

BakerHostetler



Environmental Litigation Trends and Threats Rocky Mountains and Appalachia

IEL Energy Industry Environmental Law Conference

Houston, Texas
May 18, 2018

Environmental Litigation – Trends and Coming Threats
Rocky Mountain and Appalachia (Federal and Selected State)
Energy Industry Environmental Law Conference
Houston, Texas – May 18, 2018

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Agenda

Rocky Mountain

- Federal Deregulatory Litigation
- Youth Activist Lawsuits (Colo.)
- [Not Boulder v. Suncor (III.D)]
- [Not NEPA Challenges (III.C)]



Appalachia

- PA Environmental Rights Amendment
- “Conduit Theory” of CWA Liability
- [Not PA Trespass by Fracture (IV.E)]
- [Not Ohio Ballot Initiatives (IV.B)]



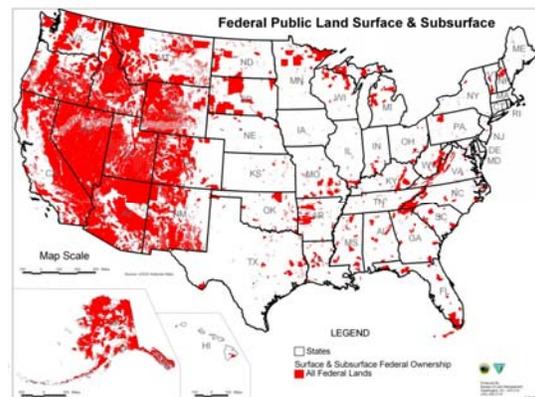
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Federal Lands

Deregulatory Lawsuits

- Regulation-forcing litigation (I.B)
- Deregulatory Challenges (I.C-I.D)
 - Compliance date deferrals
 - Rule rescissions
 - Rule reconsiderations
- “Dysfunctional” administrative law
 - Finality
 - Ripeness, Mootness
 - Comity
- Venue confusion
 - Merits in one court (e.g., D. Wyo)
 - Deferrals in another (e.g., N.D. Cal.)

The Federal Mineral Estate



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Regulation-Forcing Litigation

- 2016 NSPS OOOOa (FR 6/16)
 - EPA stayed 3 mos. for reconsideration (FR 6/17)
 - Clean Air Council et al. sued EPA in D.C. Cir. (6/17)
 - EPA proposed rule postponing 2-years (FR 6/17)
 - D.C. Cir. vacated 3-month stay (7/17)
- 20?? Emission Guidelines Existing Sources
 - EPA withdrew 2016 ICR (FR 3/17)
 - Fourteen “Blue” States sued EPA in D.D.C. (4/18)

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Deregulatory Lawsuits

BLM Venting & Flaring Rule (FR 11/16)

- (1) Imposed “Phase-In Provisions” on new and existing wells by 1/17/2018
- (2) Challenged in **D. Wyo.** (11/16)
 - By IPAA, WEA, WY, MT ...
 - Intervener-Δs: CA, NM, ENGOs

BLM Postponement Notice (FR 6/17)

- (3) Postponed \geq 1/17/18 compliance dates until rulemaking complete
- (4) Challenged in **N.D. Cal.** (7/17)
 - By CA, NM, ENGOs
 - Intervener-Δs: IPAA, WEA, WY, MT ...
- (5) Vacated by **N.D. Cal.** (10/4/17)



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Deregulatory Lawsuits

BLM Venting & Flaring Rule (FR 11/16)

- (10) **D. Wyo.** stayed “Phase-In Provisions” pending decision on the merits (4/18)*
- (11) CA, NM, ENGOs appealed to **10th Cir**
- (12) IPAA et al. filed motion to dismiss
- (13) CA, NM et al.’s response due 5/21/18

* See next slide.



BLM Suspension Rule (FR 12/8/17)

- (6) Suspended “Phase-In Provisions” compliance dates 1 year
- (7) Challenged in **N.D. Cal.** (7/17)
 - By CA, NM, ENGOs
 - Intervener-As: IPAA, WEA, WY, MT ...
- (8) Motion to transfer venue denied (2/18)
 - “Inextricably intertwined” cases; but
 - Raise different legal issues
 - Court not interfere with π ’s venue choice
- (9) BLM appealed to **9th Circuit** (pending)

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Deregulatory Lawsuits

“Sadly, and frustratingly, this case is symbolic of the dysfunction in the current state of administrative law. **And unfortunately, it is not the first time this dysfunction has frustrated the administrative review process in this Court.**”

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Deregulatory Lawsuits

2015 BLM Hydraulic Fracturing Rule

- (1) WY, CO, IPAA, WEA challenged in **D. Wyo.**
 - “End-run” around 2005 EPA Act (SDWA exemption)
- (2) **D. Wyo.** stayed before effective date (since 1/15)
- (3) CA, NM, ENGOs appealed stay to **10th Cir.**
- (4) **D. Wyo.** set rule aside on merits (6/16)
- (5) CA, NM, ENGOs appealed on merits to **10th Cir.**
- (7) In light of *proposed* rule, the **10th Cir.** dismissed CA et al.’s appeal as “prudentially unripe” (9/17)
 - Remanded to **D. Wyo.** with instructions to dismiss w/o prejudice and vacate judgment; but then ...
 - Stayed the mandate (*i.e.*, still extant in **D. Wyo.**)

2017 BLM HF Rescission Rule

- (6) BLM proposed to rescind the HF Rule (7/17)
- (8) BLM finalized the Rescission Rule (12/17)
- (9) Plaintiffs CA, NM, ENGOs challenged Rescission Rule in **N.D. Cal.** (1/18)
- (10) BLM moved to transfer venue to **D. Wyo.** (3/18)



