

Fracking Fights Are Increasingly Becoming Local

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On May 7, 2014, a petition to ban hydraulic fracturing was submitted to the city council in Denton, Texas. The petition aims to make fracking illegal within the boundary limits of Denton, which is believed to sit upon one of the largest natural gas reserves in the U.S. Currently, all oil and gas drilling is prohibited in the city, because the council voted in favor of a moratorium that will last until Sept. 9 of this year. If the city council ultimately adopts the permanent ban, Denton will become the first city in Texas to prohibit the practice. However, if the council votes against the ban, the initiative will likely find its way onto the ballot in November, allowing the public to decide the issue.[1]

Fracking is the high-pressure injection of a mix of fluids and other substances into an oil or gas reservoir. The injection into the bottom of a well fractures the reservoir rock, unlocking hydrocarbons trapped in the reservoir formations. Other substances in the fracking fluid called "proppants" hold the cracks in the reservoir rock open and allow the oil or natural gas to flow up and out of the reservoir through the well.

Conventional fracking is a common practice that has been employed in oil and gas operations for over 60 years. However, fracking began to garner national attention in 2010 after the release of "Gasland," a documentary film that examined the allegedly harmful effects of the practice, including air and groundwater pollution. In recent years, the practice has become even more controversial and widely debated, moving to the forefront of political discussions at the federal, state and local levels.

As shown by the actions taken in the city of Denton, local governments are becoming the new battleground in the contentious subject of fracking. As state governments have increasingly rejected efforts by activist groups to impose total prohibitions on fracking, these groups have begun to focus their energies on municipalities. While increasing numbers of municipalities have adopted restrictive regulations in response to public pressure, the validity of such regulations are subject to significant legal issues, especially in states where oil and gas activity is already the subject of comprehensive statewide regulations.



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Efforts to Ban Fracking at the State Level Have Mostly Failed

Due to the near-absence of federal regulation in this area, states initially sought to fill the legislative void by proposing and enacting a patchwork of laws and regulations outlining where and how fracking may be performed. Environmentalists and other activist groups across the country turned to state legislatures seeking bans and moratoriums on fracking. In response, some states, such as New York, have adopted moratoriums toward fracking pending the results of in-depth studies on the practice.

However, for the most part, state legislatures have rejected attempts to impose bans or overbroad restrictions on fracking. For example, on May 28 and May 29 of this year, the California Senate twice voted down SB 1132, which would have extended by 18 months a moratorium on fracking while further scientific study on the issue was completed. Instead, fracking is allowed to continue in California in accordance with the interim rules promulgated by the California Department of Oil, Gas and Geothermal Resources until the California Secretary of the Natural Resources Agency completes its independent scientific study on well-stimulation treatments by Jan. 1, 2015.[2]

Similarly, recent efforts to ban fracking at the state level in North Carolina have also failed. On June 4, 2014, Gov. Pat McCrory signed a law that ends the state's moratorium on fracking permits. The Energy Modernization Act allows fracking permits to be handed out in the state beginning in the spring of 2015, ending the ban that had been in place since 2012.[3]

These events in California and North Carolina are merely two examples of the current trend at the state level, where activist groups have generally been unable to persuade state legislators to impose permanent bans on fracking. Instead, state governments have tended to allow fracking efforts to continue, subject to varying levels of regulation.

Shift in Anti-Fracking Efforts

In response to these circumstances, anti-fracking efforts have begun to shift from the state arena toward individual counties and cities. Municipalities across the country are increasingly experiencing pressure from groups and citizens to impose bans and moratoriums on fracking. In many cases, local officials have folded under, adopting regulations or ordinances that impose temporary or permanent prohibitions on the practice.

