Chapter 11

State and Local Regulation of Oil and Gas Operations: Drilling Through the Maze of Preemption, Severed Mineral Estates and Surface Owner Rights

Clifford B. Levine
Shawn N. Gallagher

Thorp, Reed & Armstrong, LLP
Pittsburgh, Pennsylvania

Synopsis

§ 11.01. Introduction ........................................................................................................ 342

§ 11.02. The Intersection of State And Local Regulation of Oil
and Gas Operations in the Appalachian Basin ........................................ 343

[1] — The Inadequacy of Local Regulation of Oil and Gas
Operations and the Need for Statewide Oil
and Gas Legislation .................................................................................. 343

[a] — Traditional Zoning Concepts .................................................. 343

[b] — Traditional Preemption Principles Involving
Land Zoning Control and State
Environmental Regulations .......................................................... 344

[2] — Survey of Oil and Gas Preemption
in the Appalachian Basin ................................................................ 346

[a] — Pennsylvania ...................................................................... 346

[b] — Kentucky ........................................................................ 354

[c] — Virginia .......................................................................... 356

[d] — New York ......................................................................... 356

[e] — Ohio ................................................................................ 358

[f] — West Virginia ...................................................................... 359

[3] — Conclusion .................................................................................. 359

§ 11.03. Surface Use Conflicts Reemerge
in the Appalachian Basin ........................................................................ 360

1 Messrs. Levine and Gallagher wish to acknowledge the substantial contributions of
Ms. Felicity Hanks, a law student at the University of Pittsburgh School of Law.
§ 11.01

Introduction.

As the demand for energy production increases, so too do the numbers of oil and gas wells drilled across the country.\(^2\) These increases are consistent throughout portions of the northern and central Appalachian Basin region and have generated tension between operators and owners and local and state governments.

This chapter examines the states in the northern and central Appalachian Basin and addresses two major legislative trends that stem from increasing oil and gas development in the region: state preemption of oil and gas production and new and proposed legislation governing surface use.\(^3\)

---

\(^2\) In 2007 the Pennsylvania Department of Environmental Protection permitted 7,241 new oil and gas wells. This is more than five times the amount of wells that were drilled in 2000. See, Pennsylvania Department of Environmental Protection, Permit & Rig Activity Report 2007, http://www.dep.state.pa.us/dep/deputate/minres/OILGAS/RIG07.htm (last visited Apr. 28, 2008); Pennsylvania Department of Environmental Protection, Rig Activity Report 2000, http://www.dep.state.pa.us/dep/deputate/minres/OILGAS/2000%20Wells%20Drilled%20by%20County.htm (last visited Apr. 28, 2008). In West Virginia, the number of oil and gas wells has tripled in the last twenty years. See, West Virginia Surface Rights Organization, http://www.wvsoro.org (last visited Apr. 28, 2008).

\(^3\) The states included in this survey are New York, Ohio, West Virginia, Virginia, Kentucky and Pennsylvania. Although references are more frequently made to Pennsylvania cases as a point of reference, many of the same principles are applicable to the other jurisdictions surveyed.
The Intersection of State and Local Regulation of Oil and Gas Operations in the Appalachian Basin.

[1] — The Inadequacy of Local Regulation of Oil and Gas Operations and the Need for Statewide Oil and Gas Legislation.

In most states, local governments have the authority to enact zoning laws to further the health, safety, and welfare of the community. Prior to passage of statewide oil and gas legislation, many municipalities used this authority to (1) regulate the operational aspects of oil and gas production; and (2) to locate where oil and gas development was appropriate within the municipality. This resulted in a maze of inconsistent operational regulations governing oil and gas development across any given state. Because oil and gas development is a highly technical industry and many municipalities lacked the sophistication or experience to properly regulate the operational aspects of oil and gas production, many states enacted statewide oil and gas legislation to provide uniform operational regulations, which wholly or partially preempt local operational and locational regulations.

The extent to which municipal attempts to regulate operational and locational aspects is preempted by state law has been the subject of litigation throughout the Appalachian Basin. Some states recognize the traditional zoning authority of local governments to regulate the locational aspects of oil and gas production but not the operational and technical aspects. Some states have applied a more expansive view of preemption, finding statewide oil and gas legislation preempts virtually all local controls.

[a] — Traditional Zoning Concepts.

Zoning has been defined as “the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan.”\(^4\) Zoning ordinances, the primary mechanism of local

---

land use regulation, typically divide a municipality into zones or districts; specify the uses permitted in each district; and impose various regulations regarding the size and location of the various uses. The “very essence of Zoning is the designation of certain areas for different use purposes.”

The authority to zone is derived from the police power to protect the public health, safety and welfare. Zoning ordinances typically regulate the types of uses permitted and their locations. Uses that require strict operational regulations – like landfills, mining, quarries, oil and gas activities and other uses with the potential to adversely affect public safety and the environment – are generally subject to state and federal regulation. Traditionally, a local zoning ordinance may not regulate land use activities, to the extent that a state regulatory agency oversees the operations of those activities under state environmental statutes.

[b] — Traditional Preemption Principles Involving Local Zoning Control and State Environmental Regulations.

In considering the correlation between environmental statutes and local zoning requirements and the extent to which state statutes preempt local zoning ordinances many state courts recognize that the state is not presumed to have preempted a field in which it has legislated. The state legislature must clearly express an intent to preempt – either the statute must state on its face that local legislation is forbidden or it must indicate the legislature’s intent that municipal bodies may not supplement the legislation.

