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ENVIRONMENTAL CONSIDERATIONS IN OIL AND GAS CONSERVATION AND PERMITTING

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§ 5.01 Introduction* **

State oil and gas conservation agencies, such as the Wyoming Oil and Gas Conservation Commission (WOGCC) and the Texas Railroad Commission (RRC), regulate oil and gas operations for the purposes of

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preventing waste and protecting correlative rights.¹ In the nearly 120 years since the first conservation acts and oil and gas waste prevention statutes were enacted,² regulation by conservation agencies has vastly reduced the environmental impacts associated with oil and gas exploration and production by limiting unnecessary drilling and therefore preserving surface resources.³

The goals of conservation regulation and the tools available to conservation agencies have changed little since Howard Williams wrote his first article on conservation in 1952.⁴ Public attitudes towards conservation, however, are changing. Motivated by increased awareness of and concern about environmental and climate impacts, landowners and environmental groups have begun to demand that conservation agencies exercise their authority to provide greater environmental protections and consider a broader range of issues related to the environment and climate change in making permitting decisions.⁵ More than ever before, conservation agencies are asked to look beyond the drill site spacing unit and reservoir towards impacts on the environment as a whole.

Recently, oil and gas conservation agencies have been bombarded by protests, requests for rulemaking, and applications to intervene in administrative proceedings calling for the conservation agencies to consider environmental impacts as part of their permit approval. On average, the agencies have been reluctant to act on these requests, finding that doing so would exceed the scope of their delegated authority. As a result, there has been a flurry of litigation considering the scope of conservation agency authority to engage in administrative rulemaking or to consider broader environmental impacts as a part of carrying out their statutory duties. These proceedings are at times conferring standing, or the potential for standing, on new parties where certain environmental views have not previously had an advocate and are expanding the factors that agencies must take into consideration when exercising their delegated authority.

¹ Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization* § 3.02[4] (3d ed. 2017).

²See, e.g., 1899 Tex. Gen. Laws 68; see also George A. Wilson, “Legal History of Conservation of Oil and Gas. A Symposium. Published by the Section of Mineral Law of the American Bar Association,” 48 *Yale L.J.* 1470 (1939).

³See generally David E. Pierce, “Minimizing the Environmental Impact of Oil and Gas Development by Maximizing Production Conservation,” 85 *N.D. L. Rev.* 759 (2009).

⁴See Howard R. Williams, “Conservation of Oil and Gas,” 65 *Harv. L. Rev.* 1155 (1952).

⁵See Pierce, *supra* note 3, at 774–778.

Conversations about the scope of conservation agencies' authority are taking place through permit protests, during agency hearings, at the ballot box, in state legislatures, and in the courts. Delegations of state regulatory authority to conservation agencies are limited and require adequate standards for their reasonable administration. Traditionally, conservation agencies' authority to regulate oil and gas production has been limited to rulemaking, judicial, and enforcement functions designed to prevent waste and protect correlative rights. However, in many cases, language within the agencies' enabling statutes introduces the possibility of more expansive authority. This language may include definitions of waste that encompass actions contributing to environmental degradation or language requiring agencies to protect health, safety, and the environment.

This chapter considers pressures on state oil and gas conservation agencies to take an expanded role in regulating environmental impacts associated with oil and gas production.⁶ Section 5.02 begins with a description of conservation law and regulations, and a brief history of oil and gas regulation and the role of oil and gas conservation agencies. Section 5.03 describes conservation agencies' scope of authority and jurisdiction. Section 5.04 examines recent efforts to require oil and gas conservation agencies to consider a more inclusive scope of environmental factors, including climate change. Section 5.05 considers responses to the cases and rulemakings initiated by conservation agencies, including legislative actions preempting or limiting agency authority and Colorado voter initiatives that circumvent the legislative or agency rulemaking process.

Pressure on conservation agencies, counties, local governments, and other administrative bodies involved in permitting oil and gas operations is likely to increase. Societal and economic changes have increased awareness of and concern for the environmental externalities associated with oil and gas development. Meanwhile, the number of wells drilled and total production have grown significantly.⁷ While citizens, states, and counties attempt to compensate for what is perceived as inaction due to the lack of any comprehensive federal greenhouse gas legislation and to respond to

⁶Where oil and gas development occur on federal lands, numerous laws and regulations—including the National Environmental Policy Act of 1969—require consideration of environmental impacts, even where development is achieved by directional drilling into federal minerals from entirely nonfederal surface locations. *See* Bureau of Land Mgmt. (BLM), Permanent Instruction Memorandum No. 2018-014, “Directional Drilling into Federal Mineral Estate from Well Pads on Non-Federal Locations” (June 12, 2018).

⁷*See* U.S. Energy Info. Admin., “The Distribution of U.S. Oil and Natural Gas Wells by Production Rate” (Dec. 2017).

and prevent highly publicized environmental and human health tragedies, state conservation agencies are issuing record numbers of permits.⁸

Actions by conservation agencies and efforts at the local level have resulted in limited successes for environmental advocates but they are unlikely to result in the comprehensive changes many advocates desire. In many cases, agencies may not have the standards or expertise to engage in the fact-finding necessary to meet these demands. Conservation agencies are not formed or equipped to investigate and answer existential questions about the appropriate balance between environmental conservation and fossil energy development, nor would it be appropriate for them to do so. Instead, these actions risk muddling the regulatory environment and introducing uncertainties in an otherwise efficient permitting process. State legislatures have the opportunity to clarify the scope of conservation agency authority and indicate how questions on balancing environmental conservation and hydrocarbon development should be resolved.

§ 5.02 Conservation Law: Purpose and History

Conservation law owes its origin to the profligate waste of oil and gas and environmental devastation resulting from the unconstrained application of the rule of capture.⁹ The rule of capture provides that the title to oil and gas is obtained through capture of the hydrocarbons at the surface, regardless of whether some of those hydrocarbons may have migrated into the well from adjoining land that is not the property of the producer.¹⁰ Accordingly, actual, rather than conceptual, ownership of fluid or gaseous minerals requires an interest in a producing well.¹¹ This common law rule incentivizes the mineral owner of a tract of land, however small, to drill anywhere on the tract and in whatever density it can manage in order to capture as much of the common resource as possible.¹² Provided the mineral owner is neither negligent nor wasteful,¹³ it can do so without fear of injunction or liability for conversion.¹⁴ Other mineral owners and

⁸See Kathleen Levine, “Oil and Gas Companies Are Seeking New Well Permits Like Never Before,” *Denver Business J.* (June 5, 2018); Heather Richards, “Powder River Basin Inspires 10,000-Permit Drilling Battle from Oil and Gas Companies,” *Casper Star Trib.* (May 13, 2018).

⁹See Pierce, *supra* note 3, at 760–61; Williams, *supra* note 4, at 1158.

¹⁰Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561–62 (Tex. 1948); Robert E. Hardwicke, “The Rule of Capture and Its Implications as Applied to Oil and Gas,” 13 *Tex. L. Rev.* 391, 393 (1935).

¹¹Pierce, *supra* note 3, at 762, 765.

¹²See Hague v. Wheeler, 27 A. 714, 719 (Pa. 1893).

¹³Breaux v. Pan Am. Petroleum Corp, 163 So. 2d 406, 412 (La. Ct. App. 1964).

¹⁴Elliff, 210 S.W.2d at 562.

lessees within the same reservoir who experience drainage are left without a remedy except to drill their own wells.¹⁵ Further, the doctrine of implied covenants may compound the imperative to drill by requiring each lessee to drill to protect its lessor from drainage or else pay the royalties that would have been owed had the protection well been drilled.¹⁶ The result is a scarcity mindset and a development imperative:¹⁷ capture and profit from all within your dominion, or risk losing everything.

Unconstrained, the rule of capture presents a classic example of the tragedy of the commons.¹⁸ Not surprisingly, the result was unrestrained and excessive development, resource misallocation, and gross waste.¹⁹ As Professor Patrick Martin writes, “[r]easonable development for the lessor [and lessee] historically has meant overdevelopment for the country” leading to “extravagant, wasteful consumption of petroleum and too rapid a depletion of this finite resource.”²⁰ Excessive drilling wastes subsurface resources through the dissipation of reservoir energy.²¹ It also needlessly destroys surface properties through the drilling of wells that are unnecessary for maximum efficient recovery²² and contributes to flaring by encouraging rapid drilling and development before adequate gas handling infrastructure can be developed.²³ One only has to look to photos of Spindletop

¹⁵Bernard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907); Texaco Inc. v. Indus. Comm’n of State of N.D., 448 N.W.2d 621, 623 n.2 (N.D. 1989) (citing Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Manual of Oil and Gas Terms* 519 (4th ed. 1976) (definition of “rule of capture”)).

¹⁶See Patrick H. Martin, “A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases,” 3 *Oil & Gas, Nat. Resources & Energy J.* 401, 425 (2017) (reprint, first published at 27 *Inst. on Oil & Gas L. & Tax’n* 177 (1976)); 5 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 865 (2017); Maurice Merrill, *The Law Relating to Covenants Implied in Oil and Gas Leases* ch. 5 (2d ed. 1940).

¹⁷See Sendhil Mullainathan & Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (2013); Anuj K. Shah, Sendhil Mullainathan & Eldar Shafir, “Some Consequences of Having Too Little,” 338 *Science* 682, 682 (2012) (“Resource scarcity creates its own mindset, changing how people look at problems and make decisions.”).

¹⁸See Pierce, *supra* note 3, at 763.

¹⁹See Patrick H. Martin, “What the Frack? Judicial, Legislative, and Administrative Responses to a New Drilling Paradigm,” 68 *Ark. L. Rev.* 321, 322–23 (2015).

²⁰Martin, *supra* note 16, at 423.

²¹See Northcutt Ely, “The Conservation of Oil,” 51 *Harv. L. Rev.* 1209, 1219–20 (1938).

²²See Pierce, *supra* note 3, at 777–78.

²³See Alexandra B. Klass & Danielle Meinhardt, “Transporting Oil and Gas: U.S. Infrastructure Challenges,” 100 *Iowa L. Rev.* 947, 1009–12 (2015); see also N.D. Pipeline Auth., “North Dakota Natural Gas: A Detailed Look at Natural Gas Gathering” (Oct. 21, 2013).

in 1901 Beaumont, Texas,²⁴ or more recently of the flared gas in North Dakota's Bakken, as visible from space as a city,²⁵ to see examples of surface and subsurface waste.

Waste resulting from overproduction eventually elicited government intervention in the form of conservation regulation.²⁶ Early conservation measures took the form of statutes prohibiting certain actions that were deemed wasteful.²⁷ These included prohibitions on long-term flaring or allowing a well to become wild or ignite, mandates requiring the proper plugging of abandoned wells, and rules limiting production to some portion of a well's maximum capacity.²⁸ In many states these first conservation laws did not include mechanisms such as spacing or pooling to limit the number of wells drilled.²⁹ Instead, the focus of early conservation laws was to prevent overproduction—resulting in price instabilities—and to avoid spillage, rather than ensuring efficient reservoir development.³⁰

An additional problem with overproduction was that supply frequently outpaced demand, resulting in price instability. Cooperation of producing states within a common region was deemed necessary to achieve conservation objectives through stability and uniformity of laws across common regions.³¹ Thus, in 1935 Congress approved the Interstate Compact to Conserve Oil and Gas (IOC), which requires member states to “conserve

²⁴See Darren Dochuk, “Blessed by Oil, Cursed with Crude: God and Black Gold in the American Southwest,” 99 *J. Am. Hist.* 51, 51 (2012); Daniel Yurgin, *The Prize: The Epic Quest for Oil, Money & Power* 70 (2008).

