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Environmental LAW

Local regulation of Marcellus shale development

As the New York State Department of Environmental Conservation accepts public comments on proposed regulations to address Marcellus shale development, many local communities are beginning to weigh in on the issue. The DEC needs to finalize state regulations before it will issue permits to drill and extract natural gas from the Marcellus shale formation.

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Nonetheless, communities across the affected region of the state are beginning to act. The actions to date have taken the form of a 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 substantial investment in leases, exploration and development costs, landowners and natural gas exploration companies are mounting legal challenges. There are significant legal questions regarding whether existing state law pre-empts local regulation of Marcellus shale development.

Initially, the state regulates oil and gas development pursuant to the Oil, Gas and Solution Mining Law (OGSML) found at Article 23 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). Thus, the question of how much home rule authority municipalities will have in this area will depend upon the courts' interpretation of this suppression provision of the ECL.

In at least one instance a court has addressed the scope of the pre-emption provision in ECL Section 23-0303(2). In *Matter of Envirogas, Inc. v. Town of Kiantone*, 112 Misc.2d 432 (N.Y. S.Ct., Erie Co. 1982), aff'd 89 A.D.2d 1056 (4th Dept. 1982), lv. den., 58 N.Y.2d 602 (1982), the court invalidated a town zoning ordinance that required payment of a $2,500 compliance bond and a $25 permit fee for oil and gas wells as a result of the preemption provision of Section 23-0303(2).

The court held that "where a state law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on the same subject matter unless it has received 'clear and explicit' authority to the contrary," *Id.* at 433.

Consequently, the court found that Section 23-0303(2) expressly "pre-empts not only inconsistent local regulation, but also any municipal law which purports to regulate gas and oil well drilling operations, unless the law relates to the local roads or real property taxes which are specifically excluded by the amendment." The court rejected the town's assertion that the bond and permit fees were aimed at addressing local roads since the ordinance did not apply to operators of other forms of heavy equipment such as farmers and contractors.

Although the suppression provision of the OGSML has not been tested yet relative to Marcellus shale regulation, municipalities interested in enacting local ordinances are relying upon caselaw regarding the ECL's treatment of surface mining regulation. However, there are key distinctions between the oil and gas statute and the statute covering surface mining.

The state's Mined Land Reclamation Law (MLRL) is set forth in Article 23, Title 27 of 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. In addition, the statutory purposes are distinct. The OGSML suppression

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provision was enacted in 1981 to address state-wide problems caused by attempts at local regulation which created a patchwork of regulations and enforcement problems affecting the oil and gas industry. Thus, DEC worked with the Legislature to enact a uniform regulatory regime exclusively administered by the DEC and removed local control.

In contrast, the MLRL was aimed at creating a state and local partnership arrangement that recognized the importance of extraction of mineral resources, provided a DEC regulatory program, but acknowledged the importance of local regulation and zoning regarding the siting of surface mines as well as reclamation of mines.

In the context of MLRL cases the New York Court of Appeals has held that a municipal zoning ordinance that precluded sand and gravel mines as a permitted use within the town's zoning district did not relate to the mining industry, but rather "regulating the location, construction and use of buildings, structures, and the use of land in the [t]own," See *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987). After that decision the state Legislature amended the MLRL section to ensure that local zoning laws which determine permissible uses in zoning districts are outside the scope of pre-emption. In the subsequent case of *Gernatt Asphalt Products v. Town of Sardina*, 87 N.Y.2d 668 (1996), the Court of Appeals rejected the notion that the state's MLRL preempted a town's ability to determine that mining be eliminated as a permitted use within the community.

Aside from a complete ban, some municipalities are enacting temporary moratoriums on hydraulic fracturing while they consider zoning changes. In general a local moratorium is warranted when: it is adopted in strict compliance with the procedures for enactment and amendment of zoning regulations; the moratorium does not exceed a reasonable time period; and the municipality makes legitimate efforts to update its comprehensive plan and consider amendments to zoning regulations. Several communities, including the Towns of Marcellus, Skaneateles and DeWitt have enacted moratoriums on hydraulic fracturing while further study and analysis is performed.

Many other communities have revised their zoning codes to ban hydraulic fracturing. Given the substantial economic investment by gas exploration companies, zoning amendments that ban the practice are being met with legal challenges. In August 2011 Dryden, New York passed a 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.

The lawsuit asserts that the zoning ordinance is invalid and unenforceable because it prohibits the development of oil and gas which State law explicitly authorizes under Article 23 of