---

8 See Ryan, Pennsylvania Zoning Law and Practice, § 3.3.4.
10 Hydropress, 836 A.2d at 918, citing Western Pennsylvania Restaurant Ass’n v. Pittsburgh, 77 A.2d 616, 620 (Pa. 1951).
In applying the principles of preemption, courts have consistently held that environmental statutes can preempt zoning ordinances, but only to the extent that a zoning ordinance attempts to address the operational aspects of land uses that are within a state environmental agency’s oversight under an environmental statute. Former President Judge David Craig of the Pennsylvania Commonwealth Court summarized the precise issue in *Plymouth Twp. v. Montgomery County*:11

We must recognize statutory and judicial distinctions between ordinance provisions governing *where* the location of a facility may be (zoning provisions) and, on the other hand, *how* it may be technically designed and operated (operational regulations).12

Consistent with this logical distinction, the courts have routinely negated zoning regulations which attempt to regulate operations that are subject to state environmental regulation, while preserving the right of municipalities to designate in which zoning districts such operations could be conducted.13

---

12 *Id.* at 50 (emphasis in original).
13 *See* *Tinicum Twp. v. Delaware Valley Concrete, Inc.*, 812 A.2d 758, 764 (Pa. 2002)(court held that the Non-Coal Act preempted blasting ordinance “because it regulated surface mining operations rather than the traditional land use regulations” and all of its provisions went to when, where and how blasting could occur rather than what, where and how a particular land use would be permitted); *Plymouth*, 531 A.2d at 54-55 (regulations limiting the capacity, design and size of landfill facilities were of no effect); *Warner Co. v. Zoning Hearing Bd. of Tredyffrin Twp.*, 612 A.2d 578 (Pa. Commw. Ct. 1992)(township’s regulations that attempted to regulate surface activities the Non-Coal Act and DEP permits and regulations also specifically addressed were preempted); *Hill v. Zoning Hearing Board of Maxatawny Twp.*, 597 A.2d 1245 (Pa. Commw. Ct. 1991)(conditions restricting operations of waste processing were preempted by state statute); *Greene Twp. v. Kuhl*, 379 A.2d 1383 (Pa. Commw. Ct. 1977)(zoning ordinance’s geological and engineering standards preempted where landfill was subject to DEP regulations); *Twp. of Ross v. Crown Wrecking Co.*, 500 A.2d 1293 (Pa. Commw. Ct. 1985)(ordinance regulating air and noise pollution, hours of operation, vehicle maintenance and fencing of landfills was invalid); *Municipality of Monroeville v. Chambers Devel. Corp.*, 491 A.2d 307 (Pa. Commw. Ct. 1985)(ordinance restricting the time of landfill operations invalid); *but see*, *Southeastern Chester County*

[a] — Pennsylvania.

The purpose of the Pennsylvania Oil and Gas Act (Oil & Gas Act) is to provide for the reasonable development of oil and gas operations within the Commonwealth, consistent with the protection of the public health and safety and the environment.\textsuperscript{14} The Pennsylvania Department of Environmental Protection (DEP) is the agency entrusted with the duty and authority to administer and to enforce the Oil & Gas Act and the rules and regulations promulgated under the Act.\textsuperscript{15}


The Oil & Gas Act explicitly preserves the right of a municipality to implement a zoning ordinance which addresses oil and gas wells, to the extent that the zoning ordinance does not attempt to impose conditions, requirements or limitations on the operational features which the Oil & Gas Act regulates. Section 602 of the Act, as first enacted, provided:

Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code,16 and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. The Commonwealth, by this enactment, hereby preempts the regulation of oil and gas wells as herein defined.17

The Act and the regulations implementing the Act detail how oil and gas wells are to be operated. The Act specifically addresses activities of well operation including casing requirements;18 protection of water supplies;19 safety devices;20 and plugging of wells.21 The DEP’s compendious operational regulations include performance standards relating to well depth, erosion and sediment control, storage and disposal of production fluids, drill cuttings and residual waste, discharge requirements and site restoration as well as provisions relating to the drilling of wells, bonding of well operations, storage well construction, and waste and fire prevention.22 In accordance with

16 The Pennsylvania Municipalities Planning Code (MPC), 53 Pa. Cons. Stat. § 10101 (1968) et. seq., is the planning enabling statute governing the land-use powers of Pennsylvania municipalities except for Philadelphia and Pittsburgh. The two primary land-use ordinances authorized by the MPC are zoning ordinances and subdivision and land development ordinances (“SALDO”).
22 See 25 Pa. Code §§ 78.51-66; 78.301-313; 78.401; 79.11-12; and 79.15.
Section 602 of the Act, to the extent that a local zoning ordinance attempts to regulate these “features of oil and gas well operations,” it is preempted and superseded.

Section 205 of the Act sets forth certain restrictions on the location of wells, providing that wells “may not be drilled within 200 feet, measured horizontally from any existing building or existing water well without the written consent of the owner thereof.”\(^\text{23}\) This section also prohibits wells within 100 feet of any stream, spring, identified body of water or wetland and requires consideration of the impact of a proposed well on parks, forests, gamelands, natural landmarks, habitats of rare or endangered flora and fauna, and historical and archeological sites.\(^\text{24}\) These setback provisions, which are to be considered in the permit application process, are designed to protect buildings, bodies of water, parks, forests and other environmental features by providing that oil and gas operations cannot be conducted within certain distances of these features. Section 205 ensures a minimum level of protection to the health, safety and welfare of the public in municipalities that have no zoning regulations.