²⁵See Rachel Nuwer, “At Night, Giant Fields of Burning Natural Gas Make North Dakota Visible from Space,” *Smithsonian.com* (Jan. 18, 2013).

²⁶See Noel F. Delporte, “The California Oil-Gas Conservation Acts,” 16 *St. Louis L. Rev.* 234, 237–38 (1931); Thomas A. Mitchell, “The Future of Oil and Gas Conservation Jurisprudence: Past as Prologue,” 49 *Washburn L.J.* 379, 414 (2010); Phillip E. Norvell, “The History of Oil and Gas Conservation Legislation in Arkansas,” 68 *Ark. L. Rev.* 349, 349 (2015).

²⁷See Peter D. Junger, “The Wyoming Oil and Gas Conservation Act - Private Rights and Public Policy,” 13 *Wyo. L.J.* 1, 5–6 (1958).

²⁸*Id.*; see also *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 82 So. 206, 211–12 (La. 1919); *Kramer & Martin*, *supra* note 1, at § 3.01; Norvell, *supra* note 26, at 364–65; “Oil and Gas Conservation,” 43 *Harv. L. Rev.* 1137, 1138–40 (1930).

²⁹See J. Howard Marshall & Norman L. Meyers, “Legal Planning of Petroleum Production,” 41 *Yale L.J.* 33, 38–39 (1931); J. Howard Marshall & Norman L. Meyers, “Legal Planning of Petroleum Production: Two Years of Proration,” 42 *Yale. L.J.* 702, 739–40 (1933); Norvell, *supra* note 26, at 366–67; *Oil and Gas Conservation*, *supra* note 28.

³⁰See 1 Nancy Saint-Paul, *Summers Oil and Gas* § 4:2 (3d ed. 2017); Robert E. Sullivan, “The History and Purpose of Conservation Law,” *Oil and Gas Conservation Law and Practice* 1-1, 1-17 to 1-18 (Rocky Mt. Min. L. Fdn. 1985).

³¹*Oil and Gas Conservation*, *supra* note 28, at 1142–43.

oil and gas by the prevention of physical waste”³² Price stabilization, rather than stemming physical waste, may have been the primary objective.³³

The IOC significantly shaped conservation law.³⁴ Ratification of the IOC coincided with the passage of conservation laws in several ratifying states. Six major producing states initially ratified the IOC, though now almost all producing states are members.³⁵ By the end of the 1930s, Arkansas, California, Louisiana, Oklahoma, and Texas had passed legislation creating conservation agencies or delegated authority to existing agencies to regulate oil and gas production activities.³⁶ However, it was not until later that a majority of states adopted comprehensive conservation regulations including modern conservation techniques such as spacing and pooling. The IOC created the Interstate Oil Compact Commission (IOCC), now the Interstate Oil and Gas Compact Commission, as its governing body.³⁷ In 1949 the IOCC drafted a model conservation statute for the purposes of effectuating the goals of the IOC, preventing waste, and preserving correlative rights.³⁸ The model act went beyond previous conservation measures by providing authority to create drilling units and require cost sharing between owners within a unit.³⁹ Shortly thereafter, Colorado and Wyoming enacted conservation legislation in 1951⁴⁰ and Pennsylvania enacted its Oil and Gas Conservation Law in 1961.⁴¹ Today, every oil and gas producing state has some form of oil and gas conservation regulation.⁴²

³²IOC art. II; see H.R.J. Res. 407, 74th Cong. (1935); see also Junger, *supra* note 27, at 5; Sullivan, *supra* note 30, at 1-17.

³³See Pierce, *supra* note 3, at 764 n.18.

³⁴See Kemp Wilson, “Conservation Acts and Correlative Rights: Has the Pendulum Swung Too Far?” 35 *Rocky Mt. Min. L. Inst.* 18-1, 18-19 (1989).

³⁵See Interstate Oil & Gas Compact Comm’n, “Member States,” <http://iogcc.ok.gov/member-states> (map showing current membership in the IOC); Nat’l Ctr. for Interstate Compacts, “Interstate Compact to Conserve Oil and Gas,” <http://apps.csg.org/ncic/Compact.aspx?id=81>.

³⁶See Wilson, *supra* note 34, at 18-8 to 18-10; Hardwicke, *supra* note 10, at 420-22; A.W. Walker, Jr., “Property Rights in Oil and Gas and Their Effect upon Police Regulation of Production,” 16 *Tex. L. Rev.* 370, 380-81 (1938).

³⁷IOC art. VI.

³⁸See Junger, *supra* note 27, at 5 (citing Legal Committee, IOCC, *A Form for an Oil and Gas Conservation Statute* (adopted 1949, amended 1950)); Barth P. Jiggs Walker, “Discussion: A Model Oil and Gas Conservation Law,” 26 *Tul. L. Rev.* 267, 270 (1952).

³⁹See Thomas A. Daily, “Rules Done Right: How Arkansas Brought Its Oil and Gas Law into a Horizontal World,” 68 *Ark. L. Rev.* 259, 264-65 (2015).

⁴⁰See Colo. Rev. Stat. §§ 34-60-101 to -130; Wyo. Stat. Ann. §§ 30-5-101 to -128.

⁴¹See 58 Pa. Stat. Ann. §§ 401-419.

⁴²See Saint-Paul, *supra* note 30, at § 4:2.

While the content varies, conservation regulation has developed consistent with the purposes advanced by the IOC and the model act and “the basic pattern is essentially the same.”⁴³ Today, oil and gas conservation is more or less coterminous with “attaining maximum production from known fields by more efficient utilization of reservoir energy”⁴⁴

§ 5.03 Role of State Oil and Gas Conservation Agencies

[1] Statutory Authority

Through their statutes or constitutions, state legislatures delegate to oil and gas conservation agencies legislative, judicial, and enforcement powers.⁴⁵ Accordingly, conservation agencies engage in diverse functions including rulemaking, entering orders such as pooling orders, conducting investigations, and applying sanctions or levying civil penalties.⁴⁶ For example, most state enabling acts empower the conservation agency to promulgate rules for regulating flaring, grant an operator a variance to flare in excess of the maximum, and assess penalties against an operator who flares in excess of allowable volumes. The agency is required to fulfill its duties consistent with the public purposes as established by the legislature in the creation of an oil and gas conservation agency.⁴⁷ These purposes are principally the prohibition of waste, the protection of correlative rights, and the conservation and efficient development and production of oil and gas.⁴⁸

All state conservation statutes include a prohibition on waste.⁴⁹ Regulation of production in order to prohibit waste could have included a “complete or partial prohibition of production or consumption” or a prohibition of the use of petroleum products in “nonefficient processes or

⁴³Sullivan, *supra* note 30, at 1-18.

⁴⁴Williams, *supra* note 4, at 1156.

⁴⁵Patrick H. Martin, “The Jurisdiction of State Oil and Gas Commissions,” *Oil and Gas Conservation Law and Practice* 3-1, 3-4 to 3-5 (Rocky Mt. Min. L. Fdn. 1985); *see, e.g.*, Okla. Const. art. VII, § 1.

⁴⁶*See, e.g.*, Wyo. Stat. Ann. § 30-5-104; *see also* Martin, *supra* note 45, at 3-5.

⁴⁷*See, e.g.*, La. Rev. Stat. Ann. § 30:4(A); *see also* Martin, *supra* note 45, at 3-5.

⁴⁸*See* Union Pac. Res. Co. v. Texaco, Inc., 882 P.2d 212, 223 (Wyo. 1994); Voss v. Lundvall Bros., Inc., 830 P.2d 1061, 1067 (Colo. 1992); Larsen v. WOGCC, 569 P.2d 87, 89-90 (Wyo. 1977).

⁴⁹*See* Saint-Paul, *supra* note 30, at § 4:5 (citing, among others, Cal. Pub. Res. Code §§ 3300, 3500; N.M. Stat. Ann. § 70-2-2; Utah. Code Ann. § 40-6-2; Wyo. Stat. Ann. § 30-5-102(a)).

inferior uses.”⁵⁰ Despite these prohibitions, notably, conservation agencies have not been expected to stop or prevent waste altogether. In fact, waste has largely been accepted as a necessary and unavoidable component of development.⁵¹ For example, flaring—the process of combusting gas that is produced from oil wells but that cannot be immediately or profitably captured and sold—is undeniably wasteful. However, it is widely accepted that some flaring is necessary in order to test and equip wells,⁵² and the majority of state conservation statutes permit flaring for limited periods of time to permit operators to case or tube wells.⁵³ Further, capture of all gas may be inefficient. In situations where the capture of casinghead gas may be so costly as to make recovery of the oil uneconomic, agencies largely consider such gas to be “unavoidably lost”⁵⁴ and permit the flaring of gas so as not to “waste” the oil by making its production impractical.⁵⁵ For example, North Dakota permits operators to obtain an exception from the North Dakota Industrial Commission’s flaring rules if they can demonstrate it is

⁵⁰Williams, *supra* note 4, at 1155–56. Occasionally these methods have been implemented. For example, production and fracturing moratoria have been employed in limited circumstances while agencies pursue rulemaking efforts or to stop waste and protect health, safety, and the environment. *See, e.g.*, Minerals Mgmt. Serv., U.S. Dep’t of the Interior (DOI), NTL No. 2010-N04, “Notice to Lessees and Operators of Federal Oil and Gas Leases in the Outer Continental Shelf Regions of the Gulf of Mexico and the Pacific to Implement the Directive to Impose a Moratorium on All Drilling of Deepwater Wells” (May 30, 2010) (no longer effective); N.Y. Exec. Order No. 41 (Dec. 13, 2010), *continued by* N.Y. Exec. Order No. 2 (Jan. 1, 2011). Local governments have also imposed moratoria on drilling and hydraulic fracturing, with limited success. *See* Lori Riverstone-Newell, “The Rise of State Preemption Laws in Response to Local Policy Innovation,” 47 *Publius: The J. of Federalism* 403, 405 (2017).

⁵¹While beyond the scope of this chapter’s analysis, oil and gas leases and the mineral developer’s implied easement to access the surface imply duties not to commit waste. Tort and contract remedies may be available against lessors who unreasonably permit waste of surface or subsurface resources.

⁵²U.S. Gov’t Accountability Office, “Federal Oil and Gas Leases,” at 5 (GAO-11-34, Oct. 2010).

⁵³*See, e.g.*, Kan. Stat. Ann § 55-102(a).

⁵⁴U.S. Geological Survey, DOI, NTL-4A, “Royalty or Compensation for Oil and Gas Lost” (Jan. 1, 1980); *see* 44 Fed. Reg. 76,600 (Dec. 27, 1979).

⁵⁵The BLM’s “venting and flaring rule” discourages this practice on federal lands by requiring payment of royalty on flared gas, among other changes. *See* 43 C.F.R. § 3179.7, *partially stayed by* Wyoming v. DOI, No. 2:16-cv-00285, slip op. (D. Wyo. Apr. 4, 2018), *appeal docketed*, No. 18-8027 (10th Cir. Apr. 6, 2018); *see also* Bradley N. Kershaw, “Flames, Fixes, and the Road Forward: The Waste Prevention Rule and BLM Authority to Regulate Natural Gas Flaring and Venting,” 29 *Colo. Nat. Resources, Energy, & Envtl. L. Rev.* 115 (2018).

