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Environmental LAW

Update: NY litigation over Marcellus Shale development

As previously reported in this column, the New York State Department of Environmental Conservation is still weighing public comments and considering proposed regulations to address Marcellus Shale development. But now, many local communities are beginning to act on the issue. The DEC needs to finalize state regulations before it will issue permits to hydraulically fracture and extract natural gas from the Marcellus Shale formation.

Nonetheless, communities across the affected region of the state are beginning to ban the practice. The actions to date 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 are challenging the bans, while public interest groups are supporting the local laws.

Initially, the state regulates oil and gas development pursuant to the Oil, Gas and Solution Mining Law (OGSML) of the Environmental Conservation Law (ECL). 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).

However, there are key distinctions between the oil and gas statute and the statute addressing surface mining. The state's Mined Land Reclamation Law (MLRL) is set forth in the ECL.

The MLRL preemption provision differs significantly from that of the OGSML in that it provides that "this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however that nothing in this title shall be construed to prevent any local government from: a) enacting or enforcing local laws or ordinances of general applicability ... or b) ... local zoning ordinances or laws which determine permissible uses in zoning districts," ECL §23-2703(2)(a) and (b). (Emphasis added).

As such, the statutory language differs materially in that the OGSML precludes local regulation, except relating to roads and taxes, while the MLRL permits local zoning regulation.

Many communities have revised their zoning codes to ban hydraulic fracturing. The local actions have been premised on Home Rule authority and caselaw under the MLRL. In August 2011, Dryden, N.Y., passed a zoning ban. In September, Anschutz Exploration Company, which holds leases on approximately 22,500 acres in the town and has invested more than \$5 million in leases and research, filed suit challenging the town's action.

In *Anschutz Exploration Corp. v. Town of Dryden*, Index No. 2011-0902 (N.Y. Sup. Ct. Tompkins Co.) the company alleged that the zoning ordinance is invalid and unenforceable because it prohibits the development of oil and gas, which state law explicitly authorizes under the ECL. The gas company asserted that OGSML supersedes local ordinances relating to natural gas drilling except two limited areas of jurisdiction relating to local roads and property taxes. The case is the first in the State to address whether OGSML preempts local zoning laws.

On Feb. 21, the Tompkins County Supreme Court granted the town's summary judgment motion and held that the local law is not preempted by the OGSML. The court followed Court of Appeals' precedent in *Matter of Frew Run Gravel Products v. Town of Carrol*, 71 N.Y.2d 126 (1987) and *Matter of Gernatt Asphalt Prods. v. Town of Sardina*, 87 N.Y.2d 668 (1996), which found that local zoning of gravel mines was not pre-empted under MLRL.

The court concluded that the statutory language of both the OGSML and MLRL were nearly identical. Specifically, the court declined to find any difference in the preemption provisions of the OGSML and MLRL or the purposes behind the two statutes. The court found that neither suppression clause contained clear legislative intent to preempt local control over land use and zoning. Finally, the court referred to decisions in Pennsylvania



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addressing a similar suppression provision which allowed local zoning bans on oil and gas operations.

Similarly, on Feb. 24, the Otsego County Supreme Court issued a decision in *Cooperstown Holstein Corporation v. Town of Middlefield*, Index No. 2011-0930 (N.Y. Sup. Ct. Otsego Co.) upholding a town zoning law that declared “[h]eavy industry and all oil, gas or solution mining and drilling ...” as prohibited uses. A dairy farmer that had leased 380 acres to a gas company challenged the zoning law.

The court did not find preemption under the OGSML and wrote that there was no legislative intent in the statute to preempt local regulation. As in *Anschutz*, the court followed *Matter of Frew Run* under the MLRL to conclude that OGSML preempted only local regulation of the method and manner of gas drilling, but not local land use control.

The court closely examined the legislative history of the OGSML. The court found that neither the statute nor the legislative history of the OGSML established that the Legislature’s language “relating to the regulation of the oil, gas and solution mining industries” was intended to limit the constitutional and Home Rule authority vested in municipalities to regulate local land use. The court concluded that “[t]he state maintains control

over the ‘how’ of [natural gas development] procedures while municipalities maintain control over the ‘where’ of such exploration.”

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. The gas company and property owner in both cases have appealed to the Appellate Division, Third Department.

Regardless of the decisions at the Third Department, the cases are likely to be appealed to the state’s highest court. Depending on the outcome of legal challenges, the State Legislature may need to address the role of local governments in regulating Marcellus Shale development.

However, Pennsylvania recently adopted legislation to allow hydraulic fracturing across the state and many local governments are challenging the legislation. While the future of Marcellus Shale development in New York remains uncertain, it is clear that both sides of the issue will explore all avenues to support their position.

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