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PUBLICATIONS

11.24.2020  Colorado Looking to Issue Comprehensive Guidance for Waters of the United States (WOTUS)
By John Watson

How is Colorado Dealing with “Gap” Waters?
The scope of federal jurisdiction under the Clean Water Act remains perplexing, particularly now that Colorado is the only state in the nation where the Navigable Water Protection Rule did not take effect June 22, 2020. In the context of a lengthy “stakeholder” process, on November 20, 2020, the Colorado Department of Public Health and Environment (CDPHE) issued a White Paper addressing its regulatory options in light of the new federal WOTUS rule. Construction companies, developers, and other businesses seeking to permit activities around wetlands, ephemeral waters, and intermittent streams in Colorado would benefit from reviewing this comprehensive discussion of the multitude of dilemmas Colorado and others states face in light of the new rule.

11.23.2020  Eighth Circuit Clean Air Act Opinion Brings “Deference” into Sharp Focus
By John Watson

Chevron, Auer, and Now Voight Deference?
On November 20, 2020, the Eighth Circuit Court of Appeals jumped headlong into the Chevron, and Auer deference realm. The issue: can a Clean Air Act permittee rely on a state agency’s prevention of significant deterioration (PSD) determination? And should a Court “defer” to the state agency’s determination to assist in the interpretation of an “ambiguous” environmental program requirement? Voight v. Coyote Creek Mining Company (No. 18-2705, 8th Circuit Court of Appeals).

11.18.2020  Inadequate NEPA Climate Change Analysis Prevents Oil and Gas Leasing in Wyoming
By John Watson

JUDGE CONTRERAS’S SECOND OPINION BLASTS THE BUREAU OF LAND MANAGEMENT FOR SLOPPY ENVIRONMENTAL ANALYSIS
Last year, in a 60-page opinion issued in March 2019, U.S. District Judge Rudolph Contreras stopped the Bureau of Land Management (BLM) from leasing oil and gas on over 500 square miles of federal lands in Wyoming. He began his opinion by stating: “Climate change, and humanity’s ability to combat it, are increasingly prominent topics of public discourse. This case concerns the attention the government must give climate change when taking action that may increase its effects.”
Colorado Judge Enjoins Implementation of the WOTUS Rule in Colorado
By John Watson

California Judge Denies Nationwide Injunction
This is an updated version of a previous blog to include recent developments.

Something to do during lock-down: track the twists and turns of the multiple court challenges to the Waters of the U.S. (WOTUS) rule; a fascinating pass-time.

Partial Vacation of Nationwide Permit 12 Stands as Ninth Circuit Denies Emergency Stay
By Kathleen M. Whitby, Jessica Merrigan

The partial vacation of Nationwide Permit 12 (NWP 12) will remain in place for now as the Ninth Circuit today denied emergency motions for a partial stay pending appeal. In its May 28, 2020, Order (available here) the Ninth Circuit held that appellants “have not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal.”

Colorado Joins the Surge of WOTUS Lawsuits and Proposes State Legislation to Institute a State-Run 404 Program
By John Watson

This is an updated version of a previous blog to include recent developments.

On May 22, 2020, Colorado joined the surge of lawsuits challenging the Waters of the United States (“WOTUS”) rule issued in April by the Trump administration. See the link below to the Colorado lawsuit filed in federal court in Colorado as well as links to other similar lawsuits in other jurisdictions.

Nationwide Permit 12 Restored for Most Non-Pipeline Uses by Trial Court, While the Ninth Circuit Expedites Briefing on Emergency Motion for Stay
By Jessica Merrigan, Kathleen M. Whitby

This week the U.S. District Court for the District of Montana restored use of the U.S. Army Corps of Engineers’ Nationwide Permit 12 for some utility line construction and maintenance activities (primarily for non-pipeline projects) by restricting the scope of its earlier vacation of the permit, while the Ninth Circuit ruled on an initial round of briefings in the government’s request for an emergency stay. The District Court’s April 15 decision has been the source of significant disruption because it not only blocked application of the popular nationwide permit to the Keystone XL pipeline (the subject of the litigation), but also barred any and all other uses of the permit. See our earlier alert here.