“economically infeasible” to connect to a gas gathering line or “that a market for the gas is not available and that equipping the well with an electrical generator . . . is economically infeasible.”⁵⁶ Though one could argue that an absolute prohibition on flaring might be consistent with some state’s enabling legislation, with few limited exceptions, states have not imposed “no flare” rules on oil wells.⁵⁷

Statutory definitions of waste differ between states.⁵⁸ Texas and Wyoming, for example, limit definitions of waste to physical waste—the spillage of oil and gas or dissipation of reservoir energy resulting in the stranding of oil and gas underground.⁵⁹ Wyoming’s legislature expressly excluded economic waste from its consideration when it rejected language that would have permitted the WOGCC to consider as waste “the drilling of wells not reasonably necessary to effect an economic maximum ultimate recovery of oil and gas from a pool.”⁶⁰ Similarly, Texas does not authorize the RRC to consider economic waste, instead treating the drilling of unnecessary wells as “a political virtue . . . , not a sin.”⁶¹ Other states, like Utah, define waste more expansively to include the drilling of unnecessary wells to recover the same resource, thus resulting in an inefficient allocation of capital.⁶² This waste, called “economic waste,” results in increased costs of production, higher costs to the consumer, and unnecessary consumption of surface resources. Still other states include in their definitions “market waste,”⁶³ the

⁵⁶N.D. Cent. Code § 38-08-06.4(6).

⁵⁷See Bret Wells, “Please Give Us One More Oil Boom—I Promise Not to Screw It Up This Time: The Broken Promise of Casinghead Gas Flaring in the Eagle Ford Shale,” 9 *Tex. J. Oil Gas & Energy L.* 319, 325–29 (2014). There are some examples of successful field-wide no-flare rules in Texas. For example, a 1934 “no-flare” order imposed by the RRC on the Agua Dulce field was upheld. *See* *Clymore Prod. Co. v. Thompson*, 13 F. Supp. 469 (W.D. Tex. 1936).

⁵⁸See La. Rev. Stat. Ann § 30:3(16); Okla. Stat. tit. 52, §§ 86.2, .3; Utah Code Ann. § 40-6-2(27).

⁵⁹Tex. Nat. Res. Code Ann. § 85.046(a)(6) (defining waste as “physical waste or loss incident to or resulting from drilling, equipping, locating, spacing, or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of oil and gas from any pool”).

⁶⁰*Larsen v. WOGCC*, 569 P.2d 87, 93 (Wyo. 1977) (quoting proposed statutory language that was ultimately not enacted); *see generally* Houston G. Williams & George M. Porter, “Practice Before the Wyoming Oil and Gas Conservation Commission,” 10 *Land and Water L. Rev.* 353, 403–04 (1975).

⁶¹Jacqueline Lang Weaver, *Unitization of Oil and Gas Fields in Texas: A Study of Legislative, Administrative, and Judicial Policies* 495 (2013).

⁶²Utah Code Ann. § 40-6-2(27).

⁶³Mich. Comp. Laws §§ 324.61501(q)(iii), .61504.

abuse of correlative rights,⁶⁴ or the burning of natural gas for uses deemed wasteful, such as the manufacture of carbon black.⁶⁵

Though the majority of state conservation agencies have interpreted waste as limited to the physical and economic waste of the resource, at times courts have taken a more expansive view. This may encompass actions that result in nonproduction⁶⁶ or that, through the waste of oil and gas, result in damage to the environment. For example, waste has been broadly defined by courts as having an “ordinary and generally accepted meaning and . . . whatever the dictates of reason, fairness, and good judgment would lead a person to conclude is a wasteful practice in the production, storage, or transportation of oil and gas is included within the term.”⁶⁷ Similarly, a Michigan court interpreted its oil conservation act’s prohibition on waste to include “spoliation or destruction of the land, including flora and fauna,”⁶⁸ and waste of natural resources, as defined in the Outer Continental Shelf Lands Act, has been interpreted to include injury to animals and plants within the marine environment.⁶⁹ These same principles are reflected in some statutory prohibitions on waste. Wyoming’s statute prohibiting the waste of gas through flaring provides that:

it shall be unlawful to allow or permit such natural gas to pollute or contaminate the atmosphere to such an extent that injury or damage is sustained by growing crops, vegetation, livestock, wildlife, or domestic fowls, or to such an extent that the human health, welfare, or safety is in anywise impaired or damaged.⁷⁰

This expands on Wyoming’s general definition of waste in Wyo. Stat. Ann. § 30-5-101. Whereas flaring is not per se defined as waste,⁷¹ it is considered to be waste where it results in environmental degradation. Thus, otherwise

⁶⁴Ark. Code Ann. § 15-72-102(15)(C).

⁶⁵See Saint-Paul, *supra* note 30, at § 4:38.

⁶⁶The WOGCC recently denied Anadarko Petroleum Corp.’s motion to dismiss protests of its 2,200 applications for permit to drill on the basis that it had no intention of drilling. See WOGCC, “Hearing Wrap Up Report” (Apr. 2018) (referencing Docket No. 373-2018); see also Heather Richards, “Anadarko Is in the Midst of Mineral Dispute with Wyoming Landowners Who Claim the Company Is Building a Monopoly,” *Casper Star Trib.* (Mar. 19, 2018).

⁶⁷38 Am. Jur. 2d *Gas and Oil* § 153 (2018) (citing *RRC v. Shell Oil Co.*, 206 S.W.2d 235, 240 (Tex. 1947)).

⁶⁸*Mich. Oil Co. v. Natural Res. Comm’n*, 276 N.W.2d 141, 147 (Mich. 1979).

⁶⁹*Gulf Oil Corp. v. Morton*, 493 F.2d 141, 145 (9th Cir. 1973) (interpreting 43 U.S.C. § 1334(a)(1)).

⁷⁰Wyo. Stat. Ann. § 30-5-121.

⁷¹See *id.* § 30-5-101(a)(i)(G) (defining “waste” to include “[t]he flaring of gas from gas wells except that necessary for the drilling, completing or testing of the well”).

lawful actions that result in environmental harms may violate state statutory prohibitions on waste.

Protection of correlative rights and prevention of waste are complementary functions of state conservation agencies.⁷² Correlative rights protect each property owner's interest in a common pool or source of supply and provide the common owners a just and equitable share of that property.⁷³ Waste by any owner within a pool or common source of supply imperils the correlative rights of others within that reservoir community. Thus, conservation agencies are also tasked with protecting the correlative rights of owners within the common pool.⁷⁴ Although some states have created a hierarchy that prioritizes the prevention of waste,⁷⁵ both functions are necessary to ensure fair and efficient development of oil and gas resources. Development, however, remains the supreme objective. Accordingly, conservation agencies and courts have limited the imperative to prevent waste and protect correlative rights to the extent that those aims can be accomplished without substantially impeding development or making development impracticable.⁷⁶ State oil and gas conservation agencies have achieved these public purposes through compulsory pooling⁷⁷ and unitization,⁷⁸ and other mechanisms including well spacing,⁷⁹ waste

⁷²See generally Kramer & Martin, *supra* note 1, at § 5.01.

⁷³Interstate Oil Compact Comm'n, *A Study of Conservation of Oil and Gas in the United States* 187 (1964).

⁷⁴The U.S. Supreme Court has recognized correlative rights. See *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 203 (1900).

⁷⁵See *Sw. Kan. Royalty Owners Ass'n v. State Corp. Comm'n*, 769 P.2d 1, 9 (Kan. 1989); *Gilmore v. WOGCC*, 642 P.2d 773, 779 (Wyo. 1982); *Denver Producing & Ref. Co. v. State*, 184 P.2d 961, 963 (Okla. 1947); Wilson, *supra* note 34, at 18-7.

⁷⁶See *Larsen v. WOGCC*, 569 P.2d 87, 90-91 (Wyo. 1977).

⁷⁷See Ark. Code Ann. § 15-72-302(e)(2); Colo. Rev. Stat. § 34-60-116(7); Neb. Rev. Stat. § 57-909(2); N.M. Stat. Ann. § 70-2-17(c); Okla. Stat. tit. 52, § 87.1(e); Wash. Rev. Code § 78.52.250(4); Wyo. Stat. Ann. § 30-5-109(a); Bruce M. Kramer, "Compulsory Pooling and Unitization: State Options in Dealing with Uncooperative Owners," 7 *J. Energy L. & Pol'y* 255, 276-78 (1986).

⁷⁸See Ark. Code Ann. §§ 15-72-308 to -315; Cal. Pub. Res. Code § 3640; Kan. Stat. Ann. §§ 55-1301 to -1317; La. Rev. Stat. Ann. § 30:5.1; Miss. Code Ann. § 53-3-7; N.M. Stat. Ann. §§ 70-7-1 to -21; Okla. Stat. Ann. tit. 52, §§ 287.1-.15; Wyo. Stat. Ann. § 30-5-110. Notably, Texas does not have a compulsory pooling or unitization statute.

⁷⁹See Colo. Rev. Stat. § 34-60-116; Okla. Stat. tit. 52, § 87.1; N.D. Cent. Code § 38-08-07; N.M. Stat. Ann. § 70-2-17; *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 944 (Tex. 1935); Robert E. Hardwicke, "Oil-Well Spacing Regulations and Protection of Property Rights in Texas," 31 *Tex. L. Rev.* 99, 107 (1952) (citing Texas "Rule 37").

prevention measures,⁸⁰ maximum efficient rate limitations,⁸¹ and production allowables and prorationing.⁸²

Some state legislatures have required agencies to consider factors other than waste and correlative rights. A number of states including Alaska, Arizona, Colorado, and Kentucky authorize their oil and gas conservation agency to consider public safety, health, welfare, and responsible development in exercise of their delegated authority.⁸³ For example, the Colorado Oil and Gas Conservation Commission (COGCC) has the authority to regulate oil and gas operations “so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource . . . to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources.”⁸⁴ Illinois and Oklahoma provide their conservation agencies with more limited authority, allowing intervention only when there is an imminent threat to public health or environmental safety.⁸⁵ Oil and gas conservation agencies may also be charged with implementation of programs in addition to the conservation of oil and gas or subject to additional environmental procedural safeguards. For example, the WOGCC has jurisdiction over carbon dioxide sequestration⁸⁶ and the RRC has regulatory and enforcement responsibilities under the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Clean Water Act.⁸⁷ In California, the California Environmental Quality Act applies to decisions

⁸⁰See *Walker v. J-W Operating Co.*, 2012-0662 (La. App. 1 Cir. 12/21/12), 2012 WL 6677913, at *3 (unpublished) (conservation agency sought to prevent waste by issuing permits for alternate wells upon a finding that one well could not effectively drain the unit, drawing upon broad delegation of authority to agency to enact “any-reasonable rules, regulations, and orders” necessary to carry out purpose of conservation act (quoting La. Rev. Stat. Ann. § 30:4(C))), *writ denied*, 2013-0185 (La. 4/1/13), 110 So. 3d 582 (mem.); see also *Kramer & Martin*, *supra* note 1, at ch. 5.

⁸¹See Colo. Rev. Stat. § 34-60-102(1)(b); see also *Kramer & Martin*, *supra* note 1, at § 5.01[2].

