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Haynesville Shale: Local Regulation and State Preemption

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Part One: The Evolution of Regulation in the Haynesville Shale

I. Haynesville Shale

In recent years, the oil and gas industry has witnessed the discovery of groundbreaking natural gas shale plays throughout the world. In the United States, shale plays such as the Haynesville Shale in North Louisiana, the Barnett Shale in Texas, the Marcellus Shale in Pennsylvania and New York, and the Fayetteville Shale in Arkansas are but a few potential reserves that stand to fuel our nation’s energy needs for decades to come.

The Haynesville Shale is a geological formation that lies approximately 10,500 to 13,000 feet below the surface in the area of northwestern Louisiana, southwestern Arkansas and eastern Texas, with most of the formation in Louisiana. The Haynesville Shale hot spot is primarily in five parishes - Caddo, Bossier, DeSoto, Sabine and Red River. More limited development of the Haynesville Shale can also be found in Webster, Bienville, and Natchitoches Parishes. It is estimated that the Haynesville Shale could hold more than 243 trillion cubic feet of natural gas, making it potentially the largest onshore natural gas find in U.S. history. At that volume, it contains the equivalency of over 30 billion barrels of oil, or nearly 18 years of current U.S. oil production.

In March of 2008, news of the Haynesville Shale went public and North Louisiana became a hotbed of leasing, drilling, and development activity. Record high natural gas prices and declining oil prices created positive market conditions for the rapid development of the Haynesville. Numerous companies, many for the first time, made the decision to commence operations in Northwest Louisiana from their corporate headquarters in states like Texas, Oklahoma, Wyoming, and Colorado.

In October of 2009, Department of Natural Resources Secretary Scott Angelle announced that activity in the Haynesville Shale accounted for nearly 10.4 percent of all of the then oil and gas exploration in the United States. Secretary Angelle also noted that “five percent of the nation’s drilling activity is in one parish — DeSoto.” As of February 24, 2011, there were 1,945 Haynesville Shale wells. Of those wells, 1,036 have been completed and are producing wells, 437 are permitted...
awaiting operations, 125 are in the process of drilling, and 347 are permitted but not yet drilling.

Natural gas production in the Haynesville Shale encompasses a varied landscape that includes rural, urban, residential, and commercial acreage. The rise of urban drilling within corporate limits has resulted in unprecedented rules and regulations at the state and local levels in the state. The new frontier of urban drilling and development has raised concerns relative to safety and security. Early in the development of the play, local elected officials visited with lawmakers in the Fort Worth, Texas area to get a better understanding of the impact of urban drilling from the ongoing development of the Barnett Shale. These visits and analysis of implemented Texas local ordinances prompted municipalities in Northwest Louisiana to circulate a draft of a proposed local oil and gas ordinance during the winter of 2008-2009.

As local officials were looking to enact their regulations, officials at the Louisiana Office of Conservation officials were discussing their own regulations to address the new phenomenon of urban drilling. As a result, both the Louisiana Office of Conservation (“LOC”) and various local governments enacted new oil and gas regulations. Local governmental bodies enacted ordinances that regulated all oil and gas related activity within their jurisdiction, not just the new shale drilling and the related developmental concerns. The LOC focused their new regulation with a statewide order specific to the Haynesville zone, which complements the existing established body of comprehensive oil and gas regulations.

For the first time in the regulation of oil and gas production in Louisiana, ordinances were being passed to regulate noise and road use; a continuum of the new frontier of urban drilling. There is strong opinion about where state and local authorities begin and end relative to oil and gas operations. Many fear that having the State and local governments regulate activity is duplicative, expensive and cumbersome.

II. State Regulatory Authority of Oil & Gas Activities in Louisiana

A. Overview of State Regulatory Authority

The Haynesville Shale development has brought to light how many different state agencies are involved in the day to day operations of the oil and gas exploration and production. The Department of Transportation and Development (“DOTD”) regulates state roadways. La. R.S. 32:1, et seq. Oil spills resulting from oil and gas operations are regulated by the Department of Environmental Quality (“DEQ”) under La. R.S. 30:2451, et seq. Both the Department of Health & Hospitals (“DHH”), under La. R.S. 40:5.6-5.9, and the DEQ regulate the issues relating to drinkable water. La. R.S. 40:4.5-5.9.

While the aforementioned state agencies are involved in the process of oil and gas exploration and production, the state agency most crucial
to this field is the LOC. Created in 1908 as the Louisiana Commission for the Conservation of Natural Resources, the present day LOC has the statutory authority to regulate oil and gas activities in the state of Louisiana. The LOC has jurisdiction over the oil and gas industry, including the drilling and production of oil and gas wells, disposal of exploration and production waste, plugging and abandoning wells and issues related to interstate pipelines.

According to the Office of Conservation page of the department’s website, www.dnr.louisiana.gov, the overview of the office is as follows:

*The Office of Conservation has primary statutory responsibility for regulation and conservation of oil, gas, lignite, and other natural resources.*

Conservation's objectives are to conserve oil, gas, and lignite resources; to regulate the exploration and production of oil, gas and other hydrocarbons and lignite; to control and allocate energy supplies and distribution; and to protect public safety and the State's environment from oilfield waste, including regulation of underground injection and disposal practices.

*The Commissioner of Conservation is responsible for administering all activities involving the conservation and development of all natural and mineral resources of the state.*

The LOC's statutory authority over oil and gas exploration and production is found under La. R.S. 30:1, *et seq.* Under that authority, the Commissioner of Conservation (the “Commissioner”) may issue other rules or orders as he deems necessary for the fulfillment of his statutory duties.

Relevant to this discussion, under La. R.S. 30:28(F), the LOC has the exclusive authority to regulate drilling and mining in Louisiana. That statute provides, in relevant part that: “*the issuance of the permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.*”

The LOC handles its responsibilities through district offices around the state to supply trained, experienced personnel for ground support in regulating local exploration and production activities. In regard to the Haynesville Shale region, the Shreveport district office has jurisdiction and the Commissioner is able to rotate staff from other offices to give coverage to any area that is in need of added resources.
There are twelve (12) Conservation Enforcement Specialists based in the Shreveport District Office. These agents are responsible for oversight of operations, periodic inspections and response to complaints. Their duties encompass the enforcement of all regulations, orders and policies under statutes and administrative regulations.

B. Office of Conservation

1. Office of Conservation Rules & Regulations

Many statutes, administrative orders, emergency rules and memoranda govern oil and gas operations within Louisiana. Most notably, LAC 43:XIX or Rule 29(b), as it is commonly called, is the definitive LOC regulation regarding drilling, completion, workover and safety. Generally, Rule 29(b) covers a comprehensive list of oil and gas activities which include applications to drill, other applications, records, casing, cementing, diverter systems and blowout Preventers, well control equipment and training, drilling fluids, directional surveys, well surveys, formation evaluation, completions, workovers, plugging and abandonment, exceptions and hearings.

The LOC regulates the pressure levels that are utilized when the process of hydraulic fracturing is used to break up a targeted oil and gas formation, as well as when the well goes into production. The pressure for the injection of waste is another activity that the LOC controls or regulations. Every Tuesday of any given week, the Commissioner conducts unit hearings to determine the best geological formation to develop each reservoir.

2. Development of Statewide Order U-HS

In order to fully understand the interplay between state regulation and the local regulation of oil and gas operators in North Louisiana, it is imperative that full discussion of overlapping state and local regulations be included. Toward that end, full treatment of Statewide Order U-HS ("Order U-HS") and the three local government ordinances on this issue will be addressed in this presentation.