In *Nalbone v. Borough of Youngsville*,\(^\text{25}\) the Pennsylvania Commonwealth Court considered, for the first time, preemption challenges under Section 602 of the Oil & Gas Act with respect to two distinct zoning ordinance amendments. The first ordinance identified the districts in which oil and gas operations could be permitted as a conditional use. The second ordinance set forth operational requirements addressing the activities of oil production and operation within the borough. In evaluating the two challenges, the Pennsylvania Commonwealth Court stated that Section 602 of the statute “appears to be a strong articulation of legislative intent to preserve local regulation of oil and gas well operations upon compliance with the provisions of the [MPC].”\(^\text{26}\)

---

\(^{24}\) 58 Pa. Cons. Stat. § 601.205(b) and (c)(1984).
\(^{26}\) *Nalbone*, 522 A.2d at 1175 (emphasis added).
that the conditional use provisions in the ordinance were “traditional zoning devices.” With regard to the operational ordinance, the court observed that it was enacted pursuant to the MPC, and amended “a prior zoning regulation addressing the activities of oil production and operation” that predated the Oil & Gas Act. Thus, the court found that both the locational and operational ordinances were not preempted and unequivocally held that Section 602 does not preclude a municipality’s authority to designate zoning districts in which gas well drilling and operations are permitted and to regulate the operational aspects of oil and gas production so long as the local regulation is pursuant to an ordinance adopted pursuant to the MPC.

In permitting local operational controls through ordinances under Nalbone, oil and gas operators found themselves potentially subject to inconsistent regulations from municipality to municipality despite the comprehensive statewide operational regulations promulgated pursuant to the Oil & Gas Act. In response to these concerns, Pennsylvania’s State

---

27 Id. at 1176.
28 Id.
29 The commonwealth court’s emphasis that statewide preemption would not have impacted local zoning ordinances implemented before passage of the Oil & Gas Act may have resulted from certain statements set forth in a Pennsylvania Supreme Court case issued a few years earlier, Miller & Son Paving, Inc. v. Wrightstown Twp., 451 A.2d 1002 (Pa. 1982). In that case, the court suggested that preemption of a state law over local regulation may only impact local ordinances which had been enacted after the state law came into effect. Mr. Justice Hutchinson, writing for the majority, indicated that only local ordinances enacted after the state law would be preempted, even if the local ordinance addressed operational aspects of the regulated industry. 451 A.2d at 1005. That dicta did not address other cases where preemption of a local ordinance resulted because the Legislature had enacted statutes requiring operational regulations, whether or not the local ordinance predated the state legislation. This suggested distinction between previously or subsequently enacted laws from “inferior” jurisdictions may provide an explanation as to why the 1992 amendments to the Oil & Gas Act include the term “supersede” when the focus of the amendment was to clarify that the Oil & Gas Act preempts operational features of local ordinances, while still retaining the explicit right of municipalities to enact zoning controls of such uses under the MPC.
Legislature, in 1992, amended the Oil & Gas Act. Section 602 of the Oil & Gas Act as follows:

Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code, and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.\(^{30}\)

With its 1992 amendment, the Legislature addressed the issue of inconsistent operational regulations, by limiting the ability of municipalities to control operational features even if the local ordinance was adopted pursuant to the MPC. However, 1992 amendment retained the exception relating to ordinances adopted pursuant to the MPC.

Shortly after the 1992 amendment, in *Mahony v. Twp. of Hampton*,\(^{31}\) the Pennsylvania Supreme Court suggested that the Legislature had not intended to preempt local site selection with the 1992 amendment. There, the court reviewed a zoning ordinance which prohibited private enterprise from operating gas wells in residential districts, but permitted public operation of such wells. While rejecting a private/public ownership distinction, the court nevertheless recognized that “[s]afety hazards of gas wells might justify a zoning ordinance based on location or use, as by entirely prohibiting gas


production in residential districts.” 32 In recognizing the right of municipalities to prohibit gas wells entirely without distinction within residential districts – after the enactment of the 1992 amendment – the court seemed to recognize that the Legislature had preserved the traditional distinction between local zoning site regulation and statewide operational control.

Two recent Pennsylvania appellate decisions, however, have highlighted the on-going tension involving the extent to which state regulation preempts local zoning control. In both decisions, Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont and Great Lakes Energy Partners v. Salem Twp., 33 the Pennsylvania Commonwealth Court took a sweeping view as to the scope of statewide preemption under the Oil & Gas Act. The Pennsylvania Supreme Court accepted petitions for allocatur on each decision and scheduled arguments for September, 2008.

In Huntley & Huntley, Inc., a borough determined that gas and oil operations were not uses permitted within its residential districts. On appeal to the Commonwealth Court, the gas company argued that because DEP issued a permit for the proposed operations and that Section 205 of the Oil & Gas Act provides for the location of gas wells, the borough’s attempt to designate the zoning districts in which oil and gas operations could be conducted was preempted.

Referencing Section 602 of the Oil & Gas Act, the commonwealth court recognized that the Act does not preempt all local regulation, “because such a conclusion would render meaningless the amendment’s distinction between regulations that do or do not relate to ‘features’ the Act addresses.” 34 The court proceeded to consider what “features of oil and gas well operations” the Oil & Gas Act addresses. The court reviewed Section 205, which provides

---

32 Id. at 527.
34 Huntley & Huntley, 929 A.2d at 1256.
a well may not be placed within 200 feet of an existing building without permission of the owner, and determined that this “feature” of the Act “allows placement of gas wells anywhere outside a distance of 200 feet of existing buildings.” The court thus construed this setback restriction as a “feature of oil and gas well operations” and found that, as long as they were placed at least 200 feet from existing buildings, gas wells could be located “anywhere” in a municipality. The court concluded that, because location of the well was an “operational” feature, the borough’s zoning ordinance “is invalid with regard to the imposition of conditions of well placement.”

