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COVID-19 Pandemic Used to Challenge Oil and Gas Development in Texas

In Texas, given state preemption of local regulation under HB40, it is yet to be seen how successful those efforts will be.

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The Texas oil and gas industry faces a new threat from the COVID-19 pandemic: challenges to oil and gas drilling from opponents who claim that the virus exacerbates health effects allegedly linked to air emissions from oil and gas development. These claims come as the industry is suffering financial hardship due to record-low oil prices and reduced market demand for its products due to the pandemic. Industry opponents want to halt oil and gas activity in the state, arguing that new projects should not be approved and most, if not all, drilling activity should cease during the pandemic.

Oil and gas development in the state has long encountered vocal opponents, including environmental nongovernmental organizations (NGOs) and community groups, that often cite increased air pollution and corresponding respiratory health issues as reasons



(Courtesy photos)

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to “keep it in the ground.” Those opposed to oil and gas drilling and other development projects are now using the COVID-19 pandemic to bolster these health-based challenges. For example, opponents of oil and gas drilling in the city of Arlington recently petitioned the city council to deny a special use permit for drilling within its boundaries based on claims that increased air pollution from oil and gas activities would worsen respiratory conditions

caused by COVID-19. A majority of the city council voted on June 9 to deny the requested permit, although council members voting no declined to provide a reason for the denial. While pandemic-related health issues were raised as a concern during the public comment period and in the June 9 council meeting, it is not clear that the permit amendment was denied on that basis as opponents also cited other issues. Nonetheless, if the permit denial

is challenged, the Arlington City Council may have an uphill legal battle in court.

In 2015, Texas Gov. Greg Abbott signed House Bill 40 (HB40), which preempts local regulation of oil and gas operations in Texas, except in limited circumstances. As codified in Section 81.0523 of the Texas Natural Resources Code, the authority of a municipality or other political subdivision to regulate oil and gas operations is expressly preempted unless such regulation regulates only aboveground activities, is commercially reasonable, does not effectively prohibit oil and gas operations conducted by a reasonably prudent operator, and is not otherwise preempted by state or federal law. Given this limited exception, any attempts by local authorities to restrict oil and gas drilling due to the COVID-19 pandemic are likely preempted under HB40. As Arlington City Councilman Ignacio Nunez noted during the June 9 meeting, “There isn’t anything in that statute about health.”

In addition to local activism, oil and gas opponents are also using the COVID-19 pandemic as a rationale for pausing oil and gas activities at both the state and federal level. For instance, in May 2020, a group of 17 NGOs sent an open letter to the Railroad Commission of Texas requesting that the commission limit oil and

gas production in the state and reject flaring waivers. In addition to climate change concerns, the NGOs cited the potential for flaring to result in increased air pollution and increased vulnerability to COVID-19. While the commission considered but ultimately rejected imposing cuts in production or reduced flaring in response, the commission chairman, Wayne Christian, has expressed concern about the rate of flaring in the state and waste of natural gas. The commission recently appointed a blue-ribbon task force for oil economic recovery, which was created to help guide the state’s oil and gas industry through the challenges of the COVID-19 pandemic and the surplus of crude oil.

At the federal level, members of the U.S. Congress sent a letter to the chairman of the Federal Energy Regulatory Commission in April requesting a moratorium on the approval and construction of new natural gas pipeline projects and liquefied natural gas export facilities for the duration of the pandemic, citing the national health emergency caused by COVID-19. A similar request was sent by 11 state attorneys general to the FERC chairman in May. In addition, several NGOs, including the Sierra Club, recently commented on an environmental assessment for a proposed pipeline project in Texas,

requesting that FERC reevaluate the need for the proposed pipeline in light of COVID-19 and impose additional measures to protect workers during the pandemic. These are just a few of the examples at the national level where industry opponents are using the pandemic and corresponding public health concerns around COVID-19 to challenge oil and gas projects throughout the United States.

While COVID-19 concerns have yet to be cited as the reason for denying an oil or gas project at the federal, state, or local level, it is likely that as the pandemic continues, opponents of the oil and gas industry will use COVID-19 and its impact on public health more frequently to challenge oil and gas development. However, in Texas, given state preemption of local regulation under HB40, it is yet to be seen how successful those efforts will be.

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