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**Oil & Gas Production in Louisiana: What Can
Parishes Regulate?**

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OIL & GAS PRODUCTION IN LOUISIANA: WHAT CAN PARISHES REGULATE?

The landscape of the oil & gas industry has seen much change in the past decade. Advances in horizontal drilling, hydraulic fracturing and general industry processes have allowed our companies to capture oil & natural gas from much deeper reservoirs and allowed for the production of a greater area of minerals with a far smaller geographical footprint than ever before. With that in consideration, companies have the ability to drill in more urban areas and closer to homes, schools and businesses than what was historically the case. Because of shale plays like the Barnett Shale in Texas, the Marcellus Shale in Pennsylvania and New York, the Fayetteville Shale in Arkansas and, more personally, the Haynesville Shale and the Tuscaloosa Marine Shale in Louisiana, the local governing bodies have taken a far greater interest in enacting laws to regulate oil & gas activities within their borders. However, while the exploration & production or pipeline development or fluid disposal may be within their borders, there are significant questions as to whether or not enacting such oil & gas ordinances is within their jurisdiction.

THE SHALES: HAYNESVILLE & TUSCALOOSA MARINE

To have a full discussion of the role of parish and city governments in regulating oil & gas activities in this state, it is important to understand how the largest shale play in Louisiana to date has evolved. 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. *See*, Exhibit 1.

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 have fears that having the State and local governments regulate activity is duplicative, expensive and cumbersome.

SCOPE OF STATE REGULATION OF OIL & GAS EXPLORATION & PRODUCTION:

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: ***“[t]he 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.”***

In order to ensure that all facets of the drilling process were reviewed with an eye toward urban shale development, the Office of Conservation determined that the Haynesville Zone could be regulated in a separate statewide order, similar to the treatment of the Austin Chalk Formation in Statewide Order 29-S (September, 1997). 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. After an appointed committee considered the regulations for shale plays in other states, they released a draft of what would come to be known as “Order U-HS” in April 2009 and a public hearing was held in Shreveport in May of that same year. Public comment was taken at the hearing and solicited for submission via email and regular mail.

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.” Order U-HS 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 in urban areas. 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.

Aimed at further ensuring that oil & gas activity was regulated in light of the anticipated urban drilling, the Order H-HS stood as a supplement to the regular authority of the LOC, which already prohibited drilling within 500 feet of a residence, business or public space.

When one combines DNR and the Office of Conservation with the regulatory authority of DOTD, DEQ and DHH regarding oil & gas activities within Louisiana, the multiple layers of regulation directly and explicitly govern each step of the drilling process from test wells, to permits, to production, to storage, to transportation, to processing. But, what do the courts say in regard to challenges mounted by local governing bodies over exploration & production activities here.

THE COURT OF LAW ON THE ISSUE OF STATE PREEMPTION:

Historically, 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.

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. The most recent and direct decision addressing the State's preemption of oil and gas regulation is *Energy Management Corp. v. City of Shreveport*¹ ("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 below.

(A) The Facts: *Energy Management Corp. v. City of Shreveport*

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

¹ *Energy Mgmt. Corp. v. City of Shreveport*, No. 05-30551, 467 F.3d 471 (5th Cir. 10/6/2006).

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 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]

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 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.² 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").³ Shreveport's authority to regulate oil and gas operations was one of the primary challenges of the Cross Lake Case.

(B) *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.⁴

* * *

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].

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

² 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.

³ *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".

⁴ *Energy Mgmt. Corp. v. City of Shreveport*, No. 03-30677, 397 F.3d 297, 302-303 (5th Cir. 1/13/05).

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 Mermentau*, 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. Nos. 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).⁵

* * *

⁵ *Id.* at 303-304.

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.⁶

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.⁷

(C) District Court Judgment on Remand - *Energy Mgmt. Corp. v. City of Shreveport*, No. 97-2408 (W.D. La. May 5, 2005)

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)⁸

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 221.⁹

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

⁶ *Id.* at 304.

⁷ 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).

⁸ *Energy Mgmt. Corp. v. City of Shreveport*, No. 97-2408, *2-3 (W.D. La. May 5, 2005).

⁹ Repealed by Ordinance No. 214 of 2006, adopted January 9, 2007.

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.¹⁰

(D) 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.¹¹ 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.”¹² 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.¹³ 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.”¹⁴

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 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.’”¹⁵ 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.¹⁶ 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

¹⁰ See Ordinance No. 221, Sec. 37-150.

¹¹ This appeal included the challenge of additional district court determinations unrelated to the district court’s preemption judgment language as discussed herein.

¹² *Volk v. Gonzalez*, 262 F.3d 528, 533 (quoting *Burroughs v. FFP Operating Partners*, 70 F.3d 31, 33 (5th Cir.1995).

¹³ *Burroughs*, 70 F.3d at 33.

¹⁴ *Energy Mgmt Corp.*, 467 F.3d at 477.

¹⁵ *Id.* at 479, quoting *Energy Mgmt*, 397 F.3d at 305.

¹⁶ *Id.* at 479, quoting *Energy Mgmt*, 397 F.3d at 305.

General opinions relied upon, which relate to more than drilling; and (3) the prior panel's reliance upon La. R.S. 30:28(F),¹⁷ which provides that local political subdivisions are expressly forbidden to “*in any way* interfere with the drilling of a well.”¹⁸

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.¹⁹ 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 and Tuscaloosa Marine Shale discoveries have spurred local governing bodies to enact local regulations effecting oil and gas development, at least in this team of 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.

¹⁷ 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.”

¹⁸ *Id.* at 479.

¹⁹ *Energy Mgmt*, 467 F.3d at 478.