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Executive Summary (2014)

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EXECUTIVE SUMMARY

By: Gina S. Warren

This year's Survey on Oil & Gas includes summaries from thirty-five states. These summaries paint a picture of the various oil and gas activities across the many states. As with the last several years, hydraulic fracturing (or "fracking") remains in the spotlight, with two prominent issues coming to the forefront. The first issue is the continuing tug-of-war between state oil and gas acts and local and city ordinances attempting to regulate fracking activities. The second issue many states are wrestling with is the management of fracking wastewater.

PREEMPTION

Several states, including Colorado, Mississippi, New York, Ohio, and Virginia reported litigation or legislative activity regarding a state's authority to preempt local ordinances that attempt to limit or prohibit fracking activities. Generally speaking, many oil and gas producing states have enacted oil and gas acts that preempt local regulation of well operations that are specifically regulated under the acts. This does not prevent, however, local regulation of such things as zoning. For example, an Ohio appellate court held that a city could enforce excavation and right-of-way ordinances so long as those ordinances did not regulate oil and gas well operations. Similarly, a Mississippi appellate court upheld a city ordinance requiring perimeter fencing around oil and gas storage sites, finding that the ordinance did not contradict and was not inconsistent with the state's oil and gas laws.

In addition to these limitations, three states have addressed local ordinances that result in an outright ban of oil and gas activities within the town limits. While Virginia's Attorney General has issued a statement that "a local governing body cannot ban altogether the exploration for, and the drilling of, oil and natural gas within the locality's boundaries" when discussing the authority of local governance of oil and gas activities, New York's highest court has upheld a town-wide ban, holding that the state's oil and gas laws do not preempt, either expressly or impliedly, such ordinances. Next year we will be able to report on the outcome of two cases currently pending in Colorado's appellate court on the issue. The first deals with an ordinance that prohibits, among other things, surface facilities and operations in residential areas. The second involves an ordinance that prohibits fracking activities within the city limits.

WASTE WATER MANAGEMENT

While the courts were busy addressing preemption issues, the state legislatures were busy enacting laws to regulate fracking waste. Multiple states enacted new or amended laws on various aspects related to waste storage, disposal, recycling, and spills. For example, Ohio updated its oil and gas laws to establish a permitting process for storage, recycling, treatment, processing, or disposal of waste associated with oil and gas activities. And, Colorado amended its Conservation Act to require strict reporting requirements of any spills equal to or greater than one barrel of waste. The most stringent of the enacted laws, however, was ultimately vetoed. New Jersey passed a bill that would have prevented the treatment, discharge, disposal, or storage of waste water (or any other byproducts) from fracking activities due to the “unacceptable environmental risks.” While the bill passed with overwhelming support from both houses, the Governor vetoed it, and the legislature failed to overturn the veto. Interestingly, while New Jersey’s Governor closed the door—at least temporarily—to stricter waste management in his state, the Pennsylvania appellate court opened the door to increased litigation in theirs. The court upheld the validity of claims of negligence *per se* under the state’s Hazardous Sites Cleanup Act, Solid Waste Management Act, and the Oil & Gas Act, holding that the purpose of these acts is to protect the people of the state from improper disposal of hazardous substances.