

# THE DAILY RECORD

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## Environmental LAW

# Marcellus Shale development for thee, but not for me in New York

It has been almost two years since we reported on Marcellus Shale development in New York state. A once projected economic boom from natural gas development has been put on indefinite hold here in the Empire State.

Unfortunately, the news is not good and the prognosis for Marcellus exploration in New York remains grim. This despite the irony that Terry and Kim Pegula, who amassed their fortune through natural gas exploration in neighboring states, just acquired the Buffalo Bills franchise for an NFL record \$1.4 billion. Realistically, one has to wonder about the state of professional sports teams in Western New York if hydraulic fracturing was not permitted in other states.

The Department of Environmental Conservation's Economic Assessment Report projected that the economic impact from Marcellus Shale development in New York would be significant. Projections suggest that indirect and direct employment could increase from 13,491 to 53,969 full time jobs. This equates to anywhere from \$621 million to \$2.5 billion in employee earnings, depending on the scope of development.

Moreover, the state could receive between \$31 million and \$125 million in personal income tax receipts. The economic impact would also be great at a local level, where local governments would see a substantial jump in sales tax receipts based on Marcellus Shale development, with a typical 30-year well life spinning off \$1.45 million in tax receipts.

Here in New York, the picture for natural gas development through hydrofracking is uncertain. On the regulatory front, DEC still needs to finalize regulations before it will issue permits to hydraulically fracture and extract natural gas from the Marcellus Shale formation. The governor has passed off the issue, apparently indefinitely, to the Department of Health to conduct a health study on the process prior to DEC finalizing the SEQR review of proposed regulations.

In recent comments to The Buffalo News, the governor indicated that he has not been in contact with DOH, does not plan to be, and said in regards to the study, "When it's ready, it's ready." Perhaps that was simply pre-election talk to avoid the issue, but past history

does not give much hope that the regulatory process will be finalized in the near term so that the moratorium on Marcellus hydrofracking permits can be lifted.

On the litigation front, the news is actually quite worse. On June 24, the Court of Appeals issued a decision in the consolidated appeal of Norse Energy Corp. v. Town of Dryden; Cooperstown Holstein Corp. v. Town of Middlefield, which upheld the ability of towns to ban hydrofracking through local zoning laws.

Since the permit moratorium, many communities across the Marcellus region of the state have acted to ban the practice. The actions have taken the form of temporary moratorium on Marcellus Shale development through use of high volume hydraulic fracturing, as well as local zoning regulation of industrial development to ban the practice. Based on the huge investment in development and leases, industry and landowners challenged the bans, while public interest groups supported the local laws.

The state regulates oil and gas development pursuant to the Oil, Gas and Solution Mining Law of the Environmental Conservation Law. Section 23-0303(2) provides that the state's oil, gas and solution mining regulatory program "supersede[s] all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." (Emphasis added).

In June, the Court of Appeals affirmed the Third Department decisions in both cases, holding that the OGSML does not preempt home rule authority that municipalities have to regulate land use. The court went through a lengthy analysis of pre-emption to determine whether the OGSML preempted local zoning regulations in Dryden and Middlefield that prohibited hydraulic fracturing. The court conducted a three-part inquiry of the OGSML suppression clause by analyzing the plain language of the clause, the statutory scheme, and the legislative history of the provision.

Initially, the court determined that the text of the OGSML provision did not preempt local zoning regulations. Rather, the provision

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was intended only to preempt “local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.” The court next assessed the pre-emption clause within the overall statutory scheme.

The court found that the suppression clause was part of an overall OGSML statute that provided for DEC regulatory oversight of the industry, and there was nothing in the statute to indicate a broader reach other than to prevent “conflicting local laws directed at the technical operations of the industry.” Finally, in terms of legislative history, the clause was found to be consistent with allowing “local zoning laws regulating the permissible and prohibited uses of municipal land.” The court wrote that the “pertinent passages make no mention of zoning at all, much less evince an intent to take away local land use powers.”

The court held that the towns were within their home rule authority to adopt the zoning laws that banned hydraulic fracturing in their respective jurisdictions. Rather, in the court’s judgment, there

was “no legislative intent, much less a requisite ‘clear expression,’ requiring the preemption of local land use regulation.”

The existing uncertainty regarding the timing and scope of DEC’s proposed hydraulic fracturing regulations has now been compounded by a patchwork of local zoning barring the practice in some areas of the state. Based on the Court of Appeals decision, if DEC finalizes the permit regulations and the moratorium is lifted, the state Legislature will need to address the role of local governments in regulating Marcellus Shale development.

At this point, it’s hard to forecast whether it will be allowed in New York or, if so, what the reduced impact will be in the wake of prohibitive local regulation. Many of the oil and gas companies may just continue operations outside the state rather than risk heightened cost and diminished returns on their leases and development investments.

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