

POINT/COUNTER-POINT: TLS grads on fracking and preemption of local ordinances

Energy and Environmental law is sprinkled with cases claiming preemption of state law by federal programs; preemption between state and local authorities, while important, has had a smaller place on the docket. No longer. The advent of hydro-fracking has propelled state v. local issues to the forefront, due largely to the momentum of field development and the vigor with which local communities have reacted to what they perceive as threats to their way of life. In these brief articles two recent Tulane Law graduates, each involved in fracking litigation, present differing views on the preemption debate. Their pieces will be expanded, updated, and published in the Spring issue of the Tulane Environmental Law Journal, fully cited, and for that and space reasons their sources are not provided here. Rest assured, they exist. We've seen them.



Jamal L. Knight, Associate at Faegre Baker Danies, LLP; he represents corporate clients in challenges to local fracking ordinances.

Fracking Litigation: An Industry View

By *Jamal L. Knight, JD TLS 2012*

I. Intro

Hydraulic fracturing and horizontal drilling are safely unlocking vast reserves of oil and natural gas found in

shale and other tight-rock formations across the country. Increased concern by municipalities over the effects of hydraulic fracturing on public health and the natural environment has brought the issue to the political arena, and each level of government has sought to exercise greater control over the regulation of the oil and gas industry in response. Local bans have not turned out to be the simple solution local communities hoped. Oil and gas activities in the United States, including hydraulic fracturing, have historically been regulated at the state level, and a number of states have resisted local regulation of hydraulic fracturing when such regulations are inconsistent with the state's broader philosophies regarding the oil and gas industry. While opposition to hydraulic fracturing across the country is likely to persist, efforts to ban the practice at the city and county level should be preempted by statewide regulatory structures.

II. The Process

Hydraulic fracturing – the use of pressurized fluids to extract oil or natural gas from tight rock formations – has been used in oil and gas development for more than 60 years. To implement the process, fluid is pumped down a well into formations often located one mile or more beneath the surface. The hydraulic pressure created by the fluids creates small cracks in the formation, at which time small granular solids, such as sand or ceramic beads, are pumped into the cracks to keep the cracks open after the hydraulic pressure is removed. The cracks are then utilized to extract otherwise inaccessible oil or gas from the formation.

Recent advances in drilling technology have led to a surge in hydraulic fracturing. Instead of drilling straight down from the wellhead, operators can now drill down to the formation that they want to tap, and then turn 90 degrees to drill horizontally through the formation, permitting access to oil and gas that could previously have required up to 16 vertical wells and corresponding pads. More than 90% of the oil and gas wells in Colorado currently utilize hydraulic fracturing.

III. Conflicting Approaches:

Searching for the Proper

Balance of Authority

At the federal level, there is no comprehensive regulation for hydraulic fracturing. Instead, state and local governments have primary and often-times overlapping regulatory authority, and the issues underlying their conflict are similar in every state. The manner in which courts and state legislatures have elected to address these matters, however, varies greatly.

Municipalities are creations of the state and, therefore, only have as much authority as the state has given them, either through its constitution or statutes. Many states in which hydraulic fracturing activity is occurring have constitutional provisions granting municipalities authority to adopt ordinances addressing issues of local concern (i.e., home rule). Zoning allows municipalities to adopt comprehensive development plans and implementing ordinances, which control the particular activities or uses permissible within their borders. In many states, a presumption exists that, unless the state legislature has made clear it intends to preempt local regulation, preemption will not be found.

A. Colorado

Hydraulic fracturing has become a hot button topic in Colorado as oil and natural gas development has increased near urban and residential areas. During the 2012 election, in response to citizen concerns, the cities of Longmont, Lafayette, Fort Collins, Loveland and Broomfield adopted some form of ban on hydraulic fracturing, despite warnings from state and local industry trade groups that such bans were contrary to state law.

Earlier this year, a district court in Colorado overturned these bans in Longmont and Fort Collins, on grounds that it was preempted by the Colorado Oil and Gas Act. The Court noted that oil and gas operations are a matter of mixed local and state concern, both levels of government may regulate an activity provided that there is no conflict between them.

Applying this principle, the Court was unable to harmonize the local ban with the Oil and Gas Act's purpose of fostering the efficient development and production of oil and gas resources. "Here, giving effect to the local interest, banning fracking, has virtually destroyed the state interest in production. [...] The conflict in this case is an irreconcilable conflict." In the court's mind, local controls could result in uneven production and resource waste, as well as negatively impacting royalty owners.