In February 2014, the Los Angeles City Council adopted recommendations requesting the City Attorney to prepare an ordinance to ban fracking and other forms of well stimulation. Such an ordinance, if adopted, would make Los Angeles the first oil-producing city in California to prohibit the practice. According to the council, the moratorium will remain in place until the city can verify that fracking activities will not harm public safety or local drinking water.[4] Similar efforts to ban fracking have taken place in cities across Colorado, New York, Ohio and Pennsylvania, among other states.[5] In total, over 200 municipalities have implemented permanent bans or temporary moratoriums on fracking.[6]

Other municipalities have taken a more cautious approach, focusing on regulating the logistics of fracking activities. For example, several localities have turned to zoning mechanisms and setback requirements to prohibit fracking in specific areas.[7] Still others have concentrated their fracking regulations on addressing particular issues like noise, odor and traffic impacts.[8]

On the hand, some local efforts to curb fracking in other cities have been unsuccessful. In Carson, California, for example, city officials recently lifted a moratorium on fracking. The reversal was reported

to have been driven in large part by concerns about the effect of the ban on jobs and the local economy.[9]

Although the experiences of these municipalities have been different, they all point to the fact that the fight over fracking is increasingly becoming a local one, shifting away from state legislatures and toward counties and city councils. This trend is likely to continue. As long as fracking opponents continue to lose the battle at the state level, we can expect to see more municipalities tackling anti-fracking initiatives.

However, in taking such actions, municipalities will likely face a number of legal obstacles. As an instrumentality of the state, the authority of a municipality is limited to that which is provided to it by its state government, either through its constitution or subsequent statutes. While local governments generally have authority to regulate issues of local concern, fracking is typically subject to detailed regulations imposed at the state level for oil and gas operations. Since state agencies typically regulate how wells must be designed and operated below the ground, local efforts to curb fracking often overlap with pre-existing state regulatory regimes. As such, unless the state constitution expressly permits municipalities to assert home rule jurisdiction to enact regulations concerning fracking, courts will likely look with disfavor on attempts by local governments to impose a variety of different regulations on the practice within their boundaries.

Oil wells do not follow local geographic boundaries. A conflicting patchwork of laws will make it difficult, if not impossible, for well operators to effectively conduct their business and extract the energy resources that this country relies upon. Additionally, municipalities simply do not have the resources or expertise that exists at the state level. Decisions that impact areas as important as energy independence and the environment should be based on scientific data rather than emotions. As such, complicated decisions regarding when, where and how oil and natural gas extraction may be conducted should be determined by state legislators rather than local politicians.

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[1] Emily Schmall, Texas gas town considers banning fracking (The Kansas City Star, June 19, 2014), available at <http://www.kansascity.com/news/business/article580603/Texas-gas-town-considers-banning-fracking.html> (last accessed June 19, 2014).

[2] California SB 1132 (2014), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1132 (last accessed June 26, 2014).

[3] North Carolina SB 786 (2014), available at <http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S786v8.pdf> (last accessed June 26, 2014).

[4] City of Los Angeles, Adoption Of Action Under Council File No. 13-1152-S1 (Feb. 28, 2014), available

at http://clkrep.lacity.org/onlinedocs/2013/13-1152-S1_CA_02-28-14.pdf (last accessed June 26, 2014).

[5] See Food & Water Watch, Local Actions Against Fracking, available at <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/> (last accessed June 26, 2014).

[6] Id.

[7] Shaun A Goho, Municipalities and Hydraulic Fracturing: Trends in State Preemption, American Planning Association, 64 Planning and Environmental Law 3 (July 2012); see also Earl Hagstrom & Gregory Lahr, State Legislation Vs. Municipal Home Rule Over Fracking, Law360.com (March 24, 2014), available at <http://www.law360.com/articles/520360/state-legislation-vs-municipal-home-rule-over-fracking> (last accessed June 26, 2014).

[8] Shaun A. Goho, Municipalities and Hydraulic Fracturing: Trends in State Preemption, American Planning Association, 64 Planning and Environmental Law 3 (July 2012).

[9] Christine Mai-Duc, Fracking-inspired moratorium on oil drilling to expire in Carson (The Los Angeles Times, April 30, 2014), available at <http://www.latimes.com/local/lanow/la-me-ln-moratorium-oil-drilling-carson-fracking-20140430-story.html#axzz30OjwNcXa> (last accessed June 26, 2014).