⁸²*E.g.*, La. Admin. Code tit. 43, §§ 3501–3511, 3701–3709; 16 Tex. Admin. Code §§ 3.45, .49; see *Champlin Ref. Co. v. OCC*, 286 U.S. 210, 234–36 (1932); 2 Ernest E. Smith & Jacqueline Lang Weaver, *Texas Law of Oil & Gas* § 9.3(A) (2d ed. 2018).

⁸³Alaska Stat. § 31.05.030(e)(1); Ariz. Rev. Stat. Ann. § 27-502; Colo. Rev. Stat. §§ 34-60-102, -106(2)(d); Ky. Rev. Stat. Ann. § 353.500(2).

⁸⁴Colo. Rev. Stat. § 34-60-106(2)(d). The scope of the text is presently being litigated in *Martinez v. COGCC*, 2017 COA 37, *cert. granted*, No. 17SC297, 2018 WL 582105 (Colo. 2018). See *infra* notes 129–49 and accompanying text.

⁸⁵225 Ill. Comp. Stat. 725/1.2 (no mention of public health and safety outlined in the duties of the board); Okla. Stat. tit. 17, § 52 (granting authority for OCC to engage in emergency response to issues of public health and environmental harm).

⁸⁶Wyo. Stat. Ann. § 35-11-313.

⁸⁷Tex. Water Code Ann. § 26.131.

of the Division of Oil, Gas, and Geothermal Resources (DOGGR), thus requiring the agency to assess potential environmental impacts of proposed development activities.⁸⁸ These more expansive delegations permit the argument that conservation agencies' authorization to restrict the use of private property to protect public interests extends beyond the prevention of waste and protection of correlative rights interests.

[2] Jurisdiction

Conservation agencies' jurisdiction is limited. They are not empowered to act on all matters related to oil and gas development. For example, conservation agencies cannot adjudicate title disputes,⁸⁹ contract rights,⁹⁰ or tort claims,⁹¹ or consider violations of antitrust laws.⁹² Conservation agencies are not authorized to interpret contracts between the parties, and accordingly, disputes over operatorship are often masked as conflicts over whether a well will be "stand up" or "lay down"—something that is within the discretion of a conservation agency to decide.⁹³ In order for a conservation agency to have jurisdiction to resolve a dispute, that authority must have been lawfully delegated to it with appropriate standards for delegation and not be preempted by other law.

[3] Preemption

State conservation agencies' actions may be impliedly or expressly preempted by federal regulations. For example, the U.S. Court of Appeals for the Tenth Circuit found that action by the Oklahoma Corporation Commission (OCC) pursuant to the state's ratable take statute was preempted by the Natural Gas Act.⁹⁴ However, not all state conservation agency

⁸⁸Cal. Pub. Res. Code § 21000(g); *see* DOGGR, "California Environmental Quality Act (CEQA)," <http://www.conservation.ca.gov/dog/ceqa>.

⁸⁹*See* Martin, *supra* note 45, at 3-10 (citing Sun Oil Co. v. RRC, 390 S.W.2d 803 (Tex. Civ. App.—Austin 1965)).

⁹⁰*Id.* (citing Superior Oil Co. v. Humble Oil & Ref. Co., 241 So. 2d 911, 912 (La. 1970); Amerada Petroleum Corp. v. RRC, 395 S.W.2d 403, 406 (Tex. Civ. App.—Austin 1965)).

⁹¹*Id.* (citing Kingwood Oil Co. v. Hall-Jones Oil Corp., 396 P.2d 510 (Okla. 1964); Foree v. Crown Cent. Petroleum Corp., 431 S.W.2d 312 (Tex. 1968)).

⁹²*Id.* (citing Woods Exploration & Producing Co. v. Aluminum Co. of Am., 382 S.W.2d 343 (Tex. Civ. App.—Corpus Christi 1964)).

⁹³*See* Michael J. Wozniak & Jamie L. Jost, "Horizontal Drilling: Why It's Much Better to 'Lay Down' than to 'Stand Up' and What Is an '18° Azimuth' Anyway?" 57 *Rocky Mt. Min. L. Inst.* 11-1, 11-10 to 11-12 (2011).

⁹⁴ANR Pipeline Co. v. OCC, 860 F.2d 1571, 1582 (10th Cir. 1988). OCC Order No. 281285 asserted that regulation of interstate pipelines was within its jurisdiction based on the state's ratable take statute and was necessary to prevent waste and protect correlative rights.

regulation on federal lands has been preempted.⁹⁵ In some scenarios, federal authority may be plenary, though not exclusive.⁹⁶ Congress may not have intended to entirely occupy the field, thus leaving room for some state action provided that it is not in conflict with federal law.⁹⁷ For example, the Wyoming Supreme Court found that despite plenary federal authority under the Property Clause, the state could regulate mining activities on federal lands to safeguard environmental values provided that it was regulating rather than prohibiting an action authorized by Congress.⁹⁸ Oil and gas regulation on nonfederal lands has been an area of traditional state concern; thus, a presumption against full preemption often applies.⁹⁹

An agency's authority is also limited by the ability of the state to delegate to it certain functions. A state may not delegate its legislative or judicial powers in the absence of adequate standards to guide the administrative agency's exercise of authority.¹⁰⁰ Although delegations of fact-finding authority to fill gaps in a comprehensive legislative program have been upheld,¹⁰¹ a state must provide a method of control over the delegation through appropriate standards.¹⁰² The statute should "outline[] the policies which prompted establishment of the [agency], explain[] what the [agency] should do and how it should do it, and set[] out specific directives to govern particular situations."¹⁰³ Once that authority has been delegated, the agency may not act outside the areas where it has been empowered to act, whether that authority remains with the state or has been delegated

⁹⁵While a requirement that an operator obtain a permit required by a local zoning code prior to drilling was found to impermissibly conflict with the federal leasing program, conditions placed on a drilling permit regarding an access route where reasonable alternatives existed was upheld. See *Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979); *Gulf Oil Corp. v. WOGCC*, 693 P.2d 227, 238 (Wyo. 1985).

⁹⁶See Martin, *supra* note 45, at 3-20.

⁹⁷See *Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 199 P.3d 718, 723 (Colo. 2009) (citing *State Dep't of Health v. The Mill*, 887 P.2d 993, 1004 (Colo. 1994)).

⁹⁸*Gulf Oil Corp.*, 693 P.2d at 235.

⁹⁹See Alexandra B. Klass, "State Innovation and Preemption: Lessons from State Climate Change Efforts," 41 *Loy. L.A. L. Rev.* 1653, 1673 (2008); *Millennium Pipeline Co. v. Seggos*, 288 F. Supp. 3d 530, 539 (N.D.N.Y. 2017); *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008).

¹⁰⁰*Mistretta v. United States*, 488 U.S. 361 (1989); Martin, *supra* note 45, at 3-5 to 3-8.

¹⁰¹See *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Trapp v. Shell Oil Co.*, 198 S.W.2d 424, 438 (Tex. 1946).

¹⁰²See Morris D. Forkosch, *A Treatise on Administrative Law* § 68 (1956).

¹⁰³*United States v. Chambless*, 680 F. Supp. 793, 796 (E.D. La. 1988).

to another agency.¹⁰⁴ For example, in *Kerr-McGee Corp. v. WOGCC*, the Supreme Court of Wyoming invalidated the WOGCC's decision that a new tertiary production project was not entitled to a 2% severance tax exemption on the basis that the statute creating the tax exemption included a five-year limitation.¹⁰⁵ Although the WOGCC had the authority to certify tertiary recovery projects, the court found that the commission had "no authority to base its decision on tax matters" and had "invaded an area in which it had no statutory right" since the state legislature had delegated "the construction of any statute affecting the assessment, levying, and collection of taxes" to the State Board of Equalization.¹⁰⁶

§ 5.04 Environmental Considerations

Conservation agencies, particularly in the Marcellus Shale region and in Colorado, have faced new and growing pressures to exercise their rulemaking, adjudicative, and enforcement authorities to afford greater consideration to environmental matters. This trend is neither nascent nor should it be unexpected. Following the Michigan Supreme Court's interpretation of the state's waste prevention statute as including damage to natural resources, wildlife, and the environment, Professor Owen Anderson predicted in 1985 that conservation agencies would play an increasing role in regulating oil and gas activities to protect the environment.¹⁰⁷ Since then, the economies of many oil producing states have diversified to include a greater emphasis on high-tech industries and recreational tourism.¹⁰⁸ Despite significant economic contributions,¹⁰⁹ the oil and gas industry is no longer perceived as the lynchpin to some state economies.¹¹⁰ As a result, public interest has shifted away from assuring the vitality of the

¹⁰⁴See *Union Pac. R.R. Co. v. COGCC*, 284 P.2d 242, 246–47 (Colo. 1955); *Helmerich & Payne, Inc. v. OCC*, 532 P.2d 419, 422–23 (Okla. 1975) (citing *H.F. Wilcox Oil & Gas Co. v. State*, 19 P.2d 347, 350 (Okla. 1933)); *Gage v. RRC*, 582 S.W.2d 410, 413 (Tex. 1979); *Larsen v. WOGCC*, 569 P.2d 87, 90 (Wyo. 1977).

¹⁰⁵903 P.2d 537 (Wyo. 1995).

¹⁰⁶*Id.* at 544–45.

¹⁰⁷Owen L. Anderson, "New Directions in Oil and Gas Conservation Law," *Oil and Gas Conservation Law and Practice* 14-1, 14-8 (Rocky Mt. Min. L. Fdn. 1985) (citing *Mich. Oil Co. v. Natural Res. Comm'n*, 276 N.W.2d 141 (Mich. 1979)). Professor Anderson also anticipated increased conflicts over water pollution and local government regulation. *Id.* at 14-3, 14-10 to 14-11.

¹⁰⁸See Alexandra B. Klass, "The Frontier of Eminent Domain," 79 *U. Colo. L. Rev.* 651, 691 (2008); U.S. Energy Info. Admin., "Colorado—Profile Analysis," <https://www.eia.gov/state/analysis.php?sid=CO#1>.

¹⁰⁹See Kevin J. Duffy, "Regulating Hydraulic Fracturing Through Land Use: State Preemption Prevails," 85 *U. Colo. L. Rev.* 817, 834–37 (2014).

¹¹⁰*Id.*

industry and the maximization of development to increased concern about the economic, environmental, and social impacts of oil and gas operations.

Responses to heightened public concern have emerged from all areas of government and have had a profound impact on the regulation of oil and gas production. Legislatures have amended conservation laws to include statements in favor of environmental stewardship and proposed legislation to alter the scope of oil and gas conservation agency authority. Citizens have brought proposals before conservation agencies and to the ballot box requesting increased surface setbacks from occupied dwellings and greater consideration of the climate impacts of permitting decisions.¹¹¹ Local governments have emerged as leaders in land use determinations associated with oil and gas and the protection of health, safety, and environmental interests.¹¹² These responses have culminated in pressures on oil and gas conservation agencies to exercise their rulemaking authority in new ways and to increase the consideration given to environmental matters in exercising their permitting authority. Where conservation agencies have refused, a frontier of litigation has emerged, seeking to clarify the agencies' authority and obligations with respect to environmental matters. These cases have created new opportunities for conservation groups and municipalities to influence the oil and gas permit approval and regulatory processes.

[1] Proposals and Petitions Before State Conservation Agencies

Conservation groups and concerned citizens have pushed oil and gas conservation agencies to exercise their rulemaking authority by proposing new rules. These proposals suggest changes to increase the consideration of environmental impacts in oil and gas regulation and to provide more stringent rules to protect surface landowners from the health, safety, and environmental impacts of drilling and production.

