

WEEKLY HIGHLIGHTS AT-A-GLANCE**FEDERAL – Regulatory**

- **BLM ANWR Drilling – Alaska.** In late December 2018, the Bureau of Land Management (BLM), Alaska State Office, released its [Coastal Plain Oil and Gas Leasing Program Draft Environmental Impact Statement](#) (Draft EIS) as the next step towards implementing its statutory authority as passed by Congress last year for an oil and gas leasing program within the Arctic National Wildlife Refuge Coastal Plain. According to the BLM, the area comprising the Coastal Plain includes approximately 1.6 million acres within the approximately 19.3 million-acre Arctic National Wildlife Refuge. According to the announcement, the “Leasing EIS will serve to inform BLM’s implementation of the Tax Act, including the requirement to hold not fewer than two lease sales area-wide. It may also inform post-lease activities, including seismic and drilling exploration, development, and transportation of oil and gas in and from the Coastal Plain. Specifically, the Leasing EIS will consider and analyze the potential environmental impacts of various leasing alternatives, including the areas to offer for sale, and the terms and conditions (i.e., lease stipulations and best management practices) to be applied to leases and associated oil and gas activities to properly balance oil and gas development with existing uses and conservation of surface resources, and to limit the footprint of production and support facilities on Federal lands to no more than 2,000 surface acres.” The Draft EIS is now open for public review and comment. The public comment period is open through February 11, 2019. [Read more.](#)
- **EPA Administrator Nominee.** *(Update to 12/3/18 Weekly Report)* Last Wednesday, President Trump officially nominated Acting Administrator Andrew Wheeler to stay on as Administrator of the Environmental Protection Agency (EPA), a position he has held in an acting capacity since July when then-EPA Administrator Scott Pruitt stepped down. Wheeler had previously been the EPA Deputy Administrator. Wheeler also previously served as a special assistant in the EPA’s Pollution Prevention and Toxics office during the George H.W. Bush presidency, and as an attorney as co-chair of the Energy and Natural Resources team at the Faegre Baker Daniels law firm. According to supporters, during his time leading the EPA, Wheeler has “carried on Trump’s deregulatory agenda while implementing it in a more disciplined, understated, and professional manner.” [Read more.](#)

FEDERAL – Judicial

- **Leasing; Surface Use; Trespass – Tenth Circuit (Colorado).** On December 26, 2018,

in *Bay v. Anadarko E&P Onshore LLC* (Case No. 17-1374), the U.S. Court of Appeals, Tenth Circuit, on appeal from a Colorado federal district court, addressed a case concerning a trespass claim by plaintiffs-appellants charging that that defendants-appellees exceeded the scope of an easement by using excessive surface land to drill for oil and gas. The court held that a deed reserving mineral rights with the specific right to use the surface as “convenient or necessary” to access the mineral estate does not give the mineral owner or the lessee any greater rights than the common law “due regard” or “accommodation doctrine” standards. The court noted that “Ordinarily, a lessor is not liable for its lessee’s trespasses” but “a lessor may be liable if it authorized or ratified the trespass.” The court reversed and remanded the case for further proceedings, holding that they “leave this for the district court to consider at the appropriate time.” [Read more.](#)

