

Administrative Law and Oil & Gas Operations

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Environmental Law in Oil & Gas

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If you're interested in things that go boom...



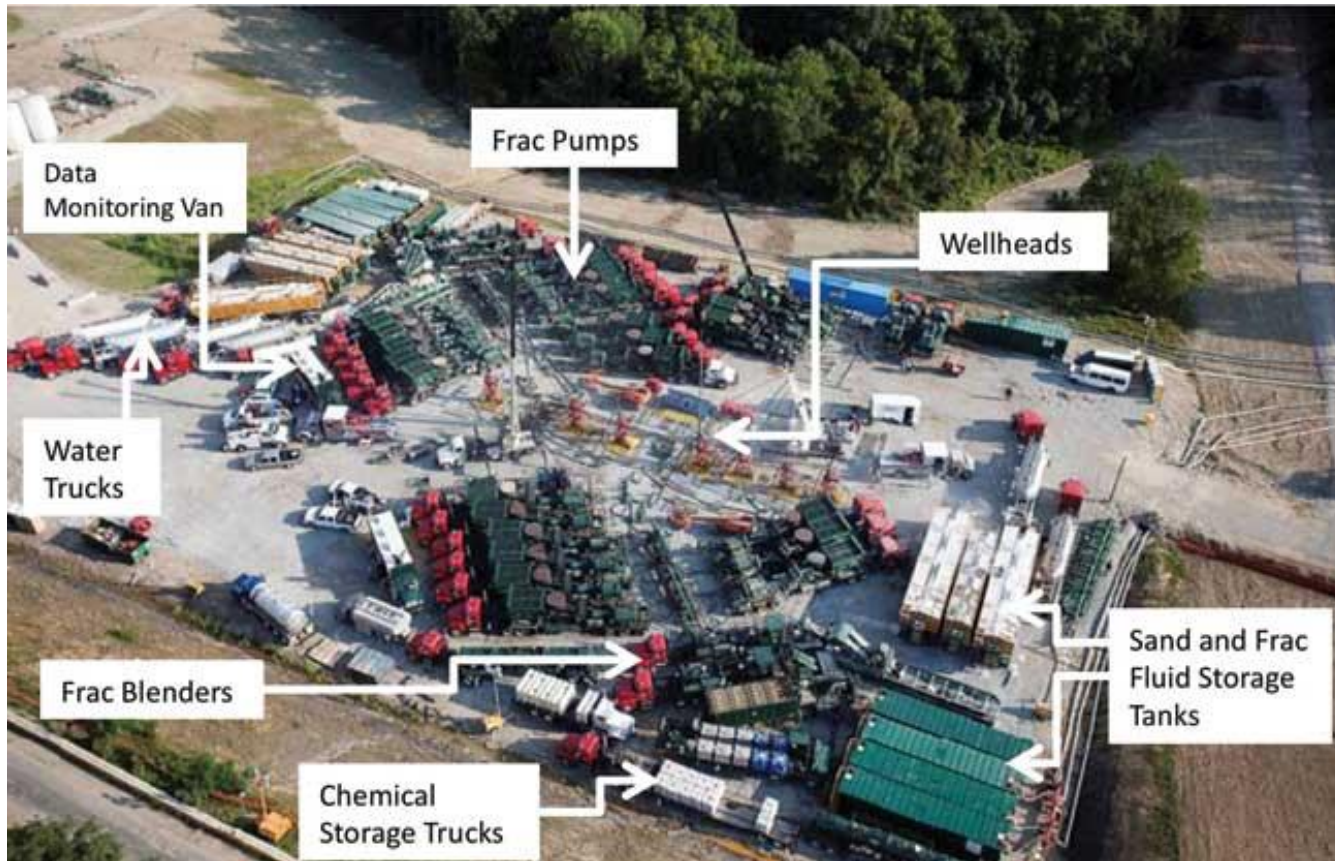
Houston Local Emergency Preparedness Committee meeting
Sept. 27, 10 am – noon



Review

- Who owns oil and gas assets for environmental purposes?
 - Onshore
 - Offshore
- Who controls and regulates it?
 - EPA
 - Corps of Engineers
 - States
- What laws apply? [CWA, CAA, RCRA, CERCLA, NEPA, ESA]
- What liabilities can apply?
- Future issues and strategies to manage environmental risks and opportunities

Test case: U.S. environmental laws and fracking sites



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Example: Fracking and Federal Environmental Enforcement

- Sources of pollution: air, water, noise, solid waste
- Primary issue for public concern: water pollution and disposal
 - Return waters
 - Contamination of aquifers
- Unexpected risks – seismic disturbances
- High profile for federal civil and criminal environmental enforcement. But how?