With its decision, the commonwealth court rejected the lower court’s holding, premised in Nalbone, that the borough was allowed to regulate the location of gas wells. Instead, the commonwealth court focused on the 1992 amendment and ruled that a local zoning ordinance could not “impose conditions, requirements or limitations on the same features of oil and gas operations” that the Oil & Gas Act regulates. The court voided the traditional distinction between locational and operational control, viewing the minimus distancing requirements to be inherently operational.

In the second case, Great Lakes Energy, the commonwealth court considered a municipality’s subdivision and land development ordinance (“SALDO”) that regulated surface development related to oil and gas well drilling operations. The SALDO imposed slope and grading requirements for oil and gas operations and regulated access roads related to such activities. The township argued that, because the Oil & Gas Act and the regulations thereunder did not specifically address these subjects, the township’s regulations were not duplicative operational regulations preempted by Section 602. The oil and gas operators asserted that, although the subject matter was not expressly provided for by statute or regulation, that DEP policy

36 Id.
and guidance documents covered the same subject matter regulated by the SALDO and therefore the township’s regulations were preempted.

In concluding that the Oil & Gas Act broadly preempted local controls, the Commonwealth Court, described the breadth of Section 602:

All of the features of oil and gas well operations that appear in the ordinance are provided for in the act, as overseen by the Department of Environmental Protection and technical advisory boards, and addressed in the regulations, guidelines and manuals that govern the same. That the township desires to impose requirements with respect to the location of some of the activities necessarily incident to the development and operation of oil and gas wells does not obviate the fact that those activities fall within the purview of the act and the oversight of the DEP.

An additional ground exists for finding that the ordinance is preempted by the Oil & Gas Act in that the purposes of the township in its attempt to regulate activities incident to oil and gas well operations are duplicative of the purposes of the act. Although the township expresses laudable goals in its concern for the health, safety and property of its citizens, the hazardous nature of oil and gas well drilling operations, and the potential for an adverse impact on environmental resources, those purposes have been addressed by the legislature in its passage of the act.37

Ironically, shortly after deciding Huntley & Huntley and Great Lakes Energy, with its view of broad preemption, the commonwealth court decided a case involving the Oil & Gas Act under traditional zoning considerations. In Coal Gas Recovery v. Franklin Twp. Zoning Hearing Board,38 the court

considered local regulation of oil and gas operations in the context of the power of municipal entities to attach conditions to local zoning approvals. There, a coalbed methane operator sought zoning approval to operate a gas compressor facility that extracts and collects coalbed methane gas. The gas extraction operation was a permitted special exception use in the zoning district in the township. The operations were also subject to regulation and approved by the DEP.39

The appeal involved the gas operators’ challenge to the local zoning board’s imposition of a condition to approval, requiring that the gas compressor be housed in a building. Although the operators had asserted preemption under provisions of the Oil & Gas Act governing the siting of a compressor, the court relied on zoning law in striking the condition, rather than on preemptive application of the Oil & Gas Act.

Notwithstanding the analysis in Coal Gas Recovery, the Commonwealth Court’s decisions in Huntley & Huntley and Great Lakes Energy may effectively negate the provision of Section 602 of the Oil & Gas Act, despite its explicit preservation of the land use authority of municipalities under the MPC. Both Huntley & Huntley and Great Lakes Energy are pending before the Pennsylvania Supreme Court, and the decisions of that court could have profound consequences on future preemption issues, not just involving oil and gas operations, but on all operations regulated by state environmental bodies.

[b] — Kentucky.

The Kentucky Oil & Gas Conservation Act vests exclusive control over oil and gas operations to the state.40 The Act prohibits all nonstate governmental entities from regulating the operational aspects of oil and gas, including exploration, production, development, gathering, and

39 Id. at 834.
transmission.  However, the statute carves out an exception for regulations enacted pursuant to the Kentucky Planning and Zoning Code, and local regulations affecting streets, highways, and rights-of-way in regard to areas affected by oil and gas operations. The statute states:

[G]overnmental responsibility for regulating all aspects of oil and gas exploration, production, development, gathering, and transmission rests with state government. The department shall promulgate regulations relating thereto and take all actions necessary to assure efficient oil and gas operations and to protect the property, health, and safety of the citizens of the Commonwealth in a manner consistent with KRS Chapter 353, and to the exclusion of all other nonstate governmental entities except as provided in KRS Chapter 100. The department shall promulgate regulations relating to gathering lines within six (6) months after June 24, 2003. Nothing in this section shall be construed as limiting the rights of local governmental units to regulate the use of streets, highways, and rights-of-way.

In Blancett v. Montgomery, an oil and gas operator challenged a city ordinance that restricted drilling within a residential zoning district. The operator argued that the state oil and gas laws restricted the authority of any city to prohibit oil and gas operations within its limits, and, because the operator had a state-issued permit to drill, the city could not interfere with such operations. The Kentucky Supreme Court upheld the ordinance finding the city’s prohibition to be a valid exercise of its police power. The court

41 Id. § 353.500(2).
43 Id. § 353.500(2).
44 Id. § 353.500(2).
45 Blancett v. Montgomery, 398 S.W.2d 877 (Ky. 1966).
46 Id. at 881.
47 Id.
stated that the state’s oil and gas policy “must be interpreted in conjunction with and subordinate to the basic powers possessed by municipalities.”