- **Leasing; Royalties; Class Actions – New Mexico.** On December 19, 2018, in *Ulibarri v. Energen Resources* (Case No. 18-294 RB/SCY), the plaintiff moved to compel the defendant to produce royalty owners’ addresses and telephone numbers in connection with a class action seeking royalty payments. The defendant refused to provide the information claiming it “is unjustified because it intrudes on the privacy of the individuals Plaintiff intends to contact; is not necessary, reliable, or proportional to the needs of the case; and is duplicative and less current than information Plaintiff is already obtaining in a separate lawsuit.” The U.S. District Court for the District of New Mexico held that addresses and telephone numbers of the royalty owners are relevant to issues of class certification, including numerosity, and to ascertaining which royalty owners are members of the proposed class, and that production of the information sought has not been shown to be burdensome, thus ordering the defendant to “provide the contact information Plaintiff requests.” [Read more.](#)
- **Leasing; Royalties; Arbitration – Ohio.** On December 20, 2018, in *Hale v. Chesapeake Exploration, L.L.C.* (Case No. 4:18-cv-2217), the U.S. District Court for the Northern District of Ohio (Eastern Division) upheld an arbitration award despite the plaintiff-lessors allegation that the arbitrators “exceeded their powers” and “effectively dispensed their own brand of justice.” The court rejected that argument and instead held that plaintiffs did not demonstrate that any of the statutory provisions that would allow the court to vacate the arbitration award were shown and there was no ground on which to vacate that award. [Read more.](#)
- **Leasing; Royalties – Ohio.** On December 14, 2018, in *Shanesville Investments LLC v. Eclipse Resources I, LP* (Case No 2:18-cv-237), the U.S. District Court for the Southern District of Ohio (Eastern Division) ruled against plaintiff-lessors in a royalty dispute. The lessors alleged that the defendant “improperly deducted expenses before calculating royalty payments in that defendant sold extracted wellhead product to unaffiliated third parties for processing and subsequently deducted the costs of this processing from their royalty payments.” The court stated that Ohio does not follow

a bright-line “at-the-well” or “marketable product” rule regarding the calculation of royalties in oil and gas leases and royalty provisions must be interpreted through traditional rules of contract construction. In so doing, the court found that under the lease, royalties are to be calculated using gross proceeds, rather than net proceeds. The court also noted that “where gas is processed for the recovery of liquefiable hydrocarbon products prior to sale, production costs are deductible.” [Read more.](#)

- **Nuisance – Pennsylvania.** On December 27, 2018, in *Russell v. Chesapeake Appalachia, L.L.C.* (Case No. 4:14-CV-00148), the U.S. District Court for the Middle District of Pennsylvania held that a nuisance claim against an oil and gas operator was time-barred. In the case, the plaintiffs claimed that “Chesapeake’s natural gas wells created excessive noise, traffic, dust, light, and air pollution, and have impaired Plaintiffs’ water quality.” The court held that “because Plaintiffs filed the present action more than two years after their claims accrued, Plaintiffs’ nuisance action is barred by the statute of limitations” and the court would not decide whether the actions alleged amounted to a nuisance as a matter of law. [Read more.](#)

STATE – LEGISLATIVE

- **Designated Wild Areas – Indiana.** On January 7, SB 286 was introduced by Sen. Mark Stoops (D). The bill would designate 13 specified areas within certain state forests as “designated wild areas” and specifies certain activities that are prohibited or allowed within a designated wild area. Responsibility for management and enforcement of these areas falls within the purview of the Department of Natural Resources. “Energy development, including wind energy, solar energy, oil and gas development, and gathering or harvesting wood for biomass consumption” are prohibited in a designated wild area. [Read more.](#)
- **Worker Misclassification – Indiana.** On January 7, SB 289 was introduced by Sen. David Niezgodski (D). The bill would require the Department of Labor, Department of Revenue, Department of Workforce Development and the Workers Compensation Board to prepare an annual report for the legislature regarding the number of employers who improperly classified at least one worker, the total number of improperly classified workers and an estimate of the costs to the state as a result of misclassified employees. The bill would take effect July 1, 2019 and would expire December 31, 2021. [Read more.](#)
- **Uniform Power of Attorney – Mississippi.** On January 8, SB 2069 was introduced by Sen. Terry Burton (R). The bill would create the Mississippi Uniform Power of Attorney Act. Adopted by the Uniform Law Commission in 2006, the Uniform Power of Attorney Act replaces the 1979 Uniform Durable Power of Attorney Act, on which Mississippi’s existing durable powers of attorney law is largely based. In 2013, the state Uniform Power of Attorney Act Task Force released a [draft report](#) on this proposed legislation

and the need for its enactment. The report noted that “Coupled with the fact that the current structure of the law in Mississippi does not provide sufficient protection to businesses and financial institutions which accept and rely on a power of attorney for their authority to take certain actions, many businesses and financial institutions are refusing to accept a power of attorney. Legislation is needed to increase the acceptance of powers of attorneys while also adequately protecting institutions from claims arising from the acceptance of a power of attorney.” [Read more.](#)

