Emerging Issues in State and Local Oil and Gas Regulation and Litigation

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Today’s Presenter

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Federal Changes Promised

- Changes in federal law promised
  - Presidential Executive Order on Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the “Waters of the United States Rule,” available at https://www.epa.gov/cleanwaterrule
  - EPA “shall consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006).”
Federal Changes Promised


Due Process Under Existing Federal Law

- **Wildearth Guardians v. U.S. Bureau of Land Management**, Civil Action No. 16-CV-03141-REB (D. Colo.) (challenge to BLM lease sale based on failure to adequately address air impacts as required by several federal laws)

- **Wildearth Guardians v. Owens**, Civil Action No. 17-CV-00608 (D. Colo.) (challenge to OSMM’s alleged failure to inspect and enforce SMCRA violations at a coal mine)

The Role of State and Local Regulation in Our Present Federal System

- *People v. Rinehart*, 1 Cal. 5th 652, 377 P.3d 818, 206 Cal. Rptr. 3d 571 (2016) (petition for writ of certiorari pending) (The General Mining Law of 1872 does not preempt California’s moratorium on suction dredge mining in river on federal land)
- *Virginia Uranium, Inc. v. Warren*, 848 F.3d 590 (4th Cir. 2017) (Virginia law preventing state agencies from accepting uranium mining permit applications was not preempted by the Atomic Energy Act)
Introduction – Change is Constant

• Goal of this Presentation:
  – Assess how new technologies and operating trends are impacting state and local regulation of oil and gas operations
  – Discuss recent health and safety studies
  – Discuss recent developments in state and local regulation of oil and gas operations
  – Discuss recent legal challenges to proposed oil and gas operations
  – Discuss recent developments in the law of preemption, nuisance and lease termination
Change is a Constant for Oil and Gas Operators

• Select Reasons for Increased Business Risks
  – Commodity price fluctuations; shale production
  – Technology changes – longer laterals, greener completions, quieter rigs, methane detection, more pipelines, multi-well pads
  – Increased oil and gas operating costs

• Select Reasons for Increased Political Risks
  – Increased awareness, public scrutiny and ability to communicate in the United States
  – More oil and gas operations near homes and places of interest
Change is a Constant for Oil and Gas Operators

• The 2013 Flood in Colorado
• My Steptoe NAPE experience
The 2017 Colorado Health Study

  - Benzene, formaldehyde and acetaldehyde concentrations in the air surrounding oil and gas operations are four to five times lower than standard health limits for short and long term exposure
  - Concentrations of other substances are five to 10,000 times lower than standard health limits for short and long term exposure
The 2017 Colorado Health Study

- Cancer risks for all substances are within EPA’s “acceptable risk” range
- Rigorous academic studies to date suggest the risk of harmful health effects is low for residents living at distances of 500 feet or more from oil and gas operations

• So why the debate?
  - Risk and risk tolerance
  - Zoning and compatible uses
  - Utilitarianism and morality
Regulatory Trends in Colorado

• Colorado Oil and Gas Conservation Commission
  – Broad surface and downhole regulation
  – Coordination with local governments (LGDs, IGAs, LUMAs)
  – Task Force on Truck Traffic; Enforcement; Shut In Wells; Reclamation
  – Staff Reports available at http://cogcc.state.co (hearings link)
Regulatory Trends in North Dakota

• 2016 Rules Changes
  – Safety and mechanical integrity
  – Saltwater and saltwater plant regulation
  – Pipelines
  – Leak and spill clean up
  – NDIC publishes month “Director’s Cut” and posts staff presentations on its website, https://www.dmr.nd.gov/oilgas
Regulatory Trends in Oklahoma

  – Earthquakes: https://earthquakes.ok.gov/what-we-are-doing/oklahoma-corporation-commission
Regulatory Trends in Ohio

• Ohio DNR Division of Oil and Gas Resources,
  http://oilandgas.ohiodnr.gov/division-updates/post
  – Published monthly updates
  – Review of state’s Underground Injection Control (UIC) program
  – Developing new rules on well spacing and oil and gas waste management facilities
Regulatory Trends in Wyoming

  - Flaring rules (4/1/16)
  - Bonding rules (2/1/16)
  - Setback rules (4/14/15)
  - Baseline water testing (3/1/14)
  - Frequent posting of director reports and presentations
Local Regulation in Colorado

• Mixed issue of state and local law

• People v. County of Boulder, Boulder County (Colo.) D. Ct. No. 2017 CV 30151
  — Filed 2/14/17
  — Motion to Dismiss filed by Boulder County on 3/7/17
  — Issue: Boulder’s series of continuing moratoria since 2012

• Active attempts at local regulation and involvement
Local Regulation in North Dakota

• Field Preemption
  – The North Dakota legislature intended that the Industrial Commission occupy the field of regulation for oil and gas waste treatment plants
  – County lacked authority through its zoning regulations to veto the Industrial Commission’s siting of an oil and gas waste treating plant
  – The Act for Control of Gas and Oil Resources grants the Industrial Commission comprehensive powers to regulate oil and gas development in North Dakota
Local Regulation in Ohio

  - Statute regulating oil and gas drilling was a general law intended to apply uniformly throughout Ohio; municipal ordinances could not conflict or override this general law
  - Statute regulating oil and gas drilling did not violate the state constitutional right of community self-government
Local Regulation in Pennsylvania

  
  – Reaffirming that several provisions in Act 13, the Pennsylvania legislature’s attempt to set statewide standards for oil and gas development, violate the right of local governments to regulate aspects of oil and gas development through local ordinances and processes
  
Local Regulation in West Virginia

  - Local regulation of wastewater disposal in UIC wells and the regulation of storage at conventional well sites was preempted by federal and state law
Health Challenges to Regulatory Approvals

• *Carbon County Resource Council v. Montana Board of Oil and Gas Conservation*, 2016 MT 240, 380 P.3d 798 (Mt. 2016)
  – Objectors’ rights guaranteed by the Montana constitution to participate in a MBOG hearing addressing proposed well stimulation and hydraulic fracturing activities at an exploratory gas well was not violated because the objectors were given an opportunity to testify and present expert witnesses

• *Dine Citizens Against Ruining our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016)
  – Environmental groups failed to make a sufficient showing of a likelihood of success on the merits required for issuance of a preliminary injunction; groups failed to demonstrate that environmental impacts of the new San Juan Basin wells at issue differed materially from wells previously studied by BLM

• *Simmers v. City of North Royalton*, 2016 Ohio 3036, 65 N.E.3d 257 (Ohio 2016)
  – When considering a mandatory pooling order in an urbanized area, the Chief of the Division of Oil and Gas Resources was required to consider factors other than pure economics
Nuisance

• *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612 (Tex. Ct. App. 2015)
  – Negligence and nuisance claims alleged against oilfield operators by neighbors required expert testimony as to causation
  – Expert testimony and epidemiological studies about excess levels of benzene, nitrogen dioxide and other chemicals was insufficient to establish causation
  – Affidavits of neighbors about foul odor from oil and gas facility failed to create a dispute of fact regarding toxic tort causation
Lease Expiration

  - Under the test for lease expiration set in *Clifton v. Koontz*, 325 S.W.2d 684 (Tex. 1959), the determination whether a well is producing in paying quantities is a question of fact to be determined on the basis of the totality of the circumstances
  - Trial court erred by issuing instructions which limited the jury’s consideration to a 15 month period
Questions?
Thank You!

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April 27, 2017

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