The Role of Local Government in Gas & Oil Production:

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Disclaimer

• This slide set is provided for informational purposes only. Nothing herein constitutes the provision of legal advice or services.
Sources of Local Authority

• U.S. Constitution – says nothing about local authority

Sources of Local Authority

• 9th Amendment – “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

• 10th Amendment – “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
Sources of Local Authority

• U.S. Supreme Court has held that there are only two sovereign entities – the federal government and the States (as well as certain Indian Tribes)

• Local government sovereignty is derived either from the state constitution or legislation (both of which may be changed by the state)

Sources of Local Authority

• Ultra vires doctrine
  – Local government may not act beyond constitutional or legislative grant of authority
  – Many rules of construction – two basic choices
    • Strictly read grant of authority (Dillon’s rule)
    • Liberally read grant, allowing action unless prohibited
Sources of Local Authority

• Home rule – two components
  – Power to manage local affairs
  – Ability to avoid interference from the state
• What is local and what is state-wide?

General Rules

• Local regulation invalid if state regulation intended to be exclusive
• Local regulation invalid if state regulation intends to regulate uniformly
• Local regulation invalid if it conflicts with a state regulation
Factors

• Does the local regulation prohibit a use reasonably necessary for the extractive activity?
• State laws often ambiguous as to boundary between state and local authority

Allocation of Regulatory Authority by Area

• Property interests
  – Recording generally local
  – Tracking exploitation generally state
    • Location of activity
    • Quantity of production
Allocation of Regulatory Authority by Area

- Taxation
  - Property interests generally locally taxed according to state guidelines
  - Production generally taxed by state, with or without revenue sharing

- Exploration
- Production
- Processing (examples)
  - Natural gas liquids separation
  - Helium separation
  - Removal of sulfur compounds
  - Compressing/odorant addition
Allocation of Regulatory Authority by Area

- Transport
  - Interstate
  - Intrastate
    - Delegation of eminent domain authority

- Access
  - Roads
    - Private
    - Public
  - Utilities

Allocation of Regulatory Authority by Area

- Sedimentation control
- Waste storage and treatment
- Water supply
  - Surface
  - Groundwater
- Chemical management and disclosure
- Emergency management
- Worker housing
States Compared

- Wyoming
- Colorado
- Pennsylvania
- Texas
- New York

North Carolina:
Session Law 2012-143 (S 820)

- Siting shared (N.C.G.S. § 113-391(a)(5)
  d. Appropriate siting standards for wells and other gas production infrastructure, such as storage pits and tanks, including appropriate setback requirements and identification of areas, such as floodplains, where oil and gas exploration and production activities should be prohibited. Siting standards adopted shall be consistent with any applicable water quality standards adopted by the Environmental Management Commission or by local governments pursuant to water quality statutes, including standards for development in water supply watersheds.
North Carolina:
Session Law 2012-143 (S 820)

• Disclosure shared (N.C.G.S. § 113-391(a)(5))

h. Disclosure of chemicals and constituents used in oil and gas exploration, drilling, and production, including hydraulic fracturing fluids, to State regulatory agencies and to local government emergency response officials, and, with the exception of those items constituting trade secrets, as defined in G.S. 66-152(3), and that are designated as confidential or as a trade secret under G.S. 132-1.2, requirements for disclosure of those chemicals and constituents to the public.

North Carolina:
Session Law 2012-143 (S 820)

• Levels of funding and funding sources:

SECTION 2.(j) The Mining and Energy Commission, in conjunction with the Department of Environment and Natural Resources, the Department of Transportation, the North Carolina League of Municipalities, and the North Carolina Association of County Commissioners, shall identify appropriate levels of funding and potential sources for that funding, including permit fees, bonds, taxes, and impact fees, necessary to (i) support local governments impacted by the industry and associated activities; (ii) address expected infrastructure impacts, including, but not limited to, repair of roads damaged by truck traffic and heavy equipment; (iii) cover any costs to the State for administering an oil and gas regulatory program, including remediation and reclamation of drilling sites when necessary due to abandonment or insolvency of an oil or gas operator or other responsible party; and (iv) any other issues that may need to be addressed in the Commission's determination. Any recommendation concerning local impact fees shall be formulated to require that all such fees be used exclusively to address infrastructure impacts from the drilling operation for which a fee is imposed. The Commission shall report its findings and recommendations, including legislative proposals, to the Joint Legislative Commission on Energy Policy, created under Section 6(a) of this act, and the Environmental Review Commission on or before January 1, 2013.
North Carolina: Session Law 2012-143 (S 820)

- **Local government role:**
  SECTION 2.(k) The Mining and Energy Commission, in conjunction with the Department of Environment and Natural Resources, the North Carolina League of Municipalities, and the North Carolina Association of County Commissioners, shall examine the issue of local government regulation of oil and gas exploration and development activities, and the use of horizontal drilling and hydraulic fracturing for that purpose. The Commission shall formulate recommendations that maintain a uniform system for the management of such activities, which allow for reasonable local regulations, including required setbacks, infrastructure placement, and light and noise restrictions, that do not prohibit or have the effect of prohibiting oil and gas exploration and development activities, and the use of horizontal drilling and hydraulic fracturing for that purpose, or otherwise conflict with State law. The Commission shall report its findings and recommendations, including legislative proposals, to the Joint Legislative Commission on Energy Policy, created under Section 6(a) of this act, and the Environmental Review Commission on or before January 1, 2013.

- **Compulsory pooling/mandatory unitization:**
  SECTION 2.(l) The Mining and Energy Commission, in conjunction with the Department of Environment and Natural Resources and the Consumer Protection Division of the North Carolina Department of Justice, shall study the State's current law on the issue of integration or compulsory pooling and other states' laws on the matter. The Department shall report its findings and recommendations, including legislative proposals, to the Joint Legislative Commission on Energy Policy, created under Section 6(a) of this act, and the Environmental Review Commission on or before January 1, 2013.
North Carolina:
Session Law 2012-143 (S 820)

• Schedule for development of regulations:
  – Deadline for first report - January 1, 2013
  – Deadline for final regulations of the Mining and Energy Commission, the Environmental Management Commission, and the Commission for Public Health - October 1, 2014

NCDENR Shale Gas

• ARE Natural Gas Page
  – http://www.ag-econ.ncsu.edu/gasleasing.html
• DENR report – Session Law 2011-276
  – http://portal.ncdenr.org/web/guest/shale-gas
• SRSI Study (May 15, 2012)