Several oil and gas conservation agencies have seen citizen-initiated petitions to increase setbacks from schools, homes, and other occupied structures, as well as from environmentally sensitive areas such as streams and wetlands. Setbacks from drilling locations are a significant area of concern

¹¹¹See § 5.05, *infra*.

¹¹²See Heidi Gorovitz Robertson, "When States' Legislation and Constitutions Collide with Angry Locals: Shale Oil and Gas Development and Its Many Masters," 41 *Wm. & Mary Env'tl. L. & Pol'y Rev.* 55, 59 n.7 (2016) ("In 2012 alone, fourteen states enacted or refined comprehensive oil and gas legislation, which in each state restricted local control to at least some degree."); Nathaniel L. Foote, "Not in My Backyard: Unconventional Gas Development and Local Land Use in Pennsylvania and Alberta, Canada," 3 *Penn. St. J.L. & Int'l Aff.* 235, 245 (2015).

to surface landowners and conservation groups alike. In the absence of regulation, a severed mineral owner has no obligation to offset a well location from a home or residence,¹¹³ though there is a strong custom of doing so. While some states have codified or implied an obligation to accommodate the existing uses of the surface owner,¹¹⁴ traditionally mineral owners' use of the surface was constrained only by the bounds of reasonableness as determined by custom and practice in the industry.¹¹⁵ Landowner tolerance for the externalities of drilling and production has diminished as a result of changing social norms and increased development in urbanized areas and on split estates.¹¹⁶ In those areas, the surface owner may have no interest in, or control of, the underlying minerals.¹¹⁷ Thus, surface landowners in suburban areas, who have little to no participation in the leasing and permitting process or the economic benefits of production, are experiencing the brunt of the localized impacts of development.¹¹⁸ These landowners, as well as conservation groups, have looked to conservation agencies to protect their interests and quality of life.

To buffer the most localized impacts of development, citizens and conservation groups have petitioned oil and gas conservation agencies to adopt new rules increasing well setbacks from occupied structures.¹¹⁹ In Colorado, Montana, and Wyoming, new surface setback and notification rulemakings were initiated only after citizen groups had proposed more stringent rules to the conservation agencies.¹²⁰ In each case, the agency rejected the proposal but eventually engaged in rulemaking efforts on the

¹¹³See Clarence A. Brimmer, "The Rancher's Subservient Surface Estate," 5 *Land & Water L. Rev.* 49, 54 (1970).

¹¹⁴See, e.g., Wyo. Stat. Ann. §§ 30-5-401 to -410; Ernest E. Smith, "The Growing Demand for Oil and Gas and the Potential Impact upon Rural Land," 4 *Tex. J. of Oil, Gas, & Energy L.* 1, 6 (2008).

¹¹⁵See *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943); Christopher M. Alspach, "Surface Use by the Mineral Owner: How Much Accommodation Is Required Under Current Oil and Gas Law?" 55 *Okla. L. Rev.* 89, 91 (2002).

¹¹⁶See Ernest E. Smith, "Urbanization and the Surface Development of Mineral Land: The Conflict Between the Dominant and Servient Estates," in *Selected Works*, *Tex. J. of Oil, Gas, & Energy L.* (2013).

¹¹⁷See Hannah J. Wiseman, "Risk and Response in Fracturing Policy," 84 *U. Colo. L. Rev.* 729, 778-79 (2013).

¹¹⁸See Alex Ritchie, "On Local Fracking Bans: Policy and Preemption in New Mexico," 54 *Nat. Resources J.* 255, 297-98 (2014).

¹¹⁹See, e.g., Rebuttal Statement of Colo. Envtl. Coal. et al., "COGCC Setback Rulemaking" (2012).

¹²⁰See Pat Bellinghausen, "Gazette Opinion: Put Some Distance Between Oil Wells and Montana Homes," *Billings Gazette* (Aug. 6, 2015); Stephanie Joyce, "Draft Rule Proposes Increased Buffer Between Drilling and Homes," *Wyo. Public Media* (Sept. 5, 2014).

same topics.¹²¹ For example, in 2012, the COGCC commenced rulemaking regarding surface setbacks following a proposal from the Colorado Environmental Coalition.¹²² The contentious process resulted in adoption of Rule 604, which creates a buffer zone setback prohibiting location of a well within 1,000 feet of a building unit.¹²³ In order to obtain an exception from the 1,000-foot setback, oil and gas operators must have engaged in consultation with landowners and local governments and agreed to “site specific mitigation measures as necessary to eliminate, minimize or mitigate potential adverse impacts to public health, safety, welfare, the environment, and wildlife.”¹²⁴ This provision empowers both surface landowners and local governments and provides opportunities for negotiation of development conditions and stipulations to mitigate impacts of development.

Montana and Wyoming followed similar processes, but with more constrained outcomes. In 2013, following a petition from the Powder River Basin Resource Council, the WOGCC commenced rulemaking to modify its occupied structure setbacks to require a 500-foot setback from an occupied structure.¹²⁵ Although the new rules doubled the previous setbacks, they were far lower than the 1,000 feet or more that landowner advocates had requested.¹²⁶ In Montana, the Montana Board of Oil and Gas commenced rulemaking on setbacks and occupied structure notice requirements following action by the Northern Plains Resource Council.¹²⁷ The Board ultimately declined to adopt setback rules but implemented new notice requirements for all occupied structures within 1,320 feet of a proposed well.¹²⁸ Through advocacy for new setbacks, landowners have successfully pushed conservation agencies to adopt new rules to mitigate the most immediate impacts of drilling.

¹²¹See WOGCC, “Statement of Principal Reasons for Amendment of Rules” (Apr. 23, 2015), <http://wyoleg.gov/arules/2012/rules/ARR14-077.pdf>.

¹²²See Rebuttal Statement of Colo. Envtl. Coal. et al., “COGCC Setback Rulemaking” (2012).

¹²³2 Colo. Code Regs. § 404-1:604.a.(2).

¹²⁴*Id.*

¹²⁵Wyo. Rules & Regs. OIL GEN ch. 3, § 47(a); see Lynne J. Boomgaarden, “The Regulators’ Perspective on Oil & Gas Surface Uses: Managing Stakeholder Expectations,” *Oil and Gas Agreements: Surface Use in the 21st Century* 11B-1, 11B-5 (Rocky Mt. Min. L. Fdn. 2017); Dustin Bleizeffer, “Homeowners Upset at State’s New Oil and Gas Rule,” *WyoFile* (Apr. 15, 2015).

¹²⁶See John Robitaille, “Robitaille: Increasing Setbacks to 500 Feet Is Reasonable,” *Casper Star Trib.* (Mar. 29, 2015).

¹²⁷See Renée Jean, “New Setback Rule Could Face Setbacks of Its Own: MPA President Says Board Didn’t Have Rulemaking Authority,” *Williston Herald* (Dec. 26, 2016).

¹²⁸Mont. Admin R. 36.22.620(2).

Conservation groups and concerned citizens have also pressed conservation agencies to limit drilling activities based on the consideration of cumulative, landscape-scale impacts.¹²⁹ One such petition in Colorado has resulted in litigation that will soon be heard by the Colorado Supreme Court regarding the role of the COGCC in considering the impact of drilling on public health, safety, and welfare and the environment.¹³⁰ In November 2013, a group of Colorado teens petitioned the COGCC to initiate rulemaking.¹³¹ The proposed rule required the COGCC to refrain from issuing new oil and gas drilling permits for operations, including hydraulic fracturing, until the “best available science” confirmed that the drilling would not “cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, . . . adversely impact human health [or] contribute to climate change.”¹³² The teens argued that under Colorado’s Oil and Gas Conservation Act,¹³³ the COGCC is tasked with ensuring that development of oil and gas is “responsible [and] balanced” and that production is “consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.”¹³⁴

Colorado’s original 1951 Oil and Gas Conservation Act “established the COGCC to provide for the responsible development of the state’s oil and gas resources,”¹³⁵ with an emphasis on increased production.¹³⁶ In 1994, the Act was amended to require the COGCC to regulate oil and gas “in a manner consistent with protection of public health, safety, and welfare.”¹³⁷

¹²⁹Litigants in California also challenged whether that state’s conservation agency, DOGGR, had failed to comply with the California Environmental Quality Act when it issued permits for 214 new oil wells in which hydraulic fracturing would be used without an environmental review of the impacts of each well. The case was dismissed as rendered moot by new legislation. See *Ass’n of Irrigated Residents v. Dep’t of Conservation*, 218 Cal. Rptr. 3d 517 (Ct. App. 2017).

¹³⁰See *Martinez v. COGCC*, 2017 COA 37, *cert. granted*, No. 17SC297, 2018 WL 582105 (Colo. Jan. 29, 2018).

¹³¹See *In re* Petition for Rulemaking Filed with the COGCC, Cause No. 1, Order No. 1-187 (May 29, 2014); see also Blair Miller, “Colorado Supreme Court to Hear Appeal of Case Involving Oil and Gas Regulators, Environmentalists,” *The Denver Channel* (Jan. 29, 2018).

¹³²*In re* Petition for Rulemaking Filed with the COGCC, Cause No. 1, Order No. 1-187 (May 29, 2014).

¹³³Colo. Rev. Stat. §§ 34-60-101 to -130.

¹³⁴*Martinez*, 2017 COA 37, ¶ 16 (emphasis omitted) (quoting Colo. Rev. Stat. § 34-60-102(1)(a)(I)).

¹³⁵*Chase v. COGCC*, 2012 COA 94, ¶ 25, 284 P.3d 161 (footnote omitted).

¹³⁶*Id.* ¶ 26.

¹³⁷1994 Colo. Legis. Serv. S.B. 94-177 (amending Colo. Rev. Stat. § 34-60-102(1)).

The Act was further amended in 2007 to require consideration of the state's environment and wildlife resources.¹³⁸ The 2007 amendment also imposed a comment period during the decision-making process to allow the Colorado Department of Public Health and Environment to provide input.¹³⁹ The Act further required that the COGCC regulate oil and gas to prevent environmental impacts, “taking into consideration cost-effectiveness and technical feasibility.”¹⁴⁰ Consistent with this language, the COGCC has generally interpreted the Act to require a balancing test with regard to conflicting public policies codified by the Act.¹⁴¹

In May 2014 the COGCC unanimously rejected the teens' rulemaking petition on the basis of guidance provided by the Assistant Attorney General. The COGCC determined that the proposed rule was beyond its authority and would require it to “readjust the balance crafted by the General Assembly,” and that delegating review of COGCC's rulemaking to a third-party organization would be an unlawful violation of the non-delegation doctrine.¹⁴² The COGCC also found that many of the issues raised in the petition were already being addressed by the Colorado Department of Public Health and Environment and the legislature and related more closely to air quality than to oil and gas.¹⁴³ The district court affirmed the COGCC's rejection of the proposed rule on the basis that adopting the rule would be outside the authority of the Act.¹⁴⁴ The court explained that the Act is unambiguous, requiring the COGCC to strike “a balance between the development of oil and gas resources and protecting public health, safety, and welfare.”¹⁴⁵

The Colorado Court of Appeals disagreed with the COGCC's assertions that it lacked authority to initiate rulemaking.¹⁴⁶ Courts frequently defer

¹³⁸2007 Colo. Legis. Serv. ch. 320 (amending Colo. Rev. Stat. § 34-60-102(1)).