- **Lease Sale Bidding – Montana.** (*Update to 1/7/19 Weekly Report*) The Senate Natural Resources Committee will hold a [committee hearing](#) on SB 41 on January 16, 2019 at 3:00 pm in Room 303 at the State Capitol in Helena. For more information attendees can call 406-444-3064. The bill would allow written bids for state trust land oil and gas leases and eliminate the current requirement that bids on oil and gas lease sales be made orally. [Read more.](#)
- **State Regulations – New Mexico.** On January 6, SB 286 was pre-filed by Sen. Richard Martinez (D). The bill would amend current law to make changes to the Oil and Gas Act concerning powers of the Oil Conservation Commission and the Oil Conservation Division regarding violation enforcement, notice, public hearings and cumulative remedies. The bill also creates a new provision regarding a reporting requirement by the Oil Conservation Division which will make public names of violators among other information. If passed, the bill would be effective July 1, 2019. [Read more.](#)
- **Well Setbacks; Disturbances – West Virginia.** On January 9, HB 2073 was introduced by Del. Terri Sypolt (R). The bill would amend current law to change the setback from horizontal well work activity to a residence from 625 feet to 1,500 feet. It would also require continuous monitoring of air, noise, dust and particulates and would require the operator to implement the maximum available control technology to limit the levels. The monitoring would not apply to or affect any well work permitted for a horizontal well prior to the enactment of this section or to permit applications pending prior to the bill’s effective date. [Read more.](#)
- **Severance Tax Allocations – West Virginia.** On January 9, HB 2087 was introduced by Del. Erika Storch (R). The bill would reallocate and dedicate three percent of oil and gas severance tax revenues up to \$20 million annually to the oil and gas producing counties of origin and their respective municipalities. The bill establishes state and local oil and gas county reallocated severance tax funds and provides for distribution of the moneys to the county commissions and governing bodies of the municipalities by the State Treasurer. The bill also establishes a procedure for determining the amounts each oil and gas producing county and their respective municipalities are to receive and requires the creation of local funds into which moneys are to be deposited and requires the funds to be used solely for economic development projects and infrastructure projects. The bill also provides restrictions on fund expenditures, sets

forth duties of the State Tax Commissioner, requires a report of expenditures to the Joint Committee on Government and Finance, provides for audits of distributed funds when authorized by the Joint Committee on Government and Finance, and authorizes legislative and emergency rules. [Read more.](#)

- **Horizontal Well Control Standards – West Virginia.** On January 9, HB 2102 was introduced by Del. Barbara Fleischauer (D). The bill contains similar provisions to HB 2073 noted above but also requires certain notice information and permits landowners to be compensated for any decrease in the values of the land for its highest and best use. The bill also requires the notice of a claim be provided to an occupant of a residential structure on the property and establishes a statute of limitations for filing of such claims. [Read more.](#)

STATE – Regulatory

- **Well Setbacks – Colorado.** On December 18, 2018, the Colorado Oil and Gas Conservation Commission broadened a requirement that oil and gas operations be located at least 1,000 feet from schools and child care centers and must be calculated from outside areas, not just from building structures. For example, the new 1,000-foot required minimum distance from schools will be measured from areas such as playgrounds, sports fields, and temporary classrooms. Under the current rule, the setback is 1,000 feet from “permanent” school buildings. [The new rule](#) “redefines a school and requires well operators to notify local governments and owners of hospitals, extended care centers, and correctional facilities which regularly serve 50 or more people before activity begins.” The rule change, which was amended after a compromise was reached between various stakeholders, including the oil and gas industry, school districts, and Anadarko Petroleum Corp., was praised by Colorado Oil & Gas Association President Dan Haley. “The oil and gas industry participated in countless meetings and conversations over the past year with schools and school districts, and participating environmental organizations, and we are proud of what has been accomplished,” said Haley. The revisions are set to take effect January 30, 2019. [Read more.](#)
- **Greenhouse Gas Emissions – Pennsylvania.** On January 8, Gov. Tom Wolf (D) signed an Executive Order, *Commonwealth Leadership in Addressing Climate Change and Promoting Energy Conservation and Sustainable Governance* ([EO No. 2019-01](#)), which establishes the state’s goal to cut greenhouse gas emissions by striving “to achieve a 26 percent reduction of net greenhouse gas emissions statewide by 2025 from 2005 levels, and an 80 percent reduction of net greenhouse gas emissions by 2050 from 2005 levels.” However, the “order is nonbinding and does not require future governors to follow it after Wolf leaves office when his second term ends in 2023. Making major progress will likely require agreements with the Republican-controlled Legislature.” [Read more.](#)