[c] — Virginia.

It is the policy of Virginia to foster, encourage, and promote the development and production of oil and gas resources.\(^49\) Pursuant to the Virginia Gas and Oil Act, the Commonwealth retains the authority to regulate oil and gas activities in accordance with this policy through the Department of Mines, Minerals, and Energy, Division of Gas & Oil. The relevant provision states:

No county, city, town or other political subdivision of the Commonwealth shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter. However, no provision of this chapter shall be construed to limit or supersede the jurisdiction and requirements of other state agencies, local land-use ordinances, regulations of general purpose, or §§ 58.1-3712, 58.1-3712.1, 58.1-3713, 58.1-3713.1, 58.1-3713.2 and 58.1-3713.3.\(^50\)

Although a Virginia court has not interpreted the statute, persuasive authority suggests that the Gas and Oil Act does not preempt traditional local land use regulations. In a formal opinion, the Virginia Attorney General addressed whether Section 45.1-361.5 of the Gas and Oil Act would exempt

\(^{48}\) Id.; see also, Peter Garrett Gunsmith, Inc. v. City of Dayton, 98 S.W.3d 517, 518 (Ky. Ct. App. 2002)(upholding the municipal power to restrict the location of a gun shops within its borders and distinguishing between the valid regulation of land uses and the preempted regulation of firearms and noting the importance of maintaining the authority of local governments to determine appropriate land uses within the municipality).


\(^{50}\) Id. § 45.1-361.5. Sections 58.1-3712, 58.1-3712.1, 58.1-3713, 58.1-3713.1, 58.1-3713.2 and 58.1-3713.3 preserve local authority to impose severance taxes on coal, oil, and gas.
a holder of a state permit from compliance with a county zoning ordinance that classified oil and gas development as a special use in an agricultural zoning district.\textsuperscript{51}

The Attorney General found that Section 45.1-361.5 expressly exempts local land-use ordinances and that special use permits are a common feature of zoning ordinances.\textsuperscript{52} As such, the Attorney General concluded that obtaining a state gas well permit does not exempt the permit holder from compliance with local land use ordinances and that the requirement to obtain a special use permit is not preempted by the Gas and Oil Act.\textsuperscript{53}

\textbf{[d] — New York.}

In New York, the New York Environmental Conservation Law (ECL) governs the production of oil and gas. Unlike the Pennsylvania, Kentucky, and Virginia oil and gas acts, the ECL does not provide an express exception for local land use laws. The statute clearly lays out the intent of the legislature to retain all regulatory authority over oil and gas operations in the state Department of Environmental Conservation. Section 23-0303 states that “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”\textsuperscript{54}

Although the preemption of local land use controls has not been addressed in the context of oil and gas production, in \textit{Envirogas, Inc. v. Town of Kiantone}, the New York Supreme Court interpreted Section 23-0303 in relation to a local ordinance requiring all oil and gas operators to post a compliance bond and permit fee with the municipality.\textsuperscript{55} In its decision to invalidate the ordinance, the court held that the additional fee requirements

\textsuperscript{52} \textit{Id.} at *2.
\textsuperscript{53} \textit{Id.} at *3.
\textsuperscript{55} Envirogas, Inc. v. Town of Kiantone, 447 N.Y.S.2d 221 (N.Y. Sup. Ct. 1982).
were an attempt to regulate the industry and thus regulated the operation of
oil and gas.\textsuperscript{56} Furthermore, the court ruled that the ordinance did not fall
within the enumerated exemption regarding local regulation of roads. The
state statute was held to clearly supersede and preclude enforcement of all
local ordinances in the area or oil and regulation.\textsuperscript{57}

\textbf{[e] — Ohio.}

Prior to 2004, Ohio recognized a shared responsibility of state and local
governments to regulate oil and gas activities.\textsuperscript{58} In \textit{Newbury Twp. Board
of Trustees v. Lomak Petroleum Inc.}, the Ohio Court of Appeals held that
townships retain the authority to adopt zoning resolutions regulating the
distance between wells and dwellings, given that the ordinance is enacted to
further safety and health standards.\textsuperscript{59} However, in 2004, the Ohio Legislature
enacted legislation that placed sole responsibility for regulating oil and gas
operations in the Ohio Department of Natural Resources (Ohio DNR). The
governing statute provides that:

The [Ohio DNR] has sole and exclusive authority to regulate the
permitting, location, and spacing of oil and gas wells within the state. The
regulation of oil and gas activities is a matter of general statewide interest
that requires uniform statewide regulation, and this chapter and rules
adopted under it constitute a comprehensive plan with respect to all aspects
of the locating, drilling, and operating of oil and gas wells within this state,
including site restoration and disposal of wastes from those wells. Nothing
in this section affects the authority granted to the director of transportation
and local authorities in section 4513.34\textsuperscript{60} of the Revised Code.\textsuperscript{61}

\begin{itemize}
\item[56] \textit{Id.}
\item[57] \textit{Id.} at 222.
\item[58] Ohio Rev. Code Ann. § 1509.39 \textit{(repealed by 2004 Legis. Serv. Ann. 278)}.
\item[60] Section 4513.34 grants the Director of Transportation and local government authorities
  the right to permit and control oversized or overweight vehicles on the roads and highways
  within their jurisdiction.
\item[61] Ohio Rev. Code Ann. § 1509.02 (West 2004).
\end{itemize}
The 2004 amendment repeals all prior provisions of the law which granted or alluded to local governments’ authority to adopt concurrent requirements with the state concerning oil and gas exploration, location, spacing, and operation.62

[f] — West Virginia.