WOTUS Lawsuits Surge
By John Watson

On May 1, 2020 in the Northern District of California, 17 States, the District of Columbia and New York City joined the menagerie suing to prevent implementation of the “waters of the United States” (“WOTUS”) rule. The Plaintiffs include the states of California, New York, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia, the North Carolina Department of Environmental Quality, the District of Columbia, and the City of New York.

Waters of the United States (WOTUS) Revised Definition Significantly Reduces Waters Subject to Federal Jurisdiction
By John Watson

On January 23, 2020, the Environmental Protection Agency (EPA) and the Department of the Army (Corps) finalized anticipated revisions to the Navigable Waters Protection Rule defining the scope of waters subject to federal regulation under the Clean Water Act. The revisions follow the dictates of President Trump’s February 28, 2017 Executive Order 13778: “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
Proposal to Repeal Colorado's Taxpayer Bill of Rights ("TABOR") Heading to the Ballot in November 2020

By John Watson

The Second Trip to the Colorado Supreme Court
No other state has a provision in its constitution like the Colorado Taxpayer Bill of Rights ("TABOR"). The TABOR measure amended Article X of the state’s constitution and restricts tax revenues and spending at all levels of government. The provision prevents tax increases without voter approval and prohibits state and local government from spending revenues collected under existing tax rates without voter approval if revenues grow faster that the rate of inflation and population growth. Tax revenues in excess of the TABOR limit must be refunded to taxpayers. The impact of the provision has been significant. Since 1992, tax authorities have refunded over $2 billion to the taxpayers.

New Ozone Classification Will Impact Permitting Along The Front Range in Colorado

By John Watson

New “Serious” Classification for Nonattainment For Ozone
On December 16, 2019, the U.S. Environmental Protection Agency (EPA) announced a final rule to reclassify the Denver Metro/North Front Range ozone nonattainment area from Moderate to Serious nonattainment under the Clean Air Act. The area covered embraces all of Adams, Arapahoe, Boulder, Denver, Douglas, and Jefferson counties as well as the southern portions of Larimer and Weld counties.

Landmark Decision Re: Climate Change and Allegations of Securities Fraud

By John Watson

Trial Court Absolves ExxonMobil
On December 10, 2019, following twelve days of trial and testimony, Judge Barry R. Ostrager of the Supreme Court of the State of New York, New York County, denied the State of New York’s claims that ExxonMobil engaged in securities fraud by either violating the Martin Act or Executive Law 63(12). New York had claimed that ExxonMobil failed to make proper public disclosures related to how ExxonMobil accounted for past, present and future climate change risks.

Colorado Oil and Gas Health Risk Study

By John Watson

Short-term risks of exposure can include headaches, dizziness, and respiratory, skin and eye irritation
Building on an earlier assessment released in February 2017, the Colorado Department of Public Health and Environmental released a state-funded study on October 17, 2019 titled: “Human Health Risk Assessment for Oil & Gas Operations in Colorado.” A peer-reviewed article summarizing the study was published in the Journal of the Air and Waste Management Association.

Citizens Sue to Prevent Colorado Oil and Gas Commission From Issuing Oil and Gas Permits

By John Watson

A Court Order Halting Agency Actions Would Prevent Any Oil and Gas Permitting for Months While the Commission Promulgates Revised Regulations
On October 8, 2019, a citizens group based in Broomfield, Colorado, filed suit in Denver District Court requesting a Court order for an immediate stay of all actions by the Colorado Oil and Gas Conservation Commission ("COGCC") involving “permitting of any drilling, pooling, and spacing units until the COGCC rulemaking is completed.”
Colorado Mining Operations Face Temporary Cessation Roadblock
By John Watson

Case of First Impression Overturns Mined Land Reclamation Board Ruling
On July 25, 2019, the Colorado Court of Appeals reversed a ruling of the Colorado Mined Land Reclamation Board (“MLRB” or “agency”) which had authorized a second period of temporary cessation for a uranium mine. The Court in Information Network for Responsible Mining, Earthworks, and Sheep Mountain Alliance v. Colorado Mined Land Reclamation Board was asked to determine if the agency properly authorized a “second period of temporary cessation” which would allow the mining permit issued by the MLRB to remain in effect.

