

Looking At The Legal Deficiencies Of Local Fracking Bans

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Hydraulic fracturing is an increasingly common method of oil and gas extraction, which has, thus far, largely escaped specific federal regulation or guidance. As more state governments allow fracking in oil and gas operations, anti-fracking groups have shifted their attention to municipalities and are driving the development of local bans and restrictions on fracking and drilling operations generally. While local governments may see this self-governance as a crucial means of exercising control over the impact of fracking on their communities, this patchwork of permitting oftentimes leaves drilling companies exposed to frustrating legal uncertainty, particularly where operators are already complying with stringent state requirements concerning oil and gas development.



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Faced with this impediment to development activities, entities with drilling interests are mounting a vociferous opposition to local municipalities' adoption of their own ordinances restricting the use of fracking. Prior to 2015, however, these efforts had met with mixed results, as the New York Court of Appeals and the Pennsylvania Supreme Court upheld local fracking regulations and bans, stating they were within the purview of the local governments' zoning authority.[1] However, as shown by two recent decisions coming out of New Mexico and Ohio, courts are increasingly setting aside these local fracking bans. These recent decisions both acknowledge the importance of local zoning powers but hold that they are subordinate to established state oil and gas regulation, even where no specific regulations concerning fracking are already in place.

On Jan. 19, 2015, the U.S. District Court for the District of New Mexico overturned a county's outright ban on fracking, holding that the ordinance violated the Supremacy Clause and New Mexico law governing the drilling of oil and gas.[2] In *SWEPI LP v. Mora County*, the municipality enacted an ordinance banning all fracking activities within its jurisdiction. The plaintiff, SWEPI, had no immediate intent of fracking but held state-regulated oil and gas leases in the county. SWEPI challenged the ban, claiming, among other things, that the ordinance violated the Supremacy Clause and was preempted by New Mexico law. In return, the county challenged SWEPI's standing, arguing SWEPI has suffered no harm as it had no intent to begin any drilling activities.

The district court found SWEPI had standing despite its lack of immediate intent to begin drilling because the ordinance itself interfered with SWEPI's ability to exploit its leasehold mineral interests. Although the county also argued that SWEPI could not have suffered an injury because its state leases were

already worthless before the ordinance was enacted, the court held there was no requirement that SWEPI show the local ordinance somehow lessened the value of its property interest, only that it affected its property interest.

The court in SWEPI went on to hold that state law governing the drilling of oil and gas preempted the outright ban on fracking. While the state government in New Mexico had not enacted a specific law that would expressly preempt the local ordinance, New Mexico had implemented a general permitting system to allow for the extraction of oil and gas. The court reasoned this state regulatory scheme was indicative of New Mexico's approval of oil and gas extraction and that approval rendered any ban on oil and gas extraction "antagonistic" to state law. Following that logic, the court held that "a county cannot outright ban an activity that is highly regulated by that state and of which the state impliedly encourages." [3] The court also struck down language in the ordinance that stated the U.S. Constitution would preempt the ordinance only when interpreted in a matter consistent with the ordinance's own limited interpretation of corporate rights.

Following along with the reasoning of the New Mexico district court in SWEPI, the Ohio Supreme Court recently held that under Ohio's constitution, municipalities cannot enact local permitting schemes which conflict with the state's "sole and exclusive" authority to regulate oil and gas production and operations. In *State ex. rel. Morrison v. Beck Energy Corp.*, [4] Ohio issued Beck Energy a permit to begin drilling in Monroe Falls. However, after drilling activities began, the city issued a stop-work order and filed suit seeking an injunction against Beck Energy's activities, alleging the company was violating multiple municipal ordinances.

On appeal to the Ohio Supreme Court, the court found that the city's municipal ordinances conflicted with the state's permitting scheme and were thus in violation of the Ohio constitution. The court based its decision on Ohio's Home Rule Amendment, a provision which grants local governments the authority to exercise police powers as long as they do not conflict with the general laws of the state. Under the amendment a local licensing ordinance impermissibly conflicts with state law if the local rule restricts an activity which is also allowed by Ohio state law. Ohio's state law establishes a permitting process for any person seeking to drill a new oil or gas well. Once a person obtains a permit, the state allows the person to proceed with drilling activities. But the city's ordinances interfered with that approval process by placing additional restrictions on oil and gas drilling, which essentially renders meaningless the state-issued permit unless the permittee also satisfies the requirements of the local ordinances.

The Ohio court overturned the zoning ordinances applicable to oil and gas drilling, holding that they impermissibly restricted an activity which state law allowed. The court, however, carefully limited the scope of its decision, noting the question before it was not whether "the law *should* generally allow municipalities to have concurrent regulatory authority, but whether [the state constitutional and statutory provisions at issue] *do* allow for the kind of double licensing at issue here." [5] It concluded that they did not.

In addition to the many other legal issues facing these types of local ordinances, such as the risk of inverse condemnation and regulatory taking claims, these preemption issues should cause other local governments to hesitate before enacting local ordinances regulating fracking and other drilling activities. For example, the cities of Los Angeles, Compton and Crenshaw have all reconsidered prior efforts to impose onerous restrictions on fracking. While other local governments are still considering enacting these types of restrictive ordinances, they should take a hard look at the legal principles set forth in these recent decisions from Ohio and New Mexico. Where the state has already enacted specific oversight over oil and gas drilling activities, any additional interference by local municipalities will be

carefully scrutinized and likely face robust opposition.

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[1] See *Robinson Township v. Commonwealth of Pa.*, 83 A.3d 901 (Pa. 2013); Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp. *USA v. Town of Dryden et al.*, 16 N.E.3d 1188 (N.Y. 2014).

[2] *SWEPI, LP v. Mora Cnty.*, No. 14-CV-0045, — F.Supp.3d — (D. N.M. Jan. 19, 2015).

[3] *Id.* at *101.

[4] *State ex. rel. Morrison v. Beck Energy Corp.*, No. 2015-Ohio-485 (Ohio Sup. Ct. Feb. 17, 2015), available at <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-Ohio-485.pdf>.

[5] *Id.* at p. 13 (emphasis in original).

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