¹³⁹*Id.* (amending Colo. Rev. Stat. § 34-60-106(11)(a)(II)).

¹⁴⁰*Id.* (amending Colo. Rev. Stat. § 34-60-106(2)(d)).

¹⁴¹*See Martinez*, 2017 COA 37, ¶ 38 (Booras, J., dissenting) (“The [COGCC] discerns that its role under the Act is to balance oil and gas development with other public interests.”); Joseph Kmetz, “Arguments for a Balance: *Martinez v. Colorado Oil and Gas Conservation Commission*,” 95 *Denv. L. Rev. Online* 139, 141–42 (2018). *But see Martinez*, 2017 COA 37, ¶ 21 (holding that “‘in a manner consistent with’ does not indicate a balancing test but rather a condition that must be fulfilled”).

¹⁴²*In re* Petition for Rulemaking Filed with the COGCC, Cause No. 1, Order No. 1-187 (May 29, 2014).

¹⁴³*Id.*

¹⁴⁴*See Martinez*, 2017 COA 37, ¶ 2.

¹⁴⁵*Id.* ¶ 10.

¹⁴⁶*Mobile Oil Corp. v. State Corp. Comm'n*, 608 P.2d 1327, 1328 (Kan. 1980); *Martin*, *supra* note 45, at 3-10.

to an agency's interpretation of its statutory enabling program and afford an agency broad discretion with respect to "how best to marshal its limited resources and personnel to carry out its delegated responsibilities."¹⁴⁷ However, the court concluded that the requirement that the COGCC regulate "in a manner consistent with protection of public health, safety, and welfare" created a condition to be fulfilled, rather than a balancing test.¹⁴⁸ This finding is consistent with "a tendency of the courts to find acts to be within the power of the agency when the issue regards protection of the environment."¹⁴⁹

On January 29, 2018, the Colorado Supreme Court granted the COGCC's petition for writ of certiorari to consider "[w]hether the court of appeals erred in determining that the [COGCC] misinterpreted [Colo. Rev. Stat. § 34-60-102(1)(a)(I)] as requiring a balance between oil and gas development and public health, safety, and welfare."¹⁵⁰ The question before the court is whether the protection of the environment is a condition precedent to granting a drilling permit or whether the Act requires the COGCC to balance those considerations with the development of oil and gas resources in a manner that achieves maximum efficient recovery.

[2] Expanded Consideration of Environmental Concerns in Agency Decisions

In addition to waste prevention and correlative rights, health, safety, and other non-economic factors may become an increasingly important component of agency decisions.¹⁵¹ In one 2016 Ohio case, *Simmers v. City of North Royalton*, health and safety concerns featured prominently in a commission decision relative to forced pooling.¹⁵² In that case, the operator sought to force pool two tracts owned by the City of North Royalton after the city unanimously voted to deny the proposed lease. The City objected on the basis that the operator, Cutter Oil Co. (Cutter), operated 17 other oil and gas wells in the vicinity of Royalton that had caused several safety concerns prior to the application to drill the well at issue.¹⁵³ In December

¹⁴⁷*Massachusetts v. EPA*, 549 U.S. 497, 527 (2007); *see also* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). *But see* *Mobile Oil Corp.*, 608 P.2d at 1328; Martin, *supra* note 45, at 3-10.

¹⁴⁸Martinez, 2017 COA 37, ¶ 21.

¹⁴⁹Martin, *supra* note 45, at 3-11 (citing *Mich. Oil Co. v. Natural Res. Comm'n*, 276 N.W.2d 141 (Mich. 1979)).

¹⁵⁰COGCC v. Martinez, No. 17SC297, 2018 WL 582105, at *1 (Colo. Jan. 29, 2018).

¹⁵¹*See* Robertson, *supra* note 112, at 105-09; Alan Romero, "Local Regulation of Mineral Development in Wyoming," 10 *Wyo. L. Rev.* 463 (2010).

¹⁵²2016-Ohio-3036, 65 N.E.3d 257 (10th Dist.).

¹⁵³*See id.* ¶¶ 5, 6.

2013, the Ohio Department of Natural Resources' Division of Oil and Gas Resources Management issued the mandatory pooling order approving Cutter's application for mandatory pooling.¹⁵⁴ The Division found that pooling was necessary to meet the state's spacing requirements and that an offer had been made to voluntarily pool on a just and equitable basis.¹⁵⁵ On appeal, the Ohio Oil and Gas Commission revoked a mandatory pooling order on the basis that the Division had not adequately considered the owner's legitimate safety concerns.¹⁵⁶ The Ohio Court of Appeals affirmed the Commission's decision, holding that a commission could consider safety concerns as part of its evaluation of whether an offer for voluntary pooling was just and equitable in light of the impact of oil and gas operations on the nonconsenting landowner, including "the negative impact of drilling activity on streets and other infrastructure, or the safety of a municipal water supply"¹⁵⁷ As noted by the dissent in *Simmers*, the majority decision departs from the traditional approach by considering safety-based concerns of the mineral owner as part and parcel of an evaluation of the value of its correlative rights.¹⁵⁸

[3] Standing for Local Governments

Although the City of North Royalton was involved in the pooling action before the Ohio Oil and Gas Commission based on its status as a mineral owner, *Simmers* also is significant for its emphasis on the growing role of local governments in determining the balance between regulation of oil and gas for efficient recovery and in advocating for mitigation or prevention of impacts to the environment. Courts have consistently emphasized the important role of local governments' use of traditional zoning authority to regulate land use to protect the health, safety, and welfare of their citizens and the interests of communities in which oil and gas development occurs.¹⁵⁹ However, at times those traditional land use regulations may interfere or conflict with, or be preempted by, state delegations of authority to conservation agencies. Frequently these delegations of authority are overlapping and not exclusive, thus leading to confusion about the extent of local government authority to regulate oil and gas activities.¹⁶⁰

¹⁵⁴*Id.* ¶ 10.

¹⁵⁵*Id.*

¹⁵⁶*Id.* ¶ 42.

¹⁵⁷*Id.* ¶ 36.

¹⁵⁸*Id.* ¶¶ 59, 60 (Sadler, J., concurring in part, dissenting in part).

¹⁵⁹See Robertson, *supra* note 112, at 61–63.

¹⁶⁰See Jacob E. Gersen, "Overlapping and Underlapping Jurisdiction in Administrative Law," 2006 *Sup. Ct. Rev.* 201, 202, 207–09 (2006); Ritchie, *supra* note 118, at 271–72.

Conflicts between state local governments, conservation agencies, and legislatures regarding the regulation of oil and gas date back to at least the 1930s when the Oklahoma Supreme Court found that a municipality was not preempted from establishing bonding for wells drilled within the city by the State's establishment of the OCC.¹⁶¹ Cases regarding the authority of cities to establish drilling blocks or to impose conditions on development have reached disparate results. Courts sometimes invalidate city actions,¹⁶² at other times uphold them,¹⁶³ and occasionally attempt to harmonize the two.¹⁶⁴ States have largely been successful in bringing preemption challenges against local ordinances that attempt to outright ban drilling or hydraulic fracturing.¹⁶⁵ However, regulations that are non-discriminatory and address traditional areas of local concern such as health, safety, welfare, and the beauty of the community are more likely to be upheld.

Legislatures have sought to clarify the division of authority between conservation agencies and municipalities through legislation. A number of states have enacted preemption laws, some of which include “maximum preemption” provisions that “prohibit localities from passing any laws or regulations in specific policy areas”¹⁶⁶ For example, following enactment of a ban on hydraulic fracturing by Denton, Texas, and despite numerous ordinances regulating noise, dust, and visual impacts of drilling, the Texas legislature passed a bill expressly preempting local regulation of oil and gas.¹⁶⁷ Shortly thereafter, Oklahoma passed a similar bill expressly prohibiting counties and local governments from prohibiting hydraulic fracturing, although permitting reasonable local rules for noise and traffic and other externalities resulting from oil and gas development.¹⁶⁸ Wyoming law confirms the authority of local governments to regulate land use,

¹⁶¹See Martin, *supra* note 45, at 3-27 (citing *Gant v. Oklahoma City*, 6 P.2d 1065 (Okla. 1931), *aff'd*, 289 U.S. 98 (1933)).

¹⁶²*Id.* at 3-28 (citing *Indian Territory Illuminating Oil Co. v. Larkins*, 31 P.2d 608 (Okla. 1934)).

¹⁶³*Id.* at 3-29, 3-31 (citing *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982); *Klepak v. Humble Oil & Ref. Co.*, 177 S.W.2d 215 (Tex. Civ. App.—Galveston 1944)).

¹⁶⁴*Id.* at 3-30 to 3-31 (citing *Oborne v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, No. 84CV109 (Colo. Dist. Ct. July 25, 1985)).

¹⁶⁵See, e.g., *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28, 369 P.3d 586; *City of Longmont v. Colo. Oil & Gas Ass'n*, 2016 CO 29, 369 P.3d 573; see also Robertson, *supra* note 112, at 111–12; Ritchie, *supra* note 118, at 257–58.

¹⁶⁶Riverstone-Newell, *supra* note 50, at 405.

¹⁶⁷See Kristen van de Biezenbos, “Where Oil Is King,” 85 *Fordham L. Rev.* 1631, 1636 (2017) (citing H.R. 40, 84th Leg., Reg. Sess., 2015 Tex. Sess. Law Serv. ch. 30 (codified at Tex. Nat. Res. Code Ann. § 81.0523)).

¹⁶⁸*Id.* (citing S. 809, 55th Leg., Reg. Sess., 2015 Okla. Sess. Law Serv. ch. 341 (codified at Okla. Stat. tit. 52, § 137.1)).

including restricting the location and use of buildings and structures, but expressly provides that a zoning resolution may not prevent reasonably necessary surface use by the mineral developer.¹⁶⁹

Pennsylvania sought to similarly preempt local regulation of oil and gas operations with the passage of Act 13 of 2012 (Act 13).¹⁷⁰ Act 13 was designed to promote uniformity of regulation across the state, including imposing uniform setback and zoning requirements.¹⁷¹ Act 13 repealed Pennsylvania's 1984 Oil and Gas Act and replaced it with a statutory framework regulating oil and gas operations in the state.¹⁷² In so doing, the legislature "attempted to entirely foreclose the ability of municipalities to afford their residents environmental protections, via the enactment of any zoning ordinances tailored to address unique local environmental needs and conditions, whenever those ordinances 'might be perceived as affecting oil and gas operations.'"¹⁷³

In March 2012, municipalities and individuals challenged the constitutionality of Act 13 claiming that it violated the Environmental Rights Amendment (ERA) of the Pennsylvania Constitution.¹⁷⁴ The court in *Robinson Township v. Commonwealth* (*Robinson II*) found that municipalities, as private landowners, were legal persons and that the strong interest of a municipality in protecting the environment and the quality of life within its borders was sufficient to confer standing in a legal action to enforce environmental standards.¹⁷⁵ On appeal to the Pennsylvania Supreme Court, the standing of the municipalities was affirmed and several provisions of Act 13 were overturned on the basis that they violated Pennsylvania's constitution.¹⁷⁶ This not only "rejuvenated" the ERA and "dispelled the oft-held view that the provision was merely an aspirational statement" but also

¹⁶⁹Wyo. Stat. Ann. § 18-5-201; see *Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm'rs*, 2014 WY 82, 329 P.3d 936; *River Springs Ltd. Liab. Co. v. Bd. of Cnty. Comm'rs of Cnty. of Teton*, 899 P.2d 1329 (Wyo. 1995).