Fracking and Federal Environmental Enforcement

- Federal statutory exemption specifically for fracking materials injected into the ground (but diesel not protected)
- Safe Drinking Water Act – potential contamination of drinking water sources
- Clean Water Act – discharge of produced water into publicly owned treatment works (or to nearby intakes)
- *Range Resources* enforcement action - dismissed



Administrative Law

- U.S. Environmental Law is largely governed by Administrative Law (federal and state)
- 1946 Administrative Procedures Act (APA) -
 - Rulemaking (legislative)
 - Adjudication (judicial)
 - Enforcement (executive)
- Fourth branch of government



APA Impact

- Through agencies, boards, and commissions
- Government agencies
 - all non-exempt federal agencies (33 start with “A”)
 - states follow *APA and* state requirements
 - over 150 in Texas
- Others affected by agency action



Enabling legislation

- We'll focus on EPA – but remember also safety, health, O&G reg, Coast Guard, and state env. agencies
 - RRC (Texas Railroad Commission, TRC, TRRC)
 - TCEQ (Texas Commission on Environmental Quality)
 - GLO (General Land Office)
- Local governments and differing types of agencies



Procedures that govern the creation of rules (regulations)

- The APA (minimum)
- Enabling legislation (more stringent)
- Agency's own regulations (most stringent)
- If law or regs don't address an issue, APA's informal rulemaking kicks in



Common rulemaking disputes

- Failure to follow appropriate procedures
- Insufficient public participation
- Content (abuse of discretion):
 1. Arbitrary or capricious
 2. Not otherwise in accordance with law
 3. Formal rulemakings: not supported by substantial evidence in the record



Arbitrary and Capricious Standard

- Easy for agency to comply
- Rule set aside if agency
 1. relied on improper factors not intended by Congress,
 2. failed to consider an important aspect,
 3. offered an explanation that runs counter to the evidence before the agency, **OR**
 4. offered an explanation so implausible it could not be ascribed to a difference in view or agency expertise



Substantial Evidence Standard

- more stringent than arbitrary and capricious
- formal adjudication and formal rulemaking
- whether a reasonable person, looking at the evidence in the record, *could* have come to the same conclusion as the agency
- Supreme Court: Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion



Types of Rulemaking

- Often addressed in enabling legislation
 - Informal
 - Formal
 - Hybrid



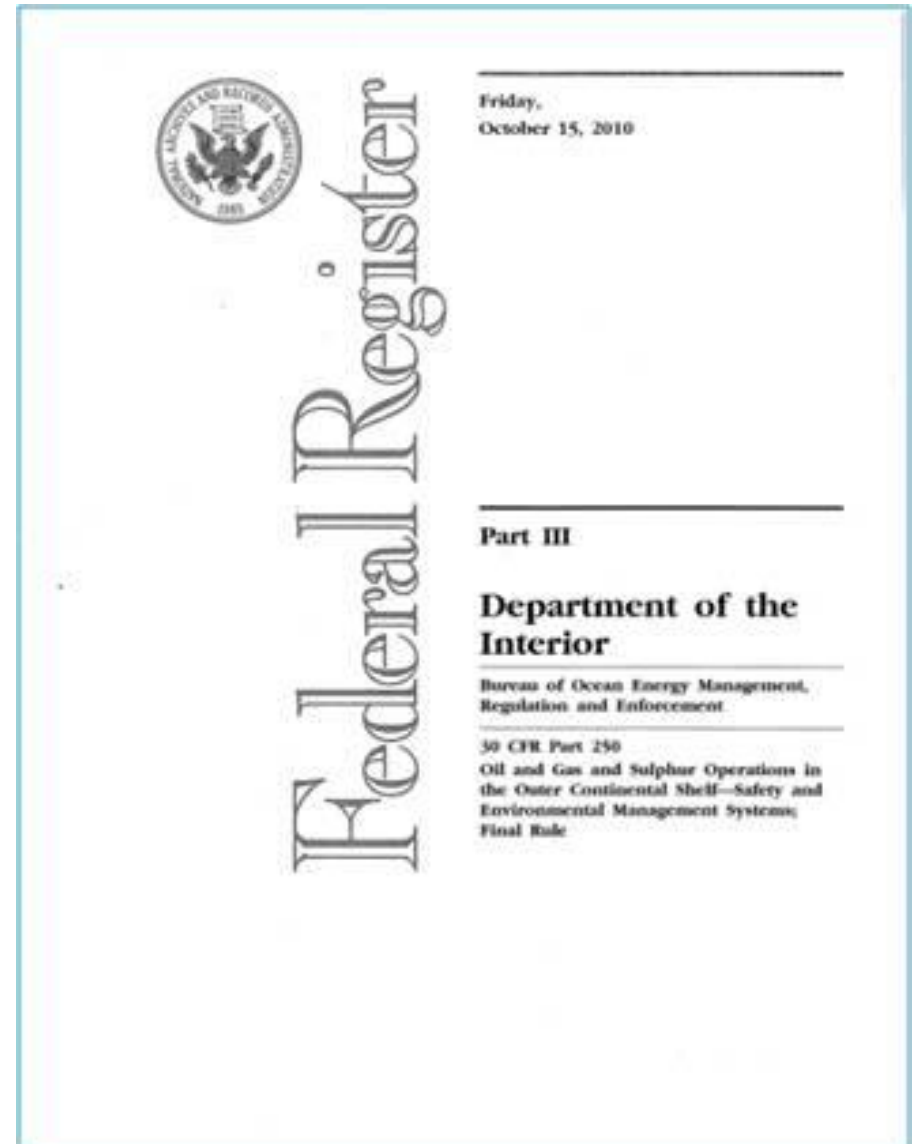
Informal (Notice and Comment) Rulemaking