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Youth Activist Lawsuits*

- *Juliana* [+ 20 *π*'s**] *v. United States* (D. Or.)
 - Also Plaintiffs Earth Guardians, Sierra Club
 - Defendants Obama, then Trump, and US Agencies
 - Defendant-Interveners NAM, AFPM, API
- D. Or. denied dismissal (4/16)
- NAM, AFPM, API withdrew (6/17)
- 9th Cir. denied US mandamus (3/18)
- Trial starts October 29, 2018



* www.OurChildren'sTrust.org

**Includes Plaintiff in *Martinez v. COGCC* (Ill.A)

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Youth Activist Lawsuits

“Atmospheric Trust Principle” claims:

- Air and atmosphere are in the *res* of the public trust
- Legislature and agencies are public trustees
- Present and future generations are beneficiaries
- Trustees owe a fiduciary duty to protect the *res* against “substantial impairment,” which amounts to an affirmative duty to restore its balance
- Courts have a duty to enforce the trust obligations



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Martinez v. COGCC (Colo. App. 2017)

- Xiuhtezcatl Martinez (+ 6 minors) petitioned for rule that COGCC would not:
 - “issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.”
- COGCC denied, and Colo. district court agreed
 - COGCC must balance O&G development and public health, safety, and welfare
 - Delegation of non-delegable duty to promulgate rules

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Martinez v. COGCC (Colo. App. 2017)

C.R.S. 34-60-102(1)(a)(1)

“Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.”

C.R.S. 34-60-106(2)(d)

“The commission has the authority to regulate ... [o]il and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility.”

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Martinez v. COGCC (Colo. App. 2017)

- Colo. Ct. App. reversed (2-1):
 - Acknowledged that Colorado had rejected “public trust doctrine”^{*}; but
 - Held “consistent with” and “to the extent that” indicate a “condition that must be fulfilled rather than mere balancing”
 - Did not reach merits of the Petition
- Colo. Supreme Court granted petition for review (1/18).
Sole issue:
“Whether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(1), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare.”



^{*} Citing *Longmont v. COGCC* (Colo. 2016)).

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PA Constitution, Article I, Section 27 (1971)

Natural resources and the public estate.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.



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Payne v. Kassab (Pa. Commw. 1973)

- Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

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Robinson Twp. v. Commw. (Pa. 2013)

- Plurality opinion found Payne test too narrow, and therefore:

“Inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.”

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Pennsylvania EDF v. Commw. (Pa. 2017)

- Narrow issues regarding use of Lease Funds
- But broad statements in *Payne*:

“The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning. Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges.”

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Common Pleas / Commw. Ct. Cases

- *Gorsline v. Fairfield Twp.* (Pa. Commw. 2015) (upholding, pet. Granted. Oral argument 3/17.
- *Markwest v. Cecil Twp.* (Pa. Commw. 3/18) (extra-statutory conditions unreasonable) (unpublished)
- *Delaware Riverkeeper v. Sunoco Pipeline* (Pa. Commw. 2018) (“We are not persuaded that the cases signify that an intent to protect public natural resources trumps all other legal concerns raised by every type of party under all circumstances.”)

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“Conduit Theory” of CWA Discharge

- CWA 502(12), defines the phrase “discharge of a pollutant” to mean:

“any addition of any pollutant *to navigable waters from any point source.*”



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“Conduit Theory” of CWA Discharge

- **CWA 502(14)** defines “point source” as
 - “*any discernible, confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, *conduit, well, discrete fissure*, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants or may be discharged. . . .



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“Conduit” Theory of CWA Discharge

Not mere allegation of potential hydrological connection
(7th Cir. 1994) (dicta)

No conduit theory
(E.D. Ky. 12/17) (appealed)

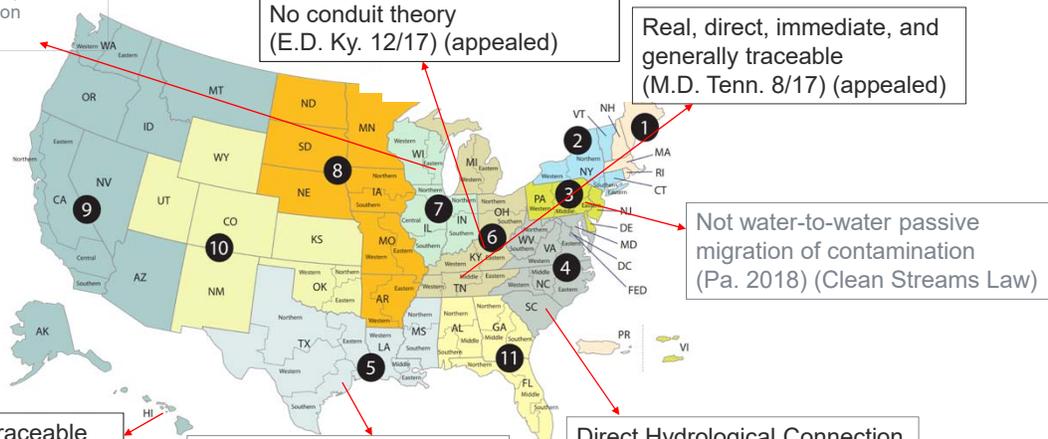
Real, direct, immediate, and generally traceable
(M.D. Tenn. 8/17) (appealed)

Not water-to-water passive migration of contamination
(Pa. 2018) (Clean Streams Law)

Fairly Traceable
(9th Cir. 3/18)

Real, direct, proximate link to actual, identifiable contamination in WOTUS
(5th Cir. 2001) (dicta)

Direct Hydrological Connection
(4th Cir. 4/18)



Trends and Threats



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