As the Haynesville Shale continued to develop, particularly in more urban areas of Northwest Louisiana, the LOC wanted to ensure that all facets of drilling were reviewed with an eye toward urban shale development. Similar to the treatment of the Austin Chalk Formation in Statewide Order 29-S (September, 1997), the LOC determined that the Haynesville Zone could be regulated in a separate statewide order. In formulating this statewide order, the LOC would continue the statutory and historical responsibility of managing these issues specific to a unique geological formations in a uniform manner. As is the custom of the LOC, input was sought from local communities relative to local concerns.

In the winter of 2008, the Commissioner appointed members to a committee, chaired by Shreveport attorney, David Smelley. This
committee was tasked with consideration of regulations for urban drilling in the Haynesville Shale development. The shale activity was considered urban anywhere drilling operations were sited within seven hundred fifty feet (750') of a residence, religious institution, public building or public park. This committee met during January and February of 2009, before a draft of the committee’s recommendations was transmitted to the Commissioner in mid-February.

The draft recommendations included regulation of areas of oil and gas operations that had not been explicitly regulated in the past by the LOC. Included in the comprehensive statewide order were issues such as noise, dust, vibrations, lighting and hours of operation.

After release of the initial draft statewide order and in accordance with rulemaking procedures, input from the public was solicited. A notice to interested parties regarding the draft order was transmitted on April 8, 2009. The notice included local governments in the Haynesville Shale area and all Haynesville Shale operators with active wells and/or permits prior to that date. The provided notice included notification of an opportunity to submit written comments for review and consideration by the LOC. Thereafter, the draft and comments were gathered and a public hearing was scheduled. On May 21, 2009, a public hearing was held at the Shreveport Exhibit Museum to further the public opportunity for comment, specifically communication of local concerns.

On June 22, 2009, Commissioner James “Jim” Welsh signed Order U-HS, an “order establishing reasonable and uniform practices, safeguards, and regulations for present and future operations related to the exploration for and production of gas from the Haynesville Zone in urban areas.” The effective date of said order was August 1, 2009.

3. Provisions of Order U-HS

The purpose of Order U-HS is stated in the “Findings” section thereof:

That in order to protect the health, safety and general welfare of the public, minimize the potential impact to property and mineral rights owners, protect the quality of the environment, and encourage the development and production of gas from the Haynesville Zone, it is necessary to establish reasonable and uniform practices, safeguards and regulations for present and future operations related to the exploration for and production of gas from the Haynesville Zone in urban areas.

Order U-HS applies “only to wells which are drilled to or completed in the Haynesville Zone, and which are within seven hundred fifty (750) feet of a residence, religious institution, public building or public park in an urban area...” (Order U-HS, Part 1).

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In regard to well setbacks, except as provided by exception within Order U-HS (Part 2.B and C), no well may be drilled within five hundred feet (500') from any residence, religious institution, public building or public park located in an urban area. (Part 2.A). It is important to note that the five hundred foot (500') distance is also used elsewhere in state law for oil and gas drilling operations. The substance of Order U-HS lies in Part 3 of the same in a section entitled “Drilling, Completion & Production Operations.” Therein, the regulations provide for a six foot (6’) fence to enclose the wellhead and production facilities. (Part 3.A). In addition, provisions on the maintenance of the drill site and on-site storage of pipe and equipment are included. (Part 3B). This section also makes careful reference to the requirements governing disposal of on-site exploration and production waste contained in Statewide Rule 29(b).

Order U-HS addresses additional aspects of the drilling process that may affect adjacent landowners, such as dust, vibration, odors (Part 3C), and on-site lighting (Part 3D). Order U-HS calls on the regulated entities to “minimize, to the extent practicable” the effect these issues may have on the area around the activity. The flexibility that this provides to the operator is imperative so that each site can be individually designed to minimize issues particular thereto.

Regulations on the muffling of exhaust (Part 3E), venting and flaring of gas (Part 3F), and discharge of certain substances (Part 3G) are also incorporated into Order U-HS. Perhaps the most challenging provisions of Order U-HS for the oil and gas industry lie in the sections regulating “Work Hours” (Part 3H) and “Noise” (Part 3I). With reference to hours of operation, the section regulating same restricts construction activities, drillstem testing, open hole testing, all fracturing operations and deliveries of equipment and materials, which are limited to daylight hours, as defined in the definitions section (Definitions (B)). This is significant in that drillsite operations had never previously been limited in the state of Louisiana. Concern exists within the industry that the included restrictions will lengthen drilling schedules, increase costs, and even upset nearby residents. For example, fracturing operations will take longer to complete due to the included restriction of 24-hour fracturing.

The longest, most comprehensive regulation in Order U-HS lies in Part 3.I., dealing with acceptable noise levels. The noise limitations are intended to minimize the disruption to neighboring homes, religious institutions, public buildings or public parks in urban areas. While drilling and completion operations can be noisy, they are temporary. In an effort to minimize the temporary noise, Order U-HS sets out a system of compliance that begins prior to the commencement of operations and is sporadically monitored throughout. In the event of a noise complaint, the required monitoring works to ensure proper conformity with noise level standards as provided in the Order.
Prior to the commencement of any operation on a well governed by Order U-HS, a seventy-two (72) hour ambient noise study must be conducted to determine minimum compliance with noise level standards. (Order 3.1.1). This ambient level forms the basis for allowable decibel levels, measured at five hundred feet (500') from the wellhead, or other noise generating equipment. Regulated drillsites cannot exceed the ambient noise level by more than seven (7) decibels during daytime, five (5) decibels during nighttime, and ten (10) decibels during fracturing and flowback. (Order 3.1.2(a-c)). Additional intermittent increases are allowed for very short time frames only (Order 3.1.3).

While periodic monitoring is required to ensure compliance, in the event of a complaint from a covered entity regarding noise, the operator shall commence continuous monitoring within twenty-four (24) hours of the complaint. (Order 3.1.4). If a violation occurs, the operator will have twenty-four (24) hours to correct the violation before a “No Compliance Order” will be issued. (Order 3.1.5).

Compliance with Order U-HS can be achieved by utilizing noise mitigation equipment — sound walls, acoustical blankets, natural foliage, site design, mufflers or other accepted methods of sound mitigation. Ultimately, each regulated site can be custom designed to meet the requirements of the Order. In regard to the allowable decibel levels, it is worthy to note that the noise limits in Order U-HS are based on a noise study conducted on Haynesville Shale wells at different points during the drilling and completion process.

The last two sections of Order U-HS deal with Water Wells (Order 3.J.) and Road Use (Order 3.K.). Incorporating by reference La. R.S. 38:3097, et seq., and the rules and regulations promulgated by the LOC pursuant thereto, Order U-HS notes compliance must be achieved with the existing regulations for water wells drilled to supply water for drilling or fracturing operations. In the section of regulation related to road use, Order U-HS requires that an operator certify, in addition to the Application for a Permit to Drill for Minerals (Form MD-O-R), that they have supplied “the chief executive officer of any affected incorporated city, town or village, and parish, with a report regarding the anticipated routes of drillsite access.” (Order 3.K). It is important to note that the state, through the LOC or the DOTD, does not explicitly oversee activity on parish or city roads. This section was therefore included solely to provide direction to the affected municipalities regarding wellsite ingress and egress routes.

While specific enforcement authority is not cited in Order U-HS, the LOC has noted that existing authority covers enforcement of this Order, particularly in La. R.S. 30:1, et seq., specifically Sections 6(G) and 18 thereof. Authorized therein are Civil Penalties of not more than Five
Thousand Dollars ($5,000.00) a day for each day of violation and for each act of violation of a rule, regulation or order of the Commissioner.

