SLIDES: Air Monitoring and Litigation Update

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Air Quality Impacts from Oil and Gas Development: Air Monitoring and Litigation Update
Presented by John Jacus - Davis Graham & Stubbs LLP – Denver, CO
Natural Resources Law Center – Hot Topics Program
Denver, CO – January 27, 2012
Summary of Topics Covered

• Air Quality Challenges for Oil & Gas Operators
• Ambient Air Monitoring and Health Assessments
• A Summary of Significant Litigation About Air Quality Impacts of Oil and Gas Development
  – Individual Tort Claims
  – Class Action Suits
  – “Aggregation” Challenges
  – NEPA “Plus” Suits
Barnett Shale in Dallas – Ft. Worth, Texas Area
Niobrara Shale Play
Colorado AQCRs and Stationary Sources

Source: Colorado APCD, February 2009
Department of Environmental Protection, Bureau of Oil and Gas Management – Marcellus Shale Map
Department of Environmental Protection, Bureau of Oil and Gas Management Well Permits Issued

Total Permits Issued January thru October 2010 - 5,360
Non Marcellus Shale - 2,765 Permits Issued
Marcellus Shale - 2,595 Permits Issued

Updated 11/01/2010
Ambient Monitoring Challenges

- Availability of monitoring stations, devices
- Weather effects on ambient concentrations
- Difficulty in identifying source signatures
- The presence of other sources and the measurement of low concentrations
- Transitory and dynamic nature of reported odors and others air impacts of oil and gas operations,
Ambient Air Sampling and Study of Oil and Gas Impacts

• Concerns about air impacts in new and existing fields have led to increased monitoring and studies
• Stationary monitors expensive, limited
• Mobile monitoring employed more frequently in new development areas, but also expensive
• Multiple monitoring studies ongoing in areas of increased activity (CO, PA, TX, UT, WY)
Texas Air Monitoring

- Mobile monitoring in 2009 by UT/TCEQ
  - 2010 report recognized difficulty in identifying source signatures in air sampled near compressor stations, deemed partial success
- TCEQ deploying additional stationary monitors in Barnett Shale counties
- Produced water tanks to be studied
Pennsylvania Air Monitoring

• Penn. DEP has conducted three short-term studies
  – NE Pennsylvania, January 2010
  – SW Pennsylvania, November 2010
  – North Central PA, May 2011

• Unable to detect concentrations of compounds likely to trigger air-related health issues
Wyoming Monitoring Studies

• **Sublette County Air Toxics & Ozone**
  – Wyoming DEQ and Sublette County
  – Sampling in 2009
  – 14 toxics monitors, 5 ozone monitors
  – Report submitted in June 2010
  – Health Risk Assessment in January 2011
  – No potential for significant acute health impacts from air toxics detected
  – Excess cancer risk of < 50 in 1 million; < urban areas
Utah DEQ Air Monitoring

- Uinta Basin monitoring in 2010 for ozone, NOx, meteorological data
- Utah DEQ working with BLM and Forest Service on ozone monitoring
- DEQ partnering with Utah State Univ. and Eastern Utah Secure Energy Project in wintertime ozone study
  - 10 portable monitors deployed
Colorado COGA Study

• COGA did Pathway Analysis and Risk Assessment Report (QEPA, 2008)
  – Air pathway analyzed based on monitoring data obtained during drilling in Garfield Co., other data available
  – No significant contribution of VOCs or carbonyls from drilling
  – Risk assessment methodology proved very conservative in estimating risk
The Three-State Study

- A pilot project of BLM, EPA, U.S. Forest Service, Utah, Wyoming, Colorado, Tribes & Stakeholders
- Regional assessment of air quality conditions focused on oil and gas development areas in NW Colorado, SW Wyoming and Eastern Utah
- Monitoring stations and “data warehouse” being implemented to support regional modeling
- Goal is to consolidate state/federal agency resources for air quality analyses
Litigation Involving Alleged Air Quality Impacts and Injury

• Individual Tort Actions
• Class Action Suits
• Permit Appeals and Source “Aggregation” Challenges
• NEPA “Plus” Challenges
• Not Covering Climate Litigation, Deadline Suits, and Numerous Petitions
Individual Tort Actions

- **Strudley v. Antero Resources** (CO) – Strudley family v. operator, driller, fracing contractor; claims in nuisance, negligence, trespass; allege health effects, reduced property value; alleges H$_2$S, Benzene, Toluene, other toxics exposure
- **Zimmerman v. Atlas America** (PA) – Claims in nuisance, trespass, negligence; allege release of noxious and harmful gases into air
- **Sizelove v. Williams Prod. Co.** (TX) – Claims for nuisance, trespass, negligence; allege compressor operations and drilling/fracing polluted the air with toxics
- **Heikel-Wolfe v. Williams Prod. Co.** (TX) – same as Sizelove
Class Action Litigation

- **Evenson v. Antero Resources (CO)** - Plaintiff landowners in Battlement Mesa v. operator and “John Doe” well service providers; complain of odor incident at a well site
- **Tucker v. Southwestern Energy Co. (E.D. Ark.)** – Class of Fayetteville Shale surface owners alleging fracing-related air quality impacts, pollution; nuisance, trespass, negligence and strict liability theories
- **Berry v. Southwestern Energy (AR)** – consolidated with Tucker
Class Action Litigation (cont.)

• **Ginardi v. Frontier Gas Services** (AR) – Class of surface owners within one mile of compressor/transmission stations; allege pollution of atmosphere with harmful gases; nuisance, trespass, negligence, etc.

• **Lester v. Frontier Gas Services** (E.D. Ark.) – Class of surface owners within one mile of compressor stations; allege emission of noxious gases; nuisance, trespass, negligence and strict liability theories
Aggregation Permit Appeals

- Kerr-McGee Gathering - Frederick Compressor Station (third time around) – Permit renewed without aggregating; Order denying petition by WEG; on appeal to Tenth Circuit; notice of settlement published for comment

- BP America Production - Florida River Compression Facility, Subject of EAB Appeal (in ADR process), notice of settlement published

- Summit Petroleum - EPA Region 5 determination to aggregate; Summit appeal in Sixth Circuit; briefed, not argued yet

- Marcellus Challenges:
  - Appalachia Midstream (WV) – directed verdict;
  - Laurel Mountain, MarkWest Liberty and Ultra Resources (PA), all in discovery, no hearings set with EHB or trial set in M.D. Pa.

- Williams Four Corners, Sims CDP (NM) – Order granting petition by WEG to object to Title V permit renewal re: “common control” factor, contracts
NEPA “Plus” Litigation

• **NRDC v. BLM** (D. Colo.) – 2006 EIS for Roan Plateau challenged on basis of BLM’s “inadequate” evaluation of AQ impacts

• **Ctr. for Biol. Diversity v. BLM** (N.D.Cal.) – oil and gas leases in CA challenged on grounds of failing to adequately consider AQ and other impacts, ozone issues, etc.

• **WEG v. BLM** (D. Colo.) – Challenge to 12 leases in Niobrara on NEPA and CAA Conformity Rule grounds (some leases in Denver non-attainment area for ozone); settlement lodged with court, open for comment
Conclusion

• Numerous CAA Citizen Suits and Petitions in addition to tort actions
• Those alleging harm and exposure will need to use available data; implicates the need for more monitoring, health assessment efforts
• Regulators and Industry will be challenged to address citizen concerns about air quality impacts of regulated oil and gas activity more fully and convincingly, but suits will be filed
Questions?

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