The West Virginia Legislature has not demonstrated an intention to preempt the field of oil and gas operations with the same express language seen in the statutes of neighboring states. The language in the West Virginia oil and gas laws is broad and charges the Office of Oil and Gas with monitoring and regulating all actions related to the exploration, drilling, storage and production of oil and natural gas.63

The issue of preemption is not prevalent in West Virginia because municipal zoning, in general, is limited. The West Virginia Constitution recognizes municipal home rule authority which permits municipalities to enact laws and ordinances relating to municipal affairs provided that the law is not in conflict or inconsistent with state law.64 Article VI, Section 39a of the West Virginia Constitution has been in place since 1936, however significant municipal autonomy has not yet been recognized.65 As a result, there have been no documented conflicts between state and local oil and gas regulations.


In recognition of the increasing drilling in the region and the need for a unified system of regulations, many states have addressed the problematic results of the concurrent regulation by preempting the field of oil and gas production. Virginia, Kentucky, Pennsylvania, New York, and Ohio have all

---

64  W.V. Const. art. VI, § 39a.
expressly preempted municipal regulation of the operational aspects of oil and gas development. However, Virginia and Kentucky statutes expressly recognize the authority of local governments to continue to enact land use ordinances in face of the state regulations. Ohio and New York statutes each set forth the exclusivity of the state’s regulations for operational aspects, yet it is unclear if the long recognized municipal zoning authority is included in that exclusivity. The Pennsylvania statute expressly exempts local land use laws from preemption, but the full scope of preemption awaits the state supreme court’s upcoming decisions in two pending cases. West Virginia, as discussed above, apparently has not yet faced this conflict in the appellate courts.

§ 11.03. Surface Use Conflicts Reemerge in the Appalachian Basin.

Coal mining and mineral extraction operations have been present in the Appalachian Basin for centuries. Most mineral estates were severed from the surface estate long ago and those conflicts between surface owners and mineral owners have since been resolved. However, changes in the legislative landscape, coupled with increased drilling in the region, have made the revision and reexamination of surface use conflicts necessary for operators and for landowners.


The owner of the surface once owned all that was buried beneath it, all that was grown on it, and all that reached above it. Due to increases in technology and developments in geological sciences, the traditional uses of land and values of mineral found within them have greatly changed over the last century. Centuries ago, the average surface owner did not have the resources to drill for oil or mine for coal and so sold the rights to those minerals. The tract of land for which the ownership of the surface

---

67 Id.
and the subsurface minerals have been split is known as the split estate. Pennsylvania, Kentucky, New York, Ohio, Virginia, and West Virginia uphold the validity of mineral severance and recognize that upon severance, each mineral estate, and the surface estate, becomes a distinct and legally separate piece of property. Each estate owner has the right to fully use and enjoy their estate without interference. Because each owner’s rights stem from the ownership of the same tract of land, these rights often conflict.

Mining rights “exist from necessity, and the necessity must be recognized, and the rights of mine and land owners adjusted and protected accordingly.” Traditionally, the mineral estate has been considered the dominant estate and upon severance, the mineral owner gains a corporeal interest in the minerals and with it the right, either express or implied, to use the surface as is reasonably necessary in order to remove the minerals. The mineral estate ends when the mineral is removed.

According to the Doctrine of Reasonable Necessity, the surface owner has no right to restrict a mineral owner’s reasonable use of the surface. The Doctrine of Reasonable Necessity is the threshold right to surface use for both the mineral estate

---

68 The split estate can be traced back to the English common law concept of “Mines Royal,” which gave the King certain rights to gold and silver mines. Mines Royal, was the exception to the rule that the owner of the fee estate owned everything of value above and below the surface of the estate. Terry McInturff, *The Dominant Mineral Estate: Erosion the Sierra Club Doesn’t Mind*, http://www.landman.org/content/SWLI06/McInturffTheDominantMineralEstate.pdf.


70 *Mellon*, 152 Pa. at 294-95.

71 *Id.* at 296-97.

owner and the surface estate owner. In general, the grant of reasonable access is very broad and will depend on the facts of each individual case.

In upholding the use of the surface, courts have permitted several activities. The construction of a facility on the surface may be reasonable, despite hardship to the surface owner.\textsuperscript{73} Reasonable access to the surface may also permit a mineral owner to build a pipeline across the surface.\textsuperscript{74} Courts have also determined reasonable surface use by the surface owner. One court ruled that the surface owner could not construct a building on the mineral owner’s right of way because it would constitute an unwarranted violation of the mineral owner’s rights.\textsuperscript{75} However, the construction of a security fence and gate on the land has been upheld as a reasonable intrusion on the mineral owner’s rights.\textsuperscript{76} Additionally, the owner of the surface may not block the mineral owner’s access onto the surface through his own, or someone else’s, actions.\textsuperscript{77}

Courts have been clear that when the mineral owner’s necessary use of the surface, be it through mining, drilling, or road building, would result in widespread destruction of the surface and prevent the surface owner from normal use of the estate, that use is unreasonable.\textsuperscript{78} For example, a deed