III. Local Enacted Oil & Gas Ordinances in the Haynesville Shale

A. Bossier City

As a local governing body in the Haynesville Shale region, Bossier City commenced official consideration of a specific oil and gas ordinance in May of 2009. The stated authority to promulgate such an ordinance was based upon its municipal authority as provided in the Code of Ordinances City of Bossier City, LA, to-wit:

Part 1. Section 2.01. General powers.

*The City of Bossier City shall have and may exercise all the powers, rights, privileges and immunities which are now, or may hereafter be, or could be conferred upon municipalities by the constitution and laws of the state; all powers, rights, privileges and immunities heretofore conferred on the City by any special act and not inconsistent with this plan of government; and all other powers pertinent to the government of a City the exercise of which is not expressly prohibited by the constitution of the state and which, in the opinion of the City Council, are necessary or desirable to promote the general welfare of the City and the safety, health, peace, good order, comfort, convenience and morals of its inhabitants, as fully and completely as though such powers were specifically enumerated in this plan of government, and no enumeration of particular powers in this plan of government shall be taken to be exclusive but shall be held to be in addition to the general grant of power.*

On June 2, 2009, the Bossier City Council enacted oil and gas regulations in the form of Ordinance 40 of 2009 ("Ordinance 40").

Ordinance 40 was crafted from various existing oil and gas ordinances, particularly from the Barnett Shale area and is largely based on the circulated draft of the proposed oil and gas ordinance from the spring of 2009. The Bossier City Council passed Ordinance 40 prior to the final signature to Order U-HS by the Commissioner, but after the public hearing over same was held on May 21, 2009. Ordinance 40 covers many of the same issues as Order U-HS and exclusively focuses on oil and gas related operations.

While the applicability of this ordinance is within all areas of Bossier City, Ordinance 40 is subdivided into regulations for rural and urban, as well as general land use regulations for all areas of the city. The four (4) major sections within the ordinance are General Land Use Regulations (Section 2), Urban Areas (Section 3), Rural Areas (Section 4), and Fences and Screening (Section 5). In addition, the ordinance applies to all wells, past and current, within Bossier City.
In Section 2, dealing with General Land Use Regulations, Ordinance 40 addresses issues in a similar manner to Order U-HS. Issues such as Dust, Vibration and Odors (Section 2-3); Lighting (Section 2-4); Abatement of Exhaust Fumes (Section 2-5); Venting (Section 2-10); Discharge (Section 2-13); Debris, Grass, Weeds or Trash (Section 2-16) closely resemble Order U-HS with only minor variations.

Section 2 also includes regulation not present in Order U-HS. Regulation of site access within Bossier City is regulated in Section 2-1. Section 2-2 includes reference language to FEMA authority for drilling in the floodway or floodplain, while recognizing the authority of the City Engineer. Regulation of electric pumpers and the City Engineer’s authority to approve any electric power generation on site is included in Section 2-6. The signage specifications to be displayed at the gate of the site of any well in Section 2-8 denotes minimum requirements and are duplicative with some of the provisions of LOC Rule 29(b).

Vehicle restrictions are included in Section 2-7, which regulate vehicles over three (3) tons by restricting them to truck routes or designated commercial routes, unless they obtain a “special use permit” through the City Engineer. Unless a special use permit is granted, no vehicle in excess of three (3) tons is permitted in any residential neighborhood or residentially zoned area. Exempted from this section are vehicles in excess of three (3) tons which are making deliveries to or picking up items from a residence or public space. This section only applies to vehicles used in connection with oil and gas related activities.

Emergency procedures are covered in Section 2-9, under Required Incident Reporting. While this section requires only a report to the District Fire Chief/911 Communications District having jurisdiction at the site, state law LAC 33:V.10111 already requires emergency reporting for local responders. LAC 33:V.10111 reads, in part, “that operators immediately notify the local emergency planning committee with jurisdiction for the site/facility...of all potential public safety and/or hazardous material incidents.” Further related to emergency procedures, Section 2-17 mandates that emergency shut-off valves must be “accessible to the District Fire Chief/911 Communications District having jurisdiction at the site.”

The placement of pipelines and flowlines are addressed through public property in Section 2-11, acknowledging a special note for those lines that are exempt because of regulation under state or federal law. The directives that said lines must not damage existing utilities, that the entity responsible for the lines furnish a plat with GIS information for location of the lines and that all city codes and regulations be followed, are included in this section.

Section 2-12 prohibits the use of public water supplies, unless the operator has complied with all regulations in the Ordinance 40 and “any
other water conservation regulations which may be imposed by the City.” It is to be noted that public water supplies are regulated by the State through DEQ and DHH.

Ordinance 40 limits disposal wells and compressor stations to areas zoned for industrial uses. The most striking provision in this section is that Bossier City further limits compressor stations by requiring enclosed structures to be used to provide “maximum noise abatement” and bans the compressor from making any noise that exceeds the pre-development ambient noise levels. (Section 2-14).

Section 3 governs operations in urban areas. Urban areas are defined therein as “any other area than a rural area.” Ordinance 40 defines “rural area” as an area outside the limits of the municipality where “…the proposed well is located on an open space of not less than twenty-five (25) acres…” Urban areas are all other areas other than open space of a minimum of twenty-five (25) acres. It is in this section of Ordinance 40 where hours of operation on a drill site or pipeline and noise are governed. Using a tiered system of distance from a protected use, Section 3-2 sets forth allowable hours of operation for oil and gas related operations, deliveries of materials and bans any activity on Sundays. There are exceptions for drilling, completion, re-working operations and other emergencies.

Allowable noise levels for oil and gas related activities within the Parish of Bossier are covered in Section 3-3. In the structure of Order U-HS, Ordinance 40 presents a departure from the Order U-HS by imposing more stringent decibel level requirements and requiring approval of all soundproofing measures taken on site by the District Fire Chief/911 Communication District of jurisdiction.

Section 5 is the complete regulation covering fences and screening for any area, urban (Section 3-1) or rural (Section 4). While the fencing requirements for Order U-HS include specifications for a six foot (6’) fence to enclose production equipment, Section 5 of Ordinance 40 adds multiple layers of regulation to the state provision. Additional regulations include specifications on support posts setting, the gauge of chain link fence, the size of posts and rails and the minimum thickness of tension bars. This section also requires operators to furnish a Knox padlock or Knox box to be located onsite, with a key furnished to the District Fire Chief/911 Communications District in case of an emergency, an unprecedented regulation in the State of Louisiana. Any appeal from a decision of a public official administering the provisions of Ordinance 40 will be handled by the Bossier City Council. (Section 6). Ordinance 40 became effective immediately upon passage by the Bossier City Council on June 2, 2009, and has not been amended.
B. Caddo Parish

Caddo Parish is governed under a home rule charter, which was approved by voters in 1984. The parish asserts their authority on their website, to-wit:

_The Caddo Parish Commission, under the provisions of Louisiana Revised Statutes 33:1271-1285, enacts ordinances, sets policy and establishes programs in such fields as criminal and juvenile justice, highways and streets, sanitation, planning and zoning, public health and welfare, libraries, culture and recreational facilities, economic development and general administrative services._

On September 17, 2009, the Caddo Parish Commission became the second local government in the Haynesville Shale area to enact an oil and gas specific ordinance by enacting Ordinance No. 4916 of 2009 ("Ordinance 4916").

Ordinance 4916 is very similar to the ordinance enacted by the City of Bossier, Ordinance 40. Ordinance 4916 contains some nuances particular to the Caddo Parish form of government and related issues of development within the parish. For purposes of brevity, only those areas that are in contrast to the Bossier City Ordinance 40 or Order U-HS will be addressed.