B. Pennsylvania

Pennsylvania sits on the Marcellus Shale, another hotspot where natural gas production increased six-fold from 2008 to 2011. Unsurprisingly, Pennsylvania's local governments were among the first to regulate that growth, and in 2009, the Supreme Court of Pennsylvania ruled that the Pennsylvania Oil and Gas Act provided local governments with the power to pass ordinances that "control the location of wells consistent with established zoning principles," and that drilling within zoned residential districts was lawfully prohibited by those principles. The Pennsylvania legislature reaction was to take the express preemption approach by enacting the Oil and Gas Act of Pennsylvania (Act 13), written to override most, if not all, local control over oil and gas drilling. Several provisions of Act 13 were challenged by municipalities. In December 2013, the Pennsylvania Supreme Court, relying upon the state's constitution, struck down portions of Act 13, which had barred local governments from asserting home rule jurisdiction and enacting ordinances and regulations governing the use of hydraulic fracturing. In March 2014, the court rejected a request by Gov. Thomas Corbett to reconsider its decision.

C. New York

The Town of Middlefield enacted its ban in June 2011. Although reports at the time indicated that the supporters of the ban were motivated in large part by opposition to hydraulic fracturing,

the ordinance prohibits all oil and gas activity, whether or not it involves fracturing. The ban was soon challenged by Cooperstown Holstein Corporation, which had granted two oil and gas leases a few years before. Cooperstown Holstein argued that the ban was preempted, as in Pennsylvania, by a state oil and gas statute.

In February 2014, a New York court upheld the ordinance. The ruling was the second in four days upholding such a ban, as it followed a court ruling on February 21 that upheld a similar ban by the Town of Dryden. [see companion article, Ed.]

D. West Virginia

In June 2011, Northeast Natural Energy sued the city of Morganton, WV, for an ordinance banning fracking within the city or one mile outside of city limits. A state trial court ruled in favor of the energy company, holding that the state had exclusive control over oil and gas development and that the town "didn't establish that fracking threatened the community's right to clean air and water." It found further that the "[s]tate's interest in oil and gas development throughout the state ... provides for the exclusive area of this law to be within the hands of the [West Virginia Department of Environmental Protection]."

E. Louisiana

A ruling several years ago found that a zoning ordinance by the City of Shreveport, Louisiana, which attempted to ban drilling within the vicinity of a lake, was preempted. In 2006, the U.S. Fifth Circuit Court of Appeals ruled in favor of Energy Management Corporation, holding that the City of Shreveport, LA, did not have the right to ban drilling within 1,000 feet of its lake. The ruling reversed the decision of a federal district court, which had found that Shreveport was within its rights to enact a ban in an effort to protect its city water supply.

F. California

In 2013, the California state legislature passed SB 4, a comprehensive law governing hydraulic fracturing across the state. On Feb. 28, 2014, the Los Angeles City Council unanimously ordered a new ordinance placing a moratorium on "all activity associated with well stimulation, including, but not limited to, hydraulic fracturing", making Los Angeles the only oil-producing city in California to ban the practice. The moratorium would remain in place until the city verified that hydraulic fracturing would not harm public safety or compromise drinking water. SB 4 also includes a "savings clause" that requires all state agencies to comply "with any other provision of existing laws, regulations and orders," seemingly permitting Los Angeles to impose additional environmental and mitigation requirements.

IV. The Way Forward

One common thread underlying the tension between state and local regulation is whether the local ordinance is intended to regulate the "where" or "how" of hydraulic fracturing. The authority to adopt zoning ordinances — the "where" an activity may take place within a municipality — has been traditionally delegated to municipalities. As such, a local ordinance that limits its scope to the where is in a better position to withstand a preemption challenge than one that attempts to regulate the "how" of hydraulic fracturing. Representatives from the oil and gas industry have challenged local bans on grounds that state programs preempt them. In some states like Colorado the lawsuits have succeeded, but opponents of hydraulic fracturing are unlikely to be deterred. Operators and policymakers should therefore prepare for the passage of statewide legislation or constitutional amendments preempting the field. Hydraulic fracturing provides clean fuel alternatives for generations, but its proponents must remain diligent to ensure that it is not delayed or precluded by municipal or statewide policy changes.