¹⁷⁰58 Pa. Cons. Stat. Ann. §§ 2301–3504.

¹⁷¹*Id.* § 3303, *abrogated by Robinson Twp. v. Commonwealth* (*Robinson II*), 83 A.3d 901 (Pa. 2013).

¹⁷²See Robertson, *supra* note 112, at 111–12.

¹⁷³*Robinson Twp. v. Commonwealth* (*Robinson IV*), 147 A.3d 536, 561 (Pa. 2016) (quoting *Robinson II*, 83 A.3d at 978). The Supreme Court of Pennsylvania recently affirmed in part and reversed in part a preliminary injunction granted by the commonwealth court that barred enforcement of some of the Act 13 regulations relative to unconventional gas operations. See *Marcellus Shale Coal. v. PADEP*, 185 A.3d 985 (Pa. 2018).

¹⁷⁴Pa. Const. art. I, § 27; see *Robinson II*, 83 A.3d at 915–16.

¹⁷⁵*Id.* at 919–20.

¹⁷⁶See generally *id.*

confirmed the right of municipalities to challenge laws that compromise their constitutional environmental rights.¹⁷⁷

The ERA imposes additional duties on the State regarding protection of the environment. In *Pennsylvania Environmental Defense Foundation v. Commonwealth* (PEDF), the Pennsylvania Supreme Court enforced the duty of the State to protect the environment and serve as a trustee, rather than as a proprietor, of its “public natural resources.”¹⁷⁸ These same trustee duties, presumably, apply to both municipalities and conservation agencies, both of which are instrumentalities of the state. However, the extent of these duties on private land is unclear. In both *Robinson II* and *PEDF*, the agency or municipality was making a decision relative to state-owned land, part of the public trust, and thus the ERA was found to be self-executing.¹⁷⁹ The Pennsylvania Environmental Hearing Board (EHB) has begun to consider how the ERA applies to agency decisions regarding private land.¹⁸⁰ Thus far, these cases indicate a requirement that agencies consider the environmental effects of their permitting actions and whether those actions will cause an unreasonable degradation to the environment.¹⁸¹ As such, the ERA may create an avenue, or a mandate, for the State or local governments to intervene in cases before the Pennsylvania Department of Environmental Protection (PADEP) or to challenge drilling permits or other actions by PADEP’s Office of Oil and Gas Management affecting private land. If so, this would open the way for the State or local governments to challenge drilling permits or other conservation agency actions, in which they were previously not considered interested parties.¹⁸²

The ERA, however, does not fully resolve issues of preemption nor does it give carte blanche to municipalities to regulate all oil and gas activities. In February 2018, the Commonwealth Court of Pennsylvania found that a township was preempted from prohibiting a pipeline in its zoning ordinance on the basis that authority to regulate public utility corporations had been entirely delegated to the Pennsylvania Public Utility Commission.¹⁸³

¹⁷⁷Pa. Env’tl. Def. Found. v. Commonwealth (PEDF), 161 A.3d 911, 940 (Pa. 2017) (Baer, J., concurring in part, dissenting in part).

¹⁷⁸*Id.* at 932.

¹⁷⁹*Id.*

¹⁸⁰*See* Ctr. for Coalfield Justice v. PADEP, EHB Docket No. 2014-072-B (Aug. 15, 2017).

¹⁸¹*Id.*

¹⁸²Objections to well spacing and permitting decisions in Pennsylvania are typically limited to operators or royalty owners of land within the area affected by the well spacing order. *See* 25 Pa. Code § 79.23.

¹⁸³Del. Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670 (Pa. Commw. Ct. 2018).

Unlike regulation of public utilities, however, delegation to PADEP has largely been found not to be exclusive.¹⁸⁴ Thus, opportunities remain for local governments to exercise their traditional land use authority to regulate to protect public health, safety, and welfare in a manner that protects the constitutional environmental rights of their residents.

§ 5.05 Amending Agency Authority

Pressures for increased consideration of environmental and climate impacts have not gone unnoticed by legislatures, citizen and industry groups, or voters. In addition to direct proposals to conservation agencies and litigation by landowners and local governments, state legislatures and voters have acted to revise the authority or application of state oil and gas conservation law. These actions include proposals to amend agency authority or the composition of agencies, modify state oil and gas conservation acts, clarify state preemption of local regulation, and provide remedies for mineral owners and lessees whose property interests are diminished in value by new rules.

[1] Legislative Action

In response to local government action, citizen initiatives, conservation agency decisions, and litigation, state legislatures nationwide are considering new laws to clarify agency authority or to address specific environmental issues that have been brought before conservation agencies. The two amendments to Colorado's Oil and Gas Conservation Act and Pennsylvania's Act 13, discussed in §§ 5.04[1] and 5.04[3], above, were precisely this: a state legislature updating its conservation laws to harmonize with the changing economy and value systems of its citizens.¹⁸⁵

Legislatures are accustomed and well positioned to respond to surface issues and citizen concerns regarding development. Beginning in the 1980s the legislatures in the majority of states enacted split estate acts.

¹⁸⁴See *Penneco Oil Co. v. Cnty. of Fayette*, 4 A.3d 722, 732 (Pa. Commw. Ct. 2010) (upholding municipal ordinance on location of oil and gas wells, where purpose of ordinance was to “preserv[e] the character of residential neighborhoods, as well as each zoning district, and encourag[e] beneficial and compatible land uses”); *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855, 866 (Pa. 2009) (holding local zoning ordinance was not preempted by the Oil and Gas Act). *But cf.* *Range Res. Appalachia, LLC v. Salem Twp.*, 964 A.2d 869, 877 (Pa. 2009) (invalidating portions of a local surface development ordinance where the ordinance imposed obstacles to achieving the objectives of the Oil and Gas Act).

¹⁸⁵See “Ritter Administration Eyes Oil and Gas Commission Overhaul,” *Denver Post* (Feb. 28, 2007); “A Conversation with Bill Ritter,” *Boulder Daily Camera* (June 19, 2015). Act 13 directed the Pennsylvania Department of Environmental Quality to promulgate regulations to implement its environmental enhancements, which led to rulemaking that significantly revised the agency's surface activities requirements for oil and gas. See 25 Pa. Code §§ 78.1, .19, .55, .72, .121.

Those acts addressed concerns of split estate surface owners by requiring notice and good-faith efforts to reach agreement for damages prior to commencement of surface-disturbing operations and directed oil and gas conservation agencies to incorporate these requirements in drilling permit requirements.¹⁸⁶ As a result, in the majority of states it is not possible to obtain a drilling permit unless the operator can demonstrate that it has an agreement or waiver from the surface owner or that it has made good-faith efforts to obtain one and thus is entitled to post a bond with the conservation agency.¹⁸⁷ These requirements have shifted bargaining power towards landowners to exact surface protections.

There has been an increase in legislative proposals to address specific issues of oil and gas regulation or to expand conservation agency authority in the past two years but without significant results. For example, in response to the notice rules adopted by the Montana Board of Oil and Gas,¹⁸⁸ and with support of the Montana Petroleum Association, in 2017 Senator Tom Richmond introduced a bill that would have reduced the distance within which notice to owners of occupied structures was required from 1,320 feet to 990 feet, thus partially rolling back the new regulations adopted by the Board.¹⁸⁹ The bill passed both the House and Senate but was vetoed by the governor on May 8, 2017. In his veto statement, Governor Steve Bullock affirmed the Board's determination that it had authority to enact the rule and lauded the "heavily vetted" rulemaking process that resulted in a "compromise between landowners' and the industry's interests."¹⁹⁰

Recent legislation to change the scope of conservation agency authority and rebalance conservation agency purposes towards greater environmental protection has, thus far, proven unsuccessful. The Colorado legislature moved to codify the Colorado Court of Appeals' majority decision in

¹⁸⁶See, e.g., N.D. Cent. Code §§ 38-11.1-04 to -04.1; Okla. Stat. tit. 52, §§ 318.2-.9; Wyo. Stat. Ann. §§ 30-5-401 to -410; see also Christopher S. Kulander, "Surface Damages, Site-Remediation and Well Bonding in Wyoming—Results and Analysis of Recent Regulations," 9 *Wyo. L. Rev.* 413, 415–17 (2009).

¹⁸⁷Kulander, *supra* note 186, at 417–19; see, e.g., Wyo. Rules & Regs. OIL GEN ch. 3, § 4(b)(iv).

¹⁸⁸See Mont. Admin. R. 36.22.620 (applicants for permits to drill must provide notice to owners of occupied structures within 1,320 feet of proposed wells).

¹⁸⁹S. 93, 65th Leg., Reg. Sess. (Mont. 2017); see Jean, *supra* note 127. Other state legislatures have also recently passed legislation related to setbacks from occupied structures and streams. See, e.g., N.D. Cent. Code § 38-08-05; Md. Code Regs. 26.19.01.09(G); see also Wiseman, *supra* note 117, at 797–98.

¹⁹⁰Governor Steve Bullock, "Statement of Veto" (May 8, 2017).

Martinez v. COGCC.¹⁹¹ The bill would have amended Colorado's Oil and Gas Conservation Act to provide that the role of the COGCC is to (1) "regulate" development rather than "foster" development, and (2) ensure that oil and gas development is conducted consistently with environmental protections.¹⁹² The bill passed the House in February 2018 but was indefinitely postponed by the Senate Committee on Agriculture, Natural Resources, and Energy. Similar legislation was introduced in California to amend the purpose and duties of DOGGR.¹⁹³ The proposed bill would have required the State Oil and Gas Supervisor to "regulate" rather than "supervise" drilling and production activities and to do so in a manner that encourages the "intelligent, safe, and efficient," rather than "wise," development of oil and gas resources.¹⁹⁴ The proposed bill also responded to concerns that the California Department of Conservation was subject to interest group pressure by changing the institutional design to specify the qualifications of appointees and repealing provisions authorizing a producers' interest group, the Conservation Committee of California Oil and Gas Producers, to make recommendations to the supervisor of DOGGR.¹⁹⁵ Instead, the bill would have replaced the producers' group with the Standing Advisory Council on Oil and Gas Extraction, which would have included equal representation by industry and by experts in air quality, water quality, and environmental justice, with other research scientists as additional members.¹⁹⁶ The purpose of the Council was to "formally incorporate non-industry voices into DOGGR's advisory processes, and [the bill] places a greater emphasis on science and environmental justice in agency decision-making."¹⁹⁷ Senator Jackson, the bill's author, wrote that the bill "updates the mission of DOGGR through various legal and structural changes that reflect a greater balance between environmental protection, public safety, and oil resource protection."¹⁹⁸ All of the provisions discussed above were removed from the bill by the Assembly in August 2018.¹⁹⁹ Although none of the proposed legislation was enacted, these efforts indicate renewed

¹⁹¹2017 COA 37, *cert. granted*, No. 17SC297, 2018 WL 582105 (Colo. Jan. 29, 2018).

¹⁹²H.R. 18-1071, 71st Gen. Assemb., Reg. Sess. (Colo. 2018).

¹⁹³*See* S. 465, 2017–2018 Leg., Reg. Sess. (Cal., as amended by Assembly, July 13, 2017).