Takings Claims in Federal Court
By John Watson

Affected by a local government just compensation action? Your remedies have now changed significantly. The Supreme Court on June 21, 2019 overturned 35 years of precedent. In Knick v. Township of Scott, Pennsylvania the Court held that you can now take your federal takings claims pursuant to 42 U.S.C. § 1983 directly to federal court without exhausting state court remedies.

Colorado lawsuit claims “forced pooling” in oil and gas development is unconstitutional. Is this the next step to try to ban the industry?
By John Watson

On January 23, 2019, Wildgrass Oil and Gas Committee (reportedly an anti-fracking group but also an organization that includes mineral owners in the Wildgrass subdivision in Broomfield, Colorado), filed suit in federal court in Denver challenging, on federal constitutional grounds, that portion of the Colorado Oil and Gas Conservation Act (C.R.S. 34-60-116) (the “Act”) that allows the Commission to “force pool” the development of oil and gas resources.

Monitoring the Deregulatory Track Record of the Trump Administration
By John Watson

There are several online resources available to track the regulatory activities of the current federal administration, including various federal government agency websites. The two sites which I and others often turn to for comprehensive and easy-to-use online access for tracking the current state of federal deregulatory efforts are the sites produced and maintained by the law schools at Harvard College and New York University.

Colorado Oil and Gas Development – State Supreme Court Upholds COGCC Decision in Martinez Case
By John Watson

In a unanimous decision which resolved more than five years of dispute, the Colorado Supreme Court on January 14, 2019 upheld the decision of the Colorado Oil and Gas Commission (COGCC) which had refused to engage in rulemaking proposed by environmental groups. Led by the so-called teenage activist Xiuhtezcatl (pronounced Shoe-Tez-Caht) Martinez, the activists proposed a rule that would have conditioned all new oil and gas development on a finding of no cumulative adverse impacts to public health and the environment. Responding to the rulemaking petition which was originally submitted in 2013, the COGCC said the rulemaking was beyond its statutory authority; on appeal, the district court agreed with the agency; and then the Court of Appeals, in a split decision, reversed.

Air Quality – Colorado to Join 13 States That Have Adopted California’s LEV Requirements
By John Watson

On August 16, the Colorado Air Quality Control Commission set a hearing to consider establishing a new Regulation Number 20 to adopt specific provisions of the California low emission vehicle (LEV) rule for model year 2022 and newer light and medium duty vehicles. The Division’s proposed rule will not include a Zero Emissions Vehicle (ZEV) mandate and has no impact on heavy-duty vehicles or non-road (construction and agricultural) equipment.
A recent analysis by the Colorado Oil and Gas Conservation Commission ("COGCC") shows that increasing the current regulatory setback of 500 feet to the 2500-foot setback proposed in Initiative # 97 would prevent oil and gas development on 85% of the non-federal land surface in the state.

On Wednesday, July 18, 2018, Governor Hickenlooper of Colorado issued an Executive Order directing the Colorado Oil and Gas Commission (COGCC) to act to “plug, remediate, and reclaim” orphaned oil and gas wells and sites. Of the over 50,000 oil and gas wells in the state, the COGCC is currently tracking 262 orphaned wells and 373 associated well sites that require remediation and reclamation.

The U.S. is projected to produce more crude oil than any other nation, including Saudi Arabia and Russia. The July 10, 2018 forecast from the U.S. Energy Information Administration (EIA) predicts that, in 2019, U.S. crude oil production will grow to 11.8 million barrels a day.

On June 11, 2018, the U.S. District Court of the Southern District of Georgia issued a preliminary injunction preventing implementation of the U.S. Environmental Protection Agency’s 2015 Waters of the United States (WOTUS) rule in 11 states including Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia and Wisconsin. The court held that if the WOTUS rule became effective the states would suffer irreparable harm in both a “loss of sovereignty and unrecoverable monetary losses.”

In a trio of case opinions issued on May 29, 2018, – all written by Chief Justice Nancy Rice who will retire in June – the Colorado Supreme Court ruled against the arguments of insurance companies.