- Least demanding process for the agency
- Notice in Federal Register (more in a minute)
 - time, place, and nature of proceedings
 - refer to legal authority under which rule is made
 - provide terms or substance of rule or description of subjects and issues involved
- Opportunity for comments
- Oral comments if in enabling legislation

Federal Register Publication



- General statement of basis and purpose (Preamble)
- Text of rule itself
- 30 days before effective date of rule



Public Participation



- Lack of public participation helped lead to passage of APA originally
- One major rulemaking goal is to encourage agencies to seek out and listen to as wide a spectrum of opinions and expertise as possible when contemplating a new rule.



Formal Rulemaking

- Promulgate rules “on the record after agency hearing”
- Full hearings
 - adversarial (trial-type)
 - Administrative Law Judge (ALJ)
 - under oath
 - cross examination
 - rules of evidence
 - closing arguments



Hybrid Rulemaking

- Not addressed in APA
- Notice and comment with additional features
- Agency's option if not in legislation
- Types
 - negotiated rulemaking
 - public legislative hearing



Hybrid Options for Interested Persons

- Discovery
- Right to have counsel present
- Ability to testify
- limited cross-examination
 - other participants
 - government employees



Judicial Review

Any party not satisfied that an agency acted properly in rulemaking has a right to request judicial review of an agency's action by the courts.



Hearings

- Enabling legislation may dictate which type of hearing you get
- Informal
 - talk/phone call
 - conference (face to face meeting)
 - letters
 - settlement conference
- Trial-like “full hearings” -- “on the record after opportunity for an agency hearing”



Enforcement Goals

1. Restore and preserve environmental quality
2. Deter violations
3. Eliminate profits from non-compliance
4. Penalize the wrongdoer



Penalty Policy Factors

- Seriousness of violation (gravity component)
- Intent to violate
- Compliance history
- Need for deterrence
- Willingness to reach swift resolution
- Response/cleanup
- Ability to pay
- Size of company



Administrative Remedies

- Fines (per day per violation; stacking)
- Cleanup orders (abatement; imminent and substantial endangerment orders)
- Injunction (ultimately authorized by court)



Administrative Record

- The transcript of testimony and exhibits from adjudication
- The ruling on each finding and conclusion on material issues of fact or law
- Reason or basis for each ruling
- Why is it important? Almost always the only record before reviewing court

Judicial Review of Administrative Action - Issues



- Standing
- Ripeness (Final Order Rule)
- Exhaustion of Administrative Remedies
- Primary Jurisdiction Doctrine (more later)
 1. issues beyond judge/jury expertise
 2. preservation of uniform regulatory procedures
 3. consistency of remedies and decisions



No Deference Review (vs. arbitrary & capricious and substantial evidence standards)

- Applied to all questions of law
- Decided only by the court
- Little or no deference to the agency
- Questions involving procedure
 - Constitution
 - APA
 - Agency's rules



Guidance v. Rulemaking

- What is a guidance (as opposed to rulemaking)?
- Why it's done
 1. clarify and explain existing rules and procedures
 2. easy
 3. test the waters
 4. build consensus
 5. account for regional variations
 6. avoid hassles and uncertainties of rulemaking



Nat. Resources Code, Title 3, Subtitle A, Ch 81
Railroad Commission

SUBCHAPTER C. JURISDICTION, POWERS, AND DUTIES

Sec. 81.051. JURISDICTION OF COMMISSION. (a) The
commission has jurisdiction over all:

- (1) common carrier pipelines defined in Section
111.002 of this code in Texas;
- (2) oil and gas wells in Texas;
- (3) persons owning or operating pipelines in
Texas; and
- (4) persons owning or engaged in drilling or
operating oil or gas wells in Texas.



Memorandum of Understanding (MOU)

- Also known as Memos of Agreement
- Between Agencies
- Clarify ambiguities & overlapping authority
- Almost have force of law



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