\textsuperscript{74} Schlueter, 141 Misc. 2d at 1004 (permitting installation of a pipeline across the surface for lack of evidence that it would be unreasonable or unnecessary).
\textsuperscript{75} Central Kentucky Natural Gas Co. v. Huls, 241 S.W.2d 986, 987 (Ky. App. 1951)(construction of building over right of way of gas company’s high pressure gas transmission line would be a burden upon the easement and an unwarranted violation of rights).
\textsuperscript{76} Jenkins, 186 S.W.2d at 16 (erection of fence and gate did not unduly restrict the mineral owner’s access because the mineral owner’s use of site was infrequent).
\textsuperscript{77} Maverick Oil & Gas, Inc. v. Barberton City Sch. Dist. Bd. of Educ., 872 N.E.2d 322 (Ohio Ct. App. 2007)(where surface owner had no authority to transfer surface rights to another grantee that would restrict mineral owner’s access to the roads).
\textsuperscript{78} See e.g., Brown v. Crozer Coal & Land Co., 107 S.E.2d 777 (W. Va. 1959); Oresta v. Romano Bros., Inc., 73 S.E.2d 622 (W. Va. 1952)(both holding that surface mining would destroy the surface and prevent the surface owner from normal use of the estate).
granting the right to extract “all” minerals did not grant with it the right to remove the surface support and let the surface fall in.79

In building upon the Doctrine of Reasonable Necessity, several state courts have developed a principal known as the Accommodation Doctrine. The crux of this standard is that the mineral owner is required to give ‘due regard’ to the interests of the surface owner if there are alternative means that are reasonable and practicable under the circumstances. For example, “as between two proposed locations for the drilling and operation of a well, when one would injure, harass and annoy the owner of the land, without benefit or advantage to the appellant, while the other would result in no such injury, the appellant is bound in equity to choose the latter location, if in so doing he is not substantially injured, or put to disadvantage thereby.”80 Many state courts have applied this doctrine to reach a more equitable result than with the Doctrine of Reasonable Necessity.81


One of the factors driving the reexamination of surface use laws is the development of coal bed methane (CBM) in the northern and upper central parts of the Appalachian Basin. CBM was historically vented from coal mines to protect against underground explosions. Technological advances have made it possible to turn CBM into a profitable and productive energy source. The national demand for alternative energy sources has enhanced the appeal of the natural gas source.

CBM is produced during the coalification process and is held within the pores of the coal bed. A state’s determination of CBM ownership rights has direct implications for surface owners. Traditionally, minerals that have not been sold off remain in the ownership of the surface estate. However, CBM’s location within the coal bed calls into question this general principal. In

79 Stonegap Colliery Co. v. Hamilton, 89 S.E. 305, 310 (Va. 1916).
81 See, e.g., Porter v. Mack Mfg. Co., 64 S.E. 853 (W. Va. 1909); Jenkins, 186 S.W.2d at 14.
states where the coal owner holds title to the CBM, the coal owner also has
the right to drill through the surface to extract the gas. Where CBM remains
part of the surface estate, the surface owner will be able to assert control
over the gas extraction process either personally, or through agreement with
the gas operator to whom they sell the rights.


Traditionally, the common law has developed to resolve disputes between
surface and mineral estate owners. Damage to the surface estate is a necessary
result of split estates, and under common law, a landowner has no right to
recover for damages caused by the reasonably necessary use of the surface
estate. 82 Most states provide landowners with notice before drilling can begin,
and set out a process by which affected persons may object to the operator’s
permit. In recognizing that common law and procedural requirements at
times are inadequate to protect surface owners, many states have introduced
legislation to address that inequity.

One of the tools that states use to increase protection for surface owners
is the surface damage statute. 83 In general, surface damage statutes provide
protection and compensation for surface owners with lands affected by oil
and gas development. Kentucky and West Virginia have enacted surface
damage legislation. 84 These statutes reflect a movement towards greater
surface owner protection.

82 Jones v. Forest Oil Co., 44 A. 1074 (Pa. 1900).
83 Surface damage statutes have been enacted in several states: e.g., North Dakota, N.D.
45-5A-7 (2000); Montana, Mont. Code §§ 82-10-501 to 82-10-511 (1999); Kentucky, Ky. Rev.
Ill. Comp. Stat. ch. 765, paragraph 530/1 to 530/7 (2000); Indiana, Ind. Code §§ 32-5-7-1 to
32-5-7-6 (1999); Oklahoma, Okla. Stat. tit. 52, §§ 318.2 to 318.9 (1999).
Virginia's Oil and Gas Production Damage Compensation Act, W. Va. Code § 22-7-1 et.
seq.
The Kentucky surface damage statute applies when oil and gas are severed from the surface or when the surface owner has an interest in the oil or gas and the surface owner has not consented to the drilling operations.\textsuperscript{85} The operator must offer to meet with the surface owner to discuss access to the site and the possible effects drilling operations will have on the land.\textsuperscript{86} However, the statute does not require the parties to reach an agreement. The surface owner is entitled to reasonable compensation for damages to “growing crops, trees, shrubs, fences, roads, structures, improvements, and livestock” caused by the drilling.\textsuperscript{87} The surface owner is also entitled to compensation for “all negligent acts of the operator that cause measurable damage to the productive capacity of the soil.”\textsuperscript{88}