About the only thing that stakeholders agree on is that the risk assessment saga in Colorado means one thing – more study is needed. On March 27, 2018, the latest in a series of health risk studies was published by the Colorado School of Public Health at the University of Colorado Medical Campus. Using air emissions data taken from within the 500 foot regulatory setback requirement for homes near wells, the study concludes that people living in close proximity to oil and gas wells are subject to an increased risk of developing cancer.

In an unpublished opinion on March 21, 2018, the Ninth Circuit Court of Appeals affirmed the trial court’s dismissal of a lawsuit citing the application of CERCLA’s petroleum exclusion. The Court held that the site investigation at a former gas station did NOT identify anything other than petroleum or fractions thereof. Consequently, the Plaintiff did not plausibly allege any CERCLA “hazardous substances” were present at the site. The case was dismissed.
EPA Will Revise Emission Standards For Cars and Light Trucks for Model Years 2022-2025
By John Watson

On April 2, 2018, the EPA announced the results of its updated Midterm Evaluation (MTE) determination related to greenhouse gas (GHG) emissions standards for cars and light trucks for model years 2022-2025. The agency stated that the current standards are not appropriate, and that it will work with the National Highway Traffic Safety Administration to set a notice and comment rulemaking to set new standards.

Hazardous Waste Generators, Transporters, and TSDFs Should Plan Now for EPA’s 2018 e-Manifest System
By John Watson

Authorized by Congress in 2012, the EPA’s Electronic Manifest System (e-Manifest) will become effective on June 30, 2018. When they register, generators, transporters, and receivers of hazardous wastes will be able to use this system to facilitate the electronic transmission of the uniform hazardous waste manifest form. States must adopt the provisions of the final rule in order to enforce them under state law and to maintain manifest program consistency.

Colorado Court of Appeals Upholds Warrantless Inspections at Oil and Gas Sites
By John Watson

On March 22, 2018, the Colorado Court of Appeals held that the Colorado Oil and Gas Conservation Commission’s authority to undertake unannounced, warrantless inspections (i.e., administrative searches) at oil and gas sites does NOT violate the U.S. or Colorado constitutions.

Colorado Legislation Could Halt Oil and Gas Production
By John Watson

House Bill 1071, if enacted as written, will obviate the need for the Colorado Supreme Court to resolve the dilemma caused by the Colorado Court of Appeals opinion in the Martinez case. As described in earlier Spencer Fane posts, that appellate decision effectively elevated the protection of public health and the environment over the interests of mineral rights owners and developers. The issue before the Colorado Supreme Court is whether the current statute dictates that the Colorado Oil & Gas Conservation Commission (COGCC) implement a statutorily directed balancing act without giving priority to any particular interest.

Tougher Oil & Gas Rules in Colorado Set to Take Effect
By John Watson

On February 13, 2018, the Colorado Oil and Gas Conservation Commission approved new rules to require the industry to track the location of oil and gas pipelines. The new rules stem from an explosion in Firestone, Colorado caused by a leaking pipeline that destroyed a house and killed two people on April 17, 2017. That disaster triggered a massive public outcry, directives from the Governor, and now significant revisions to state regulations.

Colorado Supreme Court Will Address Oil and Gas Development in its Review of the Martinez Case
By John Watson

On January 29, 2018 the Colorado Supreme Court agreed to hear the appeal of the Martinez case. The state’s high court will decide whether, in the agency’s review of oil and gas permit applications, the Colorado Oil and Gas Conservation Commission (“COGCC”) must elevate “public health and the environment” over other factors identified in the agency’s organic statute.

Denver Post Supports AG’s Appeal of Martinez Case to Colorado Supreme Court
By John Watson

As stated here in an earlier post, the Martinez decision, if upheld by the Supreme Court, has major implications for all fossil fuel as well as hardrock mineral development in the state of Colorado.
The Future of Oil and Gas Development in Colorado – Appeal by Attorney General of the Martinez Case Raises the Stakes

By John Watson

On May 18, 2017, the Colorado Attorney General filed an appeal with the Colorado Supreme Court seeking to overturn the recent 2-1 decision of the Colorado Court of Appeals which arguably conflicts with the long-standing interpretations embraced by the Colorado Oil and Gas Conservation Commission (“OGCC”) related to its organic statute.