Ordinance 4916 is applicable in both urban and rural areas. Rural areas are defined therein as those areas outside of the jurisdiction of the Metropolitan Planning Commission of Caddo Parish. Urban areas are defined as any area within the Parish that is not considered rural.

In a significant departure from Bossier City Ordinance 40, Ordinance 4916 applies "only to wells permitted by the Office of Conservation after January 1, 2008." (Section 29-9). As Caddo Parish has historic oil and gas activity, this provision focuses the regulation toward new development, which will encompass most wells drilled as a result of the Haynesville Shale play, as well as any wells drilled in the future.

Ordinance 4916 is divided into four (4) major sections, being Section 29-2, General Regulations, Section 29-3, Urban Areas, Section 29-4, Rural Areas, and Section 29-5, Fences and Screening. The sections of Ordinance 4916 that remain the same as Bossier City Ordinance 40 and vastly similar to Order U-HS are Dust, Vibration and Odors [Section 29-2(3)]; Lighting [Section 29-2(4)]; Abatement of Exhaust Fumes (Section 29-4(5)); Venting [Section 29-2(9)]; Discharge [Section 29-2(12)]; Debris, Grass, Weeds or Trash [Section 29-2(16)].

In the section regarding Disposal Wells and Compressor Stations [Section 29-2(13)], Ordinance 4916 mandates that these facilities be limited to locations which are zoned industrial. However, it does not
include the requirement that these facilities be enclosed or that no noise be created by their presence as does Bossier City Ordinance 40.

Section 29-2(16) relates to Accessibility to Emergency Shut-off Valves. While the District Fire Chief maintains accessibility to these valves, access is limited to those emergencies when the "operator has failed to respond within the time frames established under its emergency response plan..." Under this section, an emergency response plan is required to be submitted by the operator to the District Fire Chief in advance of the commencement of drilling operations. This section limits the access to shut-off valves for the Fire Chief, while at the same time requiring additional submission of the emergency response plan for each site. Bossier City Ordinance 40 allows unfettered access to the shut-off valves and Order U-HS does not address this issue.

In the regulation of noise, Ordinance 4916 requires a "noise management plan" to be submitted to the Director of Public Works detailing how an operator plans to comply with maximum noise levels in Section 29-3(3). This is an additional requirement from Bossier City Ordinance 40 and Order U-HS. Differing from Bossier City Ordinance 40, Ordinance 4916 tracks the acceptable decibel level ranges from Order U-HS, which allow noise in excess of seven (7) decibels over ambient during the daytime, five (5) at night and ten (10) for fracturing operations. Fracturing operations can only be conducted during daytime hours.

In contrast to Order U-HS, but like Ordinance 40, backflow operations are held to five (5) decibels above ambient. In a new addition, Section 29-3(e) requires that wells located within five hundred feet (500') of a protected use to be continuously monitored, at the operator's expense, to ensure compliance. Section 29-3(3) (f) does not require that noise mitigation methods used for compliance be approved, but rather leaves the methods of compliance to the operator's discretion.

The Director of Public Works is authorized to approve minor variances when by "exceptional topographic conditions or other extraordinary and exceptional physical characteristics of particular property, the strict application...would result in peculiar and exceptional practical difficulties to or exceptional or undue hardship to an applicant for a minor variance. This variance is to be granted only if "approval shall be without substantial detriment to the public good and without substantially impairing the intent and purpose of this Chapter." [Section 29-6(1)].

Any appeal from the decisions by the Director of Public Works would be first to the Parish Administrator and then to the Caddo Parish Commission. [Section 29-6(2)]. The allowance of a variance and a multi-tiered appeals process stands in contrast to the Bossier City Ordinance 40.
With an effective date of November 1, 2009, Ordinance 4916 has not been amended since its initial introduction and has been administered largely through the Parish Engineer’s office.

C. City of Shreveport

In 1978, pursuant to authority granted under the 1974 Louisiana Constitution, Shreveport adopted an updated home rule charter. From the Shreveport Code of Ordinances Part I. Section 2.01 – General Powers:

...(b) The City of Shreveport shall have and may exercise all of the powers, rights, privileges and immunities which are now or may hereafter be or could be conferred upon cities of its population class by the constitution and general laws of the state; all powers, rights, privileges and immunities heretofore conferred on said city by any special act and not inconsistent with this Charter; all other powers pertinent to the government of a city the exercise of which is not expressly prohibited by the constitution of the state; any power which, in the opinion of the council, is necessary or proper for the management of the city's affairs which is not expressly denied by this Charter or general state law, as fully and completely as though such powers were specifically enumerated in this Charter; and no enumeration of particular powers in this Charter shall be taken to be exclusive but shall be held to be an addition to this general grant of power.

(c) The rights, powers, privileges and authority heretofore enjoyed, herein retained, or herein claimed shall subsist, notwithstanding the repeal of any law, until any such right, power, privilege or authority be altered or taken away by amendment to this Charter in the manner provided for by the constitution.

On October 27, 2009 the Shreveport City Council joined Bossier City and Caddo Parish in enacting the oil and gas regulation, Ordinance 66 of 2009 (“Ordinance 66”).

As was done relative to Caddo Parish Ordinance 4916, this section on Shreveport’s Ordinance 66 will only focus on those items that are in contrast to Bossier City Ordinance 40, Caddo Parish Ordinance 4916 or Order U-HS. Shreveport Ordinance 66 is very similar to Caddo Parish Ordinance 4916. Shreveport’s Ordinance 66 also took a more forward-looking stance to apply only to wells permitted by the LOC after January 1, 2008.

An appeal from any matter subject to Ordinance 66 is to be made to the Comprehensive Board of Appeals and then to the City Council for a hearing. (Section 25-6).

In Section 25-24(a), it is made unlawful to locate a compressor station within the City of Shreveport, except as permitted by zoning ordinance or other applicable law or regulations. Part (b) of this same
section revives the Bossier City Ordinance 40 requirement that compressor stations not create any noise exceeding the pre-development ambient noise level, when measured at five hundred feet (500') from the compressor station.

As in Caddo Parish Ordinance 4916, but unlike Bossier City Ordinance 40, emergency response personnel are limited to access of emergency shut-off valves. An emergency response person may access the emergency valves in instances when the operator has failed to respond within the time frames laid out in its emergency response plan provided to the City of Shreveport.

The work hours regulation in this Ordinance 66 is not determined by proximity to a protected use, but is a blanket rule prohibiting construction activities, repair work and deliveries of trucks with more than two (2) axles limited to daytime hours, except in the case of emergencies. Drillstem, open hole testing and fracturing are also constrained to daytime hours, as defined from 6:00 a.m. to 8:00 p.m. [Section 25-28 (a-b)].

As the Caddo Commission chose in Ordinance 4916, Shreveport Ordinance 66 tracks the state regulations in regard to noise contained in Order U-HS. In addition to those requirements, Ordinance 66 also requires that wells located within five hundred feet (500') of a protected use be continuously monitored to ensure compliance, with the cost of monitoring to be borne by the operator.

Ordinance 66 of 2009 became effective on December 1, 2009, and has largely been administered through the City Engineer's office.

IV. Miscellaneous Ordinances in the Haynesville Shale

A. Noise Ordinances

In the spring of 2010, Bossier and Caddo Parishes entered into a joint agreement to retain the services of Arpeggio Acoustic Consultants out of Atlanta, Georgia ("Arpeggio"), to conduct a comprehensive noise study within the parishes and develop draft regulations in regard to noise. After meeting with parish representatives and oil and gas industry representatives, Arpeggio developed a plan to conduct a noise study of several sites within each parish. The purpose of the study was to gather technical data to form the basis of a noise ordinance, which Arpeggio would draft on behalf of Bossier and Caddo Parishes.