The West Virginia Oil and Gas Production Damage Compensation Act (Damage Compensation Act) protects surface owners who sold their mineral rights prior to 1983 by permitting compensation for damages caused by rotary drilling.\textsuperscript{89} The Damage Compensation Act holds operators liable for surface damage and requires compensation for the surface owner’s lost income or expenses, destroyed crops, damage to the water supply, cost of personal property, and the diminution in value of the surface lands resulting from the oil or gas drilling operations.\textsuperscript{90} The Damage Compensation Act also promotes cooperation between landowners and operators by requiring operators to make a settlement offer for the damages, rather than encourage litigation.

\begin{itemize}
  \item \textsuperscript{86} Id. § 353.595(3)(c).
  \item \textsuperscript{87} Id. § 353.595(3)(d).
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} The Damage Compensation Act creates a rebuttable presumption that no landowner, prior to 1983, knew of the great surface area needed to drill oil and gas wells by the rotary method. W. Va. Code § 22-7-1.
  \item \textsuperscript{90} W. Va. Code. § 22-7-3.
\end{itemize}

Colorado is the first state to enact a comprehensive statute to protect the rights and interests of surface owners from mineral operators. On May 29, 2007, the Colorado Governor signed the Surface Owner Protection Act, effective September 1, 2007. This legislation represents a variation of the common law Accommodation Doctrine. It balances the rights of landowners to surface use with the rights of mineral owners to extract oil and gas.

The Act requires oil and gas companies to take steps to reduce the effect of their operations on the surface estate. Operators must use state of the art technology to prevent and reduce surface damages. By setting a technological floor, the legislature prevents the use of antiquated and inefficient drilling methods that may disturb more land than newer technologies. Operators are required to minimize the intrusion upon, and damage to, the land, and use all available alternatives to reduce negative impacts. If an operator fails to use the least intrusive technology and operations, the Act gives the affected landowner a cause of action in trespass. In the event of litigation, the Act places the burden of proof on the operator to demonstrate that the surface use was reasonable and that the operator considered all the required alternatives.


There is a national trend towards more protective surface use laws. Surface owner protection acts have been enacted in Colorado, and there is proposed legislation to do the same in other parts of the country, including parts of the Appalachian Basin. States are addressing the conflict caused by the traditional dominance of the mineral estate and are enacting legislation that encourages surface owner - mineral owner cooperation, not conflict.

---

[a] — Pennsylvania.

House Bill 1735 was introduced in July of 2007.\textsuperscript{92} House Bill 1735 would require coal bed methane operators to enter into a surface use agreement with the landowner. Agreements would address compensation for surface damages, consideration of the landowner’s reasonable preferences with regard to the location of wells, maintenance of roads, fencing, and equipment, and would also provide landowners the option to use recovered gas free of charge. If an agreement could not be reached between the parties, the court of common pleas would set out reasonable use guidelines to govern the extraction activities. Failure of the operator to abide by the agreement would give the landowner the right to bring an enforcement action against the operator. House Bill 1735 was recommitted to the Appropriations Committee on February 6, 2008.

House Bill 2227 was introduced in February of 2008.\textsuperscript{93} The bill would amend the Oil & Gas Act to include a surface damage provision. When a landowner believes that damage to the property resulted from oil and gas activities, the surface owner would be able to request compensation from the operator. Should the operator and landowner fail to agree on compensation within six months, the landowner could petition the DEP for an evaluation of the damage and order requiring repairs or compensation. Failure to comply with the DEP order could result in a cessation order or a permit revocation. The bill was referred to the Committee on Environmental Resources and Energy.

House Bill 2446, known as the Coal Bed Methane Well Dispute Resolution Act, was introduced, and referred to the Committee on Environmental Resources.\textsuperscript{94} This bill would create the Coal Bed Methane Review Board to resolve disputes between property owners over the location of coal bed methane wells and access roads.

\begin{footnotes}
\end{footnotes}
House Bill 297, which was referred to the Committee on Environmental Resources, would provide the owners of the surface property the right to notice, and the right of first refusal to purchase mineral rights under their surface property and voids interests in mineral rights that have been conveyed without providing the right to such owners.95

[b] — The West Virginia Oil and Gas Surface Owner’s Bill of Rights.

The Surface Owner’s Bill of Rights was introduced in 2008 by the West Virginia House and Senate.96 It would require operators to provide landowners with greater notice of operations, and would allow more time for landowners to contest permits. The proposed legislation would also encourage surface use agreements between the operators and the landowners in order to set out each party’s rights and responsibilities prior to permit approval. The Bill of Rights would also amend existing surface damage laws to ensure that surface owners are paid fair market value for their land rather than permitting damages based on the actual use of the property. The legislation will also give surface owners the right of first refusal if mineral owners fail to pay their mineral taxes.

The West Virginia Legislature recently passed a resolution to study the effects of adopting the Surface Owner’s Bill of Rights.97


The New York Senate has proposed a bill that will direct the Commissioner of Environmental Conservation to develop and publish materials to educate and advise landowners who have been solicited to enter into a lease for oil and gas drilling on their property.98


The conflict between the surface owner and mineral owner has resurfaced in the Appalachian Basin due to increased activity resulting from expanded gas recovery, and states are responding. Proposed legislative changes add procedures with which developers must comply and may increase their liability for damages to the surface. New legislation will also educate landowners about their property rights, increase the transparency of oil and gas permitting, and will encourage cooperation between landowners and oil and gas developers. The traditional dominance of the mineral estate is being replaced by laws favoring cooperation between the surface owner and mineral owner. As activity expands, the response of the courts and the legislatures will likely add to the complex relationships involving governmental regulation and common law and statutory protections both for the industry and affected property owners.