's business and a greater degree of foresight. By developing legal and factual strategies early in a case, counsel can successfully navigate these parallel proceedings and achieve favorable outcomes for the client.