STATE – Judicial

- **Mineral Deeds; Trusts; Heirship; Probate – Texas.** On December 19, 2018, in *Yates Energy Corp. v. Broadway National Bank* (Case No. 04-17-00310-CV), the Texas Court of Appeals, Fourth District (San Antonio) addressed plaintiffs seeking a declaration as to the validity of an amended correction deed covering real property interests in DeWitt County and Gonzales County. The court held that a latter amended correction deed did not comply with statutory requirements and as a result it did not replace an earlier mineral deed. Specifically, “by including only the signatures of the original parties to the 2005 Mineral Deed, and not the signatures of the parties’ heirs, successors, or assigns, the 2013 Amended Correction Deed did not comply with the requirements of section 5.029 of the Code, and as a result, it did not replace the 2005 Mineral Deed.” [Read more.](#)

INDUSTRY NEWS FLASH:

◆ **API releases its State of American Energy 2019 report.** Last week, the American Petroleum Institute (API) held its State of American Energy event in Washington, DC where API’s annual [“America’s Generation Energy”](#) report was released. Highlights from the report and the event included new polling on Americans’ views on key energy issues, with 78 percent of voters supporting increased natural gas and oil production, among other metrics. API President and CEO, Mike Sommers, also spotlighted our country’s leadership in energy production. “As the world’s leading natural gas and oil producer, our nation is in a position of strength, after decades of feeling captive to faraway events and to the decisions of others.” [Read more.](#)

State-by-State Legislative Session Overview

California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia and Wyoming are in regular session. The **District of Columbia, Puerto Rico** and the **United States Congress** are also in regular session.

The following states adjourned their 2018 legislative sessions on the dates provided: the **District of Columbia, Michigan, Ohio** and **Rhode Island** (December 31); **Massachusetts** (January 1); the **United States Congress** (January 3); **Wisconsin** (January 7); **Illinois** and **New Jersey** (January 8) and **New York** (January 9).

The following states are scheduled to convene their 2019 legislative sessions on the dates provided: **Arizona, Arkansas, Georgia, Iowa, Kansas** and **Washington** (January 14); **Alaska, New Mexico** and **Wisconsin** (January 15); **Hawaii** (January 16) and **Oregon** (January 22).

Ohio Republican Gov. John Kasich has until January 10 act on legislation presented on or after December 21 or it becomes law without signature. **District of Columbia** Democratic Mayor Muriel Bowser has 10 days from presentment, not including weekends or holidays, to sign or veto a bill or it becomes law without signature. **Illinois** Republican Gov. Bruce Rauner has 60 calendar days while the legislature is in session to act on legislation or it becomes law without signature. **Massachusetts** Republican Gov. Charlie Baker has 10 days after a bill has been presented to either sign or veto the measure or it becomes pocket vetoed. **New York** Democratic Gov. Andrew Cuomo has 10 days from presentment, Sundays excepted, to sign or veto legislation or it becomes law without signature. **U.S.** Republican President Donald Trump has 10 days from presentment to act on legislation, Sundays excepted, or the bill is pocket vetoed.

The following states are currently holding 2019 interim committee hearings: [Alabama](#), [Alaska](#), [Arizona](#), [Arkansas](#), [Florida House](#) and [Senate](#), [Hawaii](#), [Iowa](#), [Kansas](#), [Nevada](#), [New Mexico](#), [Oklahoma House](#), [Oregon](#), [Utah](#), [Washington](#), and [Wisconsin](#).

The following states are currently posting 2019 bill drafts, pre-files and interim studies: [Arizona](#), [Arkansas](#), [Florida House](#) and [Senate](#), [Georgia](#), [Iowa](#), [Kansas House](#) and [Senate](#), [Kentucky](#), [Nevada](#), [Oklahoma House](#) and [Senate](#), [Utah](#), and [Washington](#).

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