¹⁹⁴*Id.* § 2 (amending Cal. Pub. Res. Code § 3106(a), (d)).

¹⁹⁵*Id.* § 4 (repealing Cal. Pub. Res. Code §§ 3450–3451); *see also* Rachel E. Barkow, "Insulating Agencies: Avoiding Capture Through Institutional Design," 89 *Tex. L. Rev.* 15, 47–48 (2010) (describing issues of partisan appointments).

¹⁹⁶S. 465 § 3 (adding Cal. Pub. Res. Code § 3113).

¹⁹⁷Assemb. Comm. on Natural Res., "S. 465—Bill Analysis," at 2–3 (July 7, 2017).

¹⁹⁸*Id.* at 2.

¹⁹⁹*See* S. 465, 2017–2018 Leg., Reg. Sess. (Cal., as amended by Assembly, Aug. 23, 2018).

legislative attention on the role of conservation agencies in achieving a balance between development and environmental protection.

[2] **Voter Initiatives: An Example from Colorado**

In addition to legislative action, Colorado has seen a series of direct citizen action on issues related to health, safety, and the environment. In 2016, Colorado citizens unsuccessfully attempted to bring a ballot initiative for a constitutional amendment that would have increased well setbacks to a minimum of 2,500 feet.²⁰⁰ Although it failed to get enough signatures to make the November 2016 ballot, had it passed, in some counties over 90% of the land would have been unavailable to future oil and gas development.²⁰¹ Concerns about development near occupied structures were heightened after an explosion resulting from a flowline leak near an occupied structure that resulted in two fatalities in Firestone, Colorado, in 2017.²⁰² In addition to actions by the Governor,²⁰³ cities and counties,²⁰⁴ and the COGCC,²⁰⁵ voters also put forth ballot initiatives that would provide additional local control and increase setbacks beyond those established by the COGCC.²⁰⁶ In 2018, Colorado Rising for Health and Safety (Colorado Rising) put forward Ballot Initiative #97, again proposing a 2,500-foot setback from occupied structures.²⁰⁷ The proposal was approved by the Colorado Initiatives and Title Board in mid-January and was cleared by the Colorado Supreme Court in April 2018.²⁰⁸ In contrast to the 2016 effort, organizers with Colorado Rising gathered enough signatures to get the initiative on

²⁰⁰Colo. Sec’y of State, “Statement of Insufficiency—Proposed Initiative 2015-2016 #78 ‘Mandatory Setback for Oil and Gas Development’” (Aug. 29, 2016).

²⁰¹See COGCC, “2500’ Mandatory Setback from Oil and Gas Development,” at 2 (May 27, 2016).

²⁰²See Bruce Finley, “Deadly Firestone Explosion Caused by Odorless Gas Leaking from Cut Gas Flow Pipeline,” *Denver Post* (May 2, 2017).

²⁰³See News Release, Office of Governor John Hickenlooper, “Gov. Hickenlooper Directs Review of Statewide Oil and Gas Operations Following Firestone Home Explosion Investigation” (May 2, 2017).

²⁰⁴See Natalie Spiess, “A Cause Worth Fighting For: The Battle for Local Control over Colorado’s Oil and Gas Industry,” 95 *Denv. L. Rev. Online* 71 (2018).

²⁰⁵See COGCC, “Flowline Rulemaking,” Docket No. 171200767 (adopted Feb. 13, 2018).

²⁰⁶See Nora Olabi, “Anti-Fracking Initiative Gathering Signatures for November Ballot,” *Westword* (Apr. 11, 2018).

²⁰⁷See Colo. Sec’y of State, “Results for Proposed Initiative #97,” <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2017-2018/97Results.html>.

²⁰⁸*In re* Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #97 (“Setback Requirement for Oil and Gas Development”), No. 2018SA31 (Colo. Apr. 6, 2018).

the ballot as Proposition 112.²⁰⁹ Voters will have the opportunity to vote for or against the proposition on the November 2018 ballot.

Likewise, Colorado ballot initiatives have been proposed to clarify the authority of local governments to regulate oil and gas. Ballot Initiatives #178, 179, 180, and 181 would assert that local governments can regulate oil and natural gas development “to protect public health, safety and welfare, and the environment” provided such ordinances are not in conflict with state law and do not unreasonably restrict a property owner from accessing its surface or mineral interests.²¹⁰ These initiatives are consistent with the holding in a 2016 Colorado Supreme Court case, *City of Longmont v. Colorado Oil & Gas Ass’n*.²¹¹ That case held that a voter-approved amendment to the city charter banning the use of hydraulic fracturing within the city was preempted by state law, but recognized that the city retained its traditional right to “exercise its zoning authority over land where oil and gas development occurs.”²¹²

In anticipation of more restrictive state and local land use regulation, including setbacks and zoning, industry and royalty owners proposed a series of 2018 ballot initiatives to counteract the financial impacts, including amending the Colorado Constitution to qualify losses in market value resulting from new laws or regulations as compensable takings.²¹³ If passed these initiatives, on the ballot as Amendment 74, would provide compensation for economic losses resulting from government regulation that reduces the fair market value of property or prevents property from being used for purposes allowable at the time the owner acquired its interest.

§ 5.06 Conclusion

Oil and gas conservation agencies have been instrumental in limiting waste and environmental externalities from oil and gas production activities through prohibitions on wild wells, well spacing regulations, and compulsory pooling. However, for most of its history, environmental protection has been an incidental benefit of conservation law rather than its underlying purpose. Concerned citizens, including surface owners and conservation and environmental groups, have pushed conservation agencies and

²⁰⁹See Colorado Rising, “About Colorado Rising and Initiative 97,” <https://corising.org/about-us/#initiative>.

²¹⁰Respondents’ Opening Brief at 2, *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2017-2018 #178, #179, #180 and #181 “Regulation of Oil and Gas Development,”* 2018 CO 65, 421 P.3d 173.

²¹¹2016 CO 29, 369 P.3d 573.

²¹²*Id.* ¶ 31.

²¹³See Colo. Sec’y of State, “2017-2018 Initiative Filings, Agendas & Results,” <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html> (Initiatives #108–113).

legislatures to revise oil and gas conservation statutes to include provisions addressing surface impacts, requiring consideration of impacts to air quality, wildlife, and the environment, modifying common law dominance of the minerals within split estates, and establishing setbacks from residences, schools, and hospitals. The traditional hierarchy whereby the prevention of waste is paramount to all other public concerns, including the protection of correlative rights, is undeniably changing.

Legislatures are required to make difficult decisions regarding the balance between the strong and often divisive public interests when considering the efficient development of oil and gas resources, the protection of the environment, and the impacts to surface owners. These decisions require consideration of both positive and negative impacts of oil and gas development on the economy, including jobs, education, and public services, and on the quality of life of their constituents. These are precisely the types of considerations legislatures, rather than courts, agencies, or special interest groups, are best equipped to address. Thus, the introduction and discussion of bills regarding consideration of environmental impacts and the proper role of oil and gas conservation agencies is encouraging. Together with reasonable local regulation of traditional land use functions, legislatures can provide for the efficient and responsible development of oil and gas in light of the changing technologies, development methodologies, and impacts to the environment.

Conservation agencies can play a bigger role in environmental protection. There are unrealized opportunities to prevent waste and limit harm to the environment through more targeted agency regulation. For example, scholars have been advocating for exploratory unitization or regulations that give more weight to correlative rights as a means to limit environmental impacts by maximizing recovery from the minimum number of wells.²¹⁴ Rules to constrain flaring and venting in order to prevent waste during development of infrastructure for gas capture and utilization have also been suggested.²¹⁵ Through modification to oil and gas conservation acts and passage of additional legislation, it is possible to strike a balance between efficient development and environmental protection. These means may include environmental requirements, like those incorporated

²¹⁴See Pierce, *supra* note 3, at 778; Owen L. Anderson & Ernest E. Smith, III, "The Use of Law to Promote Domestic Exploration and Production," 50 *Inst. on Oil & Gas L. & Tax'n* 2-1, 2-65 (1999); David E. Pierce, "Coordinated Reservoir Development—An Alternative to the Rule of Capture for the Ownership and Development of Oil and Gas," 4 *J. Energy L. & Pol'y* 1, 78-79 (1983); Owen L. Anderson & Ernest E. Smith, "Exploratory Unitization Under the 2004 Model Oil and Gas Conservation Act: Leveling the Playing Field," 24 *J. Land Resources & Env't'l L.* 277 (2004).

²¹⁵See Wells, *supra* note 57, at 323-24.

in the 2007 and 1994 amendments to Colorado's Oil and Gas Conservation Act, or refinements of state standards for spacing, pooling, and unitization. Care should be taken to avoid ambiguity resulting in litigation like that considered by the court in *Martinez* and to provide sufficient standards for agencies to develop corresponding regulations.

Legislatures should be conscious of amending the composition of conservation agencies to be consistent with expanded agency authority. As presently constructed, agencies may not have the expertise to make the necessary fact-findings environmental mandates would require. One of the chief benefits of legislative delegation to agencies is that agencies can develop the highly specialized expertise necessary to complete the fact-finding necessary to make decisions regarding drilling and permitting in the public interest. Oil and gas conservation agencies are usually staffed with experts in law, geology, engineering, and land.²¹⁶ These disciplines are chosen based on the ability of specialists within them to make determinations relative to the prevention of waste and protection of correlative rights. However, these specialties may not provide the requisite expertise to make findings relative to wildlife, or cumulative impacts such as those related to climate change. Further, while agencies may have authority to include site-specific conditions and stipulations for individual well permits, most agencies do not have the mechanisms necessary to gather information and require and monitor mitigation for landscape-scale impacts. If authority is expanded, agencies will need to engage in rulemaking efforts to outline the nature and scope of environmental information to be provided and whether and to what extent the agency will consider mitigation on or off-site.

Expansion of conservation agency authority may also confer standing on parties who have an interest in individual permitting decisions to protest permit applications or challenge an agency decision. Under most statutes, an application for permit to drill can be protested only by the owners of the subject property.²¹⁷ Community members, nearby landowners not owning interests within the drill spacing unit or covered by the split estate act, and individuals and groups who enjoy recreational opportunities in the region have no standing to object to the grant of a permit. If agency authority is expanded through legislative action to require agencies to engage in fact-finding relative to regional or global environmental, recreation, and wildlife impacts, an increase in litigation challenging agency decisions should be expected.

²¹⁶See, e.g., Wyo. Stat. Ann. § 30-5-103.

²¹⁷See Wyo. Rules & Regs. OIL GEN ch. 5, § 11(b)(i).

Even so, only so much can be accomplished through legislative or voter-initiated revisions to conservation agency authority. These efforts are a clunky substitute for actual legislation addressing climate impacts or greenhouse gas emissions on a national scale. Any agency authority will be inherently limited to a subset of one very narrow scope of activities on one type of property, and only as to new development or development requesting additional agency action. Producing wells will largely be unaffected by new regulations, as will contributions to climate from other industries engaged in surface land development. Thus, initiatives that incorporate subsidies for environmentally friendly development practices, create tradable mitigation credits, or otherwise use market mechanisms to encourage low-carbon and sustainable energy development practices may be more effective than regulations aimed at impacting the oil and gas permitting stage.²¹⁸

²¹⁸It is too early to determine how California's cap and trade program, which first applied to upstream producers of oil and gas in 2015, will impact production and drilling activities in the state. *See* Cal. Code Regs. tit. 17, §§ 95801–96022.