By July 2010, a working draft of the noise ordinance was presented to the governmental bodies and released to the public. A joint meeting of the Bossier Parish Police Jury and Caddo Parish Commission was scheduled for August 2, 2010. However, due to a regional black-out, that meeting was interrupted and rescheduled. At the rescheduled public meeting on October 14, 2010, Arpeggio presented their collected data.
and explained elements of the then second draft of the noise ordinance to Bossier and Caddo Parish officials.

On January 19, 2011, the Bossier Parish Police Jury enacted noise Ordinance No. 4372, which included an effective date of April 1, 2011. Any facilities permitted or initiated after the adoption of the ordinance is subject to the original ordinance.

At present, the Caddo Commission has introduced an updated draft of its noise ordinance for consideration by the full Commission. At present, a public hearing is scheduled for March 3, 2011.

While the noise ordinances are comprehensive and parish-wide, specific sections relating to oil and gas operations are contained therein. Very technical in nature, the ordinances are intended to be enforced by a Noise Control Officer, hired by each parish. This Noise Control Officer ("NCO") will oversee the compliance of Significant Noise Generators ("SNG's") which are permitted or initiated after the effective date of the ordinances. The costs of compliance with the ordinance will be very high, not only for the oil and gas industry, but for all SNG's in either parish.

The allowable decibel levels in the enacted and draft noise ordinances are in conflict with the state regulations of Haynesville Shale activity contained in Order U-HS. This presents a dilemma for those operators in Bossier and Caddo Parishes as to how to ensure compliance with both state and local regulations.

B. Road Ordinances

The topic of much discussion and debate throughout the development of the Haynesville Shale is the condition of parish and city roads. As a result, it has been a much regulated issue with local governments. While many entities have enacted their own standards to recoup resources used to repair damages as a result of development, this has created an inconsistent system for operators, service companies, timber companies and various heavy-haulers to operate. Those road ordinances carry with them varied levels of expectations in each jurisdiction. The ordinances vary from simple tracking of DOTD regulations resulting in duplicate enforcement to ordinances that have created a permit system. These permit structures require private repair of public roads. To note, even under the DOTD enforcement, there is a required payment for a permit and private repair of public roads.

While it is not disputed that local parish and city governments have sound jurisdiction over their roadways, there is much concern from industry concerning the liability incurred from private repair on public roads. Even when one considers an indemnification agreement or cooperative endeavor agreement entered into prior to private repair, many are left asking if this is the right structure for repairs. In response
to these concerns, some jurisdictions are looking into bidding out for
road contractors who could maintain and repair the roads while private
companies whose overweight vehicles traverse the road reimburse the
public body.

In that regard, it is worthy to note that local jurisdictions have
shown a willingness to work with industry in an effort to achieve a
workable solution to protect the public interest in repairing and
maintaining its public roads. The balance is to achieve the local
government purpose, while at the same time encouraging the vital
economic development in their areas.

V. Summary

The Haynesville Shale development is a significant economic
engine for the State of Louisiana. It has provided immense opportunity
for the citizens of the parishes within the active play. The challenge for
the future is to balance the development needs of the industry and to
have predictability with local government needs to protect the health,
welfare and safety of its citizens. This balance can only be realized if the
regulations are consistent and without conflict with state regulation.

Part Two: State Preemption

I. Introduction to State Preemption

A. Definition

Louisiana preemption vests and retains the authority for regulation
of designated uses or activities to the State of Louisiana. The concept of
state preemption derives from the Supremacy Clause, Article VI, Section
2 of the United States Constitution, and the ensuing requirement that
federal law override state regulation in case of conflict. Preemption,
whether federal preemption of state regulation or state preemption of
local regulation, arises from the fundamental authority of a superior
legislative body to override the actions of an inferior legislative body
when the two are in conflict. State supremacy over local regulation is
bolstered by Louisiana constitutional preclusion of parishes’ and
municipalities’ exercise of any power or performance of any function
denied by general law.

B. Express Preemption v. Implied Preemption

Preemption may be express or implied. Express preemption is found
when there exists an express constitutional, codal, or statutory provision
granting the state the sole power to regulate a particular field. An

1 Hildebrand v. City of New Orleans, 549 So.2d 1218, 1227 (La.1989), cert. denied, 494
2 Id.
3 La. Const. art. VI, §7. See also Desormeaux Enterprises, Inc. v. Village of Mermentau,
example of express state preemption can be found in La. R.S. 40:5, wherein the state health officer and the office of public health of the DHH is given the “exclusive jurisdiction, control, and authority” over specific health related issues throughout the state including the isolation or quarantine for the care and control of communicable disease, the enforcement of a state sanitary code, the issuance of state health permits and the enforcement of controls and issuance of permits for the distribution and handling of dangerous drugs.

Implied preemption occurs in the absence of an express statutory provision mandating preemption. Under this scenario, a state statute preempts local regulations only when the legislative purpose is “clear and manifest” or “the exercise of dual authority is repugnant to the [state legislative] objective.” The mere fact that the superior legislative body has enacted legislation in an area does not necessarily imply intent to preempt. To determine the legislative intent, the courts will examine the pervasiveness of the state regulatory scheme, the need for state uniformity and the danger of conflict between the enforcement of local laws and the administration of the state program.

II. Recognized State Preemption

Although state preemption is not an issue that arises often, notably, Louisiana courts have ruled in favor of state preemption of local regulation in areas such as the sale of alcohol, the disposal of hazardous waste, the field of environmental regulation and oil and gas development, as shown by the following cases.

In City of Minden v. David Bros. Drug Co.,7 the Louisiana Supreme Court struck down a municipal ordinance enacted to regulate the sale and consumption of alcoholic beverages, specifically the prescribing of intoxicating liquors as medicines by physicians and the sale thereof by registered pharmacists. In City of Minden, David Bros. Drug Company was charged with selling intoxicating liquor as medicine without obtaining a permit from the city. When ruling the municipal ordinance and resulting conviction invalid, the Court noted that while Act No. 17 of the First Extra Session of 1935 allowed the exercise of local option by parishes, wards and municipalities, the sale of intoxicating liquor when prescribed as medicine by a licensed physician is specifically exempted therein.8 The Court further noted, “[i]t is also fundamental that a statute granting a municipality the right to exercise a designated portion of the

4 Hildebrand v. City of New Orleans, 549 So.2d at 1227.
5 Id at 1228.
7 197 So. 505 (La. 1943).
8 Id at 506.
police power must be strictly construed, and any fair and reasonable doubt of the existence of the power must be resolved against the municipality. 9 (See also, State of Louisiana v. Victoria Sissons, 10 finding state preemption of a local ordinance regulating the sale and consumption of alcoholic beverages).

In Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury, 11 the Louisiana Supreme Court struck down a parish ordinance attempting to regulate the disposal of hazardous waste. The Court held that the existence of a comprehensive scheme of federal and state environmental laws preempted enforcement of local ordinances by local governments designed to independently regulate the same area. 12 The Court based its decision upon the actions taken by the Louisiana legislature to advance the field of environmental regulation on the state level and noted specifically the state's "desire to protect the health and safety of the State's citizens, growth of the State's industrial activity and the need to coordinate environmental control regulations with the federal program." 13 Finally, the Court noted that "regulation of hazardous wastes is a matter of broad national and state concern" and "it is apparent that the matter is such that spotty municipal and parochial control would be ineffective." 14

In Desormeaux Enterprises, Inc. v. Village of Mermentau, 15 the Louisiana Third Circuit Court of Appeals found state preemption over a municipality's ordinance forbidding the location of underground disposal wells within its borders. In Desormeaux, a company purchased property in the village of Mermentau for the purpose of converting an oil and gas well into a commercial saltwater disposal facility. After the company published a notice of its intent to apply for a state permit to operate said facility, the village adopted an ordinance that would have had the effect of forbidding operation of the disposal well. The new ordinance specifically prohibited importation "on any land within the Village..." of any waste material, specifically "any foreign material which is considered waste and must be disposed of, as saltwater for injection into sub-surface well, etc." 16 Citing Rollins, supra, and the express statutory

9 Id at 508.
10 In State of Louisiana v. Victoria Sissons, 292 So.2d 523, 526 (La. 1974), the Louisiana Supreme Court struck down a parish ordinance prohibiting the sale and production of beverages containing more than one-half of one percent of alcohol by volume, noting that said ordinance exceeded the parishes legislative delegation of power.
11 371 So.2d 1127 (La. 1979).
12 Id.
13 Id. at 1133.
14 Id at 1132.
15 568 So.2d 213 (La. App. 3d Cir. 1990).
16 Id at 215.
provisions of Louisiana law, the Court held "the regulation of the disposal of any waste product into the subsurface by means of a disposal well, including siting, is within the exclusive jurisdiction of the Department of Conservation." The Court went on to state "[t]he express terms of our pertinent statutory law and the regulations adopted pursuant thereto are pervasive and clearly manifest a legislative intent to pre-empt such field in its entirety." 

In *Twin Parish Port Commission v. Berry Brothers, Inc.* the Louisiana Third Circuit Court of Appeals declared a parish ordinance preempted by comprehensive state regulations of the same area the ordinance attempted to regulate. Therein, the parish port commission sued for an injunction and declaratory judgment seeking to prevent defendant company from constructing and operating a natural gas storage facility on Lake Peigneur. The suit was brought under a port commission ordinance making it unlawful to discharge "any oil, grease or refuse matter" into any navigable water within the port commission's district, including Lake Peigneur. As outlined in the case, the statutory provisions delegating responsibility for formulating and promulgating environmental regulations to the Louisiana DEQ and its Office of Water Resources included no direct statement that said state agencies had exclusive authority over the area. Further, none of the aforementioned provisions specifically barred local governments from regulating in the same area. However, based upon the allocation of responsibility for such activities in the state agencies, the Court found local regulation preempted.

In *Energy Management Corp. v. City of Shreveport*, the United States Fifth Circuit Court of Appeals, declared a City of Shreveport ordinance regulating oil and gas development preempted by the comprehensive state regulation of the area.

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17 *Id.*
18 *Id.*
19 663 So.2d 257 (La. App. 3d Cir.1995).
20 *Id* at 259.
21 *Id* at 259-260.
22 Notably, the Court considered the *absence* of statutory authority granting the port commission concurrent jurisdiction with the state over environmental matters. Specifically, La. R.S. 34:1603, the provision setting forth the rights and powers of the port commission's governing body, directing the commission to "regulate commerce and traffic," without any mention of regulation of environmental matters. *Id.* at 260.
23 *Energy Mgmt. Corp. v. City of Shreveport*, No. 05-30551, 397 F.3d 297 (5th Cir. 1/13/05), *on appeal after remand*, 467 F.3d 471 (5th Cir. 10/6/2006).
III. Louisiana’s Preemption of the Regulation of Oil and Gas

A. Introduction

As provided above, the regulation of oil and gas drilling and development has been determined to be preempted by the State’s pervasive regulation of the area. The most recent and direct decision addressing the State’s preemption of oil and gas regulation is *Energy Management Corp. v. City of Shreveport* ("EMC Decision"). Since the EMC Decision represents the latest, most comprehensive consideration of the State’s preemption of the regulation of oil and gas development, the EMC Decision is discussed in detail below.

B. Pertinent Factual Background

1. *City of Shreveport Ordinance No. 221 of 1990’s Regulation of Oil and Gas Activities*

The factual background for Ordinance 221 is provided by the Fifth Circuit as follows:

Cross Lake is located just outside of Shreveport, Louisiana, and is the main source of water for the city. In Act 31 of 1910, the Louisiana legislature authorized the transfer of Cross Lake to the City of Shreveport. See 1910 La. Acts. 31. In 1914, the Secretary of State conveyed “all that portion of land belonging to the State of Louisiana in what is known as the bed of Cross Lake” to Shreveport to “provide a water supply” to the city. The deed explicitly reserved to the state “all minerals or mineral rights to and under said land, with a full and unrestricted right to the state, through its officers, agents or agencies, to enter thereon, and bore for oil, gas or any other mineral.” It further reserved the right to “drill and operate any well . . . and also such other privileges as are reasonably requisite for the conduct of said operations, and the removal of any mineral.”

The act authorizing the transfer of the lake to Shreveport granted the city “full and plenary power over said lake” for the purpose of “the protection and conservation of [the city's] water supply.” The state made a similar grant of authority in 1926 and extended the geographic scope of that authority to the land immediately surrounding the lake up to 5,000 feet, see 1926 La. Acts. 39 (“The City of Shreveport is hereby granted full power and authority to adopt and enforce all needful police and sanitary ordinances and regulations for the protection of the bed and waters of Cross Lake . . . from pollution and contamination from any source and is likewise

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24 *Energy Mgmt. Corp. v. City of Shreveport*, No. 05-30551, 467 F.3d 471 (5th Cir. 10/6/2006).

25 The City of Shreveport is referred to in the EMC Decision and herein as “City” or “Shreveport.” Similarly, City of Shreveport Ordinance No. 221 of 1990, adopted November 27, 1990, is referred to in the EMC Decision and herein as “Ordinance 221.”
granted similar power and control over the area surrounding said lake for a distance of five thousand feet . . . .”], and in 1990 reiterated its grant of this authority, see 1990 La. Acts. 145.

In 1978, pursuant to authority granted under the 1974 Louisiana Constitution, Shreveport adopted an updated home rule charter. Section 2.03(v) of the charter provides that Shreveport shall have the power “to make all necessary regulations to protect the water supply of the City from pollution and other damage, and to exercise full and unlimited police power over the bed and waters of Cross Lake and for a distance of five thousand feet from the meander contour line . . . and to pass any and all rules, regulations and ordinances deemed to be necessary for these purposes . . . .” This grant of authority in Shreveport's home rule charter mirrors the grant of authority by the state in Act 39 of 1926.

In 1990, citing its authority to adopt ordinances designed to protect its water supply under both its home rule charter and state law, Shreveport adopted Ordinance 221. Ordinance 221 claims to be an “overall legislative scheme to regulate hazardous activities, including but not limited to oil and gas exploration and production, that do or may pose a threat to the safety of the City's water supply.” The ordinance forbids any new drilling within 1,000 feet of Cross Lake. It further sets up a comprehensive regulatory scheme governing all new drilling between 1,000 and 5,000 feet of Cross Lake. [Footnotes omitted]26

2. Louisiana’s Rejection of Proposed Authority for Local Regulation of Oil and Gas Activities

In conjunction with Shreveport's attempts to regulate oil and gas through Ordinance 221, Shreveport specifically sought additional legislative authority to regulate oil and gas activities. In 1991, legislation was introduced on behalf of Shreveport in the Louisiana legislature in an attempt to: (i) broaden Shreveport’s police powers concerning Cross Lake and similar power and control over the area surrounding Cross Lake and within and including the watershed of Cross Lake (“Extra-Territorial Area”), so that it could regulate the siting of oil and gas facilities; and (ii) circumscribe the authority of the Commissioner concerning same. This proposed legislation was presented to the State Legislature via House Bill Nos. 1339 and 1341 of the 1991 Regular Session, and reciprocal Senate Bill Nos. 661 and 662 of the 1991 Regular Session. The referenced Louisiana House and Senate Bills, sought to expand Shreveport’s limited Enabling Legislation by adding the following, “In the event of a conflict with the provisions of any other

26 Energy Mgmt. Corp. v. City of Shreveport, No. 03-30677, 397 F.3d 297, 299-300. (5th Cir. 1/13/2005).
statute whatsoever, the power and authority granted herein shall be controlling, notwithstanding any language in such other statute to the contrary."

During the same session, a corresponding bill was proposed that would have the same effect as the above bills, but be applicable to municipalities statewide. That legislation was proposed as House Bill No. 1397 of the 1991 Regular Session ("HB 1397").

HB 1397 proposed to amend directly the statute granting the Commissioner his authority, proposing the addition of a subsection (J) to Louisiana Revised Statutes 30:4, to wit:

Notwithstanding R.S. 30:204(F) [now 30:28(F)], nothing in this Subtitle shall prevent local governments from regulating the initial siting of facilities, pursuant to any general land use planning, zoning, or solid waste disposal ordinances. 27

As explanation for the above amendment, the digest accompanying HB 1397, as prepared by the Louisiana House of Representatives Legislative Services, provided the following: 28

Present law prohibits local political subdivisions of the state from having any authority to prohibit or interfere with the drilling of a well by the holder of a drilling permit from the office of conservation. (Citation omitted) (Emphasis added).

Proposed law provides that notwithstanding the present law, local government would not be prohibited from regulating the initial siting of facilities by land use planning, zoning, or solid waste disposal ordinances.

In discussions of HB 1397 before the Committee on Natural Resources, the issue of whether the proposed legislation would affect the siting or location of oil wells was specifically addressed. The following dialogue was reported:

Representative Sour asked if the bill specifically addressed siting or location of oil wells. Representative Holden said yes. Representative Sour said that this bill would require staff to be added providing more expert information: geological information, taxes, engineering. He said that cities are not qualified to make siting decisions.

* * *

Ms. Emily Stitch, Louisiana Association of Business and Industry, expressed concern with local government regulating siting of

28 Id.
facilities. She said that the administrative hearing process is adequate to provide local input.

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Representative Haik asked if present law prohibits local government from interference with environmental oil and gas matters. Representative Holden said yes; there can be no involvement except through public hearings conducted by the state prior to issuing a permit. (Emphasis added).

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Representative Haik said that this bill will allow local governments to become involved with initial siting. Representative Holden said that local government could enact rules and regulations preventing a company from locating in a community. He said that the bill does not deal with the actual technical aspects of the permit - the intent is to involve local government for decision making as to where a facility is located.

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Representative Siracusa said that wells are drilled in the lake in Morgan City, and that lake provides drinking water. He asked for an amendment to be drafted taking oil and gas out of the bill.

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Representative Sour said that local politics will enter into the siting decision. He said that the decision should be left to geologists and engineering experts.

As a result of the detrimental effects of providing regulatory authority to local governing bodies without the expertise or ability to regulate such an important resource of our state, the proposed legislation was rejected, thus limiting Shreveport's authority to those grants provided via 1910 La. Acts. 31; 1926 La. Acts. 39; 1990 La. Acts. 145 and Shreveport's Home Rule Charter.

3. Cross Lake Mineral Interests

Prior to enactment of Ordinance 221, Total Minatome Corporation ("Total") put together a block of oil, gas and mineral leases and other mineral rights under and around the Northeast shore of Cross Lake ("Cross Lake Interests"). To develop the Cross Lake Interests, Total proposed to drill a well to explore the Hosston formation in the area. Residents of the area, presenting concerns over the impact of the proposed mineral development, set upon a course of opposing the development, utilizing local governing bodies, such as the Parish of

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Caddo and Shreveport, culminating in the enactment and enforcement of Ordinance 221.

Total transferred the Cross Lake Interests to Energy Management Corp. ("EMC"). As previously experienced by Total, EMC's operations became bogged down and stymied by the local regulations, specifically the imposed spacing prohibitions and the drilling and operating requirements of Ordinance 221. Of particular import to EMC's proposed operations was Ordinance 221's preclusion of the location of a well within one thousand feet (1,000') of Cross Lake. Having exhausted all other avenues, including a denied request to amend Ordinance 221 to allow mineral development to continue, in 1997, EMC instituted suit against Shreveport, in the United States District Court for the Western District of Louisiana Federal District Court (the "Cross Lake Case"). Shreveport's authority to regulate oil and gas operations was one of the primary challenges of the Cross Lake Case.

C. Energy Mgmt. Corp. v. City of Shreveport, No. 03-30677, 397 F.3d 297 (5th Cir. 1/13/05).

In 2005, after years of intense litigation, involving a complicated and cumbersome procedural history, the United States Fifth Circuit Court of Appeals entered its written opinion finding Ordinance 221 preempted, and providing in pertinent part:

EMC argues that the City of Shreveport's ability to legislate to ban oil and gas drilling for the purpose of protecting its water supply is preempted and precluded by Louisiana's comprehensive regulation of such activities and the statutory prohibition of local regulation of drilling operations. We agree.32

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In this case there is no express provision mandating pre-emption. However, all other inquiries lead to the conclusion that local regulation of oil and gas drilling activities is preempted by comprehensive state regulation of oil and gas activities under the LOC [Louisiana Office of Conservation].

30 The boundary of Cross Lake is established at the 172 foot contour line. Section 37-130 of Ordinance 221 specifically precluded the location of a well within one thousand feet (1000') of Cross Lake.

31 Energy Management Corp. v. City of Shreveport, United States District Court, Western District of Louisiana, Shreveport Division, Civil Action No. 97-2408, 2003 U.S. Dist. LEXIS 27294, June 16, 2003. The Cross Lake Case involves a complicated procedural history including numerous proceedings before and resulting decisions by the district court and the United States Fifth Circuit Court of Appeals. The involved court proceedings are herein collectively referenced as the "Cross Lake Case".

32 Energy Mgmt. Corp. v. City of Shreveport, No. 03-30677, 397 F.3d 297, 302-303 (5th Cir. 1/13/05).
Regulations by the state of oil and gas drilling activity through the LOC are clearly pervasive addressing every phase of the oil and gas exploration process from exploration and prospecting to cleanup of abandoned oilfield waste sites. La. R.S. 30:1, et seq.; Statewide Order 29-B. Addressing a challenge to the authority of the LOC to issue orders relating to gas balancing between producers in a unit, the Louisiana Supreme Court has stated that the “authority and responsibility for conserving Louisiana's oil and gas resources are virtually entirely vested in the office of the Commissioner of Conservation, Department of Conservation.” *Hunt v. Batchelor*, 644 So.2d 191, 196-97 (La. 1994). In every case which has been brought to our attention involving a challenge to the authority of the LOC, its far-reaching authority has been upheld. See *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979)(LOC regulations and permit governing deep well disposal facilities preempted parish ordinance prohibiting disposal of hazardous waste within the parish.); *Greater New Orleans Expressway Com. v. Traver Oil Co.*, 494 So. 2d 1204 (La. App. 5th Cir. 1986)(Causeway commission could not restrict drilling within one mile of Causeway Bridge contrary to authorization of LOC and Corps of Engineers.); *Desormeaux Enterprises, Inc. v. The Village of Mermontau*, 568 So.2d 213 (La. App. 3d Cir. 1990)(Village ordinance prohibiting corporation from operating disposal facility on property if it received a permit from the commissioner of conservation found null and void.). The Louisiana Attorney General has consistently concluded that attempts at local regulation of drilling operations are preempted by state law. Such regulation is within the exclusive authority of the LOC, precluding regulation by other governing bodies. La. Atty. Gen. Op. No. 82-1021, 88-418, and 89-416.

The statute itself reflects a desire for state uniformity and addresses the danger of conflict between the state program and enforcement of local laws. Under La. R.S. 30:28(F) the Louisiana Office of Conservation (“LOC”) has the exclusive authority to regulate drilling and mining in Louisiana. Louisiana state law requires possession of a permit from the LOC to drill in the state. See La. R.S. 30:28(A). The statute sets out a comprehensive regulatory regime by which the LOC will determine whether to grant a permit to drill. See La. R.S. 30:28(D). It further provides that “the issuance of the permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon.” La. R.S. 30:28(F). Even more importantly it provides that “no other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in
any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.” La. R.S. 30:28(F) (emphasis added). These statutory provisions make it clear that the process of regulating when and where an oil and gas well may be drilled within the state is entirely vested in the LOC and interference by other political bodies is prohibited. Moreover, the statute gives the Commissioner authority to issue regulations and orders to “ensure ground water aquifer safety,” which is the same concern motivating the adoption of Ordinance 221 (Footnotes omitted). 33

* * *

In this case, even a quick review of state statute establishing the Office of Conservation and designating its authority reveals that Ordinance 221 clearly overlaps and conflicts with those provisions. La. R.S. 30:1, et seq. As a practical matter, if Ordinance 221 is enforced, this nullifies the LOC's authority to exercise its discretion to grant or deny a drilling permit at EMC's proposed drill site. In these circumstances, the local ordinance must yield to comprehensive state regulation. 34

The Court concluded:

In summary, we conclude that the City of Shreveport's Ordinance 221 is preempted by state law and is invalid to the extent that it purports to prohibit the drilling of oil and gas wells in an area within the state of Louisiana, an authority granted exclusively by state statute and regulations to the Louisiana Office of Conservation. ... We remand for entry of declaratory judgment declaring that Ordinance 221 is invalid to the extent stated above and for consideration of any further relief to which EMC may be entitled. 35


On remand and after additional briefing, the district court entered its judgment providing in pertinent part:

“Ordinance 221 is hereby declared invalid to the extent that it purports to prohibit the drilling of oil and gas wells in an area within the state of Louisiana.” (Emphasis added) 36

33 Id. at 303-304.
34 Id. at 304.
35 The Court's finding of state preemption obviated the need to consider the effect of the state's contractual mineral reservation. Energy Mgmt. Corp. v. City of Shreveport, No. 03-30677, 397 F.3d 297, fn 4 (5th Cir. 1/13/05).
The district court judgment implies that Shreveport retained the authority to maintain and enforce Ordinance 221’s requirements not required by the State, so long as drilling is not prohibited. This position was asserted by Shreveport to the district court in the remand proceedings. Consistent with Shreveport’s stated position, by Ordinance No. 117 of 2005, adopted on August 22, 2005, Shreveport amended Section 42-357 of the Code of Ordinances to delete the prohibition against drilling within one thousand feet (1,000’) of Cross Lake and reiterating all other requirements of Ordinance 221.37

The ambiguity created by the district court judgment placed EMC and all other parties wishing to drill and operate wells within approximately one mile of Cross Lake subject to the continuing potential for regulation by Shreveport. Failure to comply with Shreveport’s requirements subjected the non-complying party to threat of fine, criminal penalty and/or injunction.38

E. EMC Decision - Energy Mgmt. Corp. v. City of Shreveport, No. 05-30551, 467 F.3d 471 (5th Cir. 10/6/2006).

Having approximately eight (8) years invested in the litigation and faced with the potential for continued regulation by Shreveport, EMC appealed the district court judgment to the United States Fifth Circuit Court of Appeals.39 The scope of review for appeal following judgment on remand is extremely limited. “[T]he only issue for consideration is whether the court below reached its final decree in due pursuance of the appellate court’s previous opinion and mandate.”40 Courts of appeal may consider a prior opinion to determine what was actually intended, but may not reconsider issues already decided by the earlier panel.41 As such, on appeal after remand, the Fifth Circuit review and consideration was limited to determining “whether the prior panel intended that Louisiana law preempt Ordinance 221 and, if so, whether the declaratory judgment language of the district court reflects that intent.”42

After additional briefing and oral argument, the Fifth Circuit clearly and unequivocally concludes that the local governmental entity, Shreveport, is precluded and preempted from regulating oil and gas drilling activities, and declares Ordinance 221 preempted and thus invalid in its entirety. In reaching its conclusion, the Fifth Circuit

38 See Ordinance No. 221, Sec. 37-150.
39 This appeal included the challenge of additional district court determinations unrelated to the district court’s preemption judgment language as discussed herein.
40 Volk v. Gonzalez, 262 F.3d 528, 533 (quoting Burroughs v. FFP Operating Partners, 70 F.3d 31, 33 (5th Cir.1995).
41 Burroughs, 70 F.3d at 33.
42 Energy Mgmt Corp., 467 F.3d at 477.
provides: "the prior panel leads off by unequivocally stating..., '[We] find that Ordinance 221 is preempted by Louisiana's comprehensive regulation of oil and gas drilling.'43 While the language at the end of the prior holding, i.e. "[Ordinance 221] is invalid to the extent that it purports to prohibit the drilling of oil and gas wells in an area within the state of Louisiana," might appear limiting when read out of context, when taken with the prior opinion as a whole, said language in no way limits the holding.44 To reach its decision, the Fifth Circuit notes three crucial determining aspects of the prior panel's decision: (1) the express language utilized, which in no way suggests an intention to hold Ordinance 221 invalid only to a limited extent; (2) the cases and Louisiana Attorney General opinions relied upon, which relate to more than drilling; and (3) the prior panel's reliance upon La. R.S. 30:28(F),45 which provides that local political subdivisions are expressly forbidden to "in any way interfere with the drilling of a well."46

IV. Summary

The contentious and hotly contested Cross Lake Case ultimately resulted in the EMC Decision's specific and unequivocal conclusion that the local regulation of oil and gas activities is preempted by the comprehensive State regulation of oil and gas activities under the Louisiana OOC.47 The EMC Decision stands as the most recent and direct Louisiana precedent considering state preemption of the regulation of oil and gas development. Based upon Louisiana law and Louisiana authorities, specifically the EMC Decision, it appears clear that local regulation of oil and gas activities is an area that is preempted in its entirety through the pervasive state regulation of oil and gas activities through the Louisiana OOC. While the Haynesville Shale discovery has spurred local governing bodies to enact local regulations effecting oil and gas development, at least in this writer's opinion, such regulations like Ordinance 221 as involved in the Cross Lake Case, are properly subject to serious preemption challenge/consideration due to the State's comprehensive regulation of the area.

43 Id. at 479, quoting Energy Mgmt, 397 F.3d at 305.
44 Id. at 479, quoting Energy Mgmt, 397 F.3d at 305.
45 Louisiana Revised Statute 30:28(F) provides "No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such permit."
46 Id. at 479.
47 Energy Mgmt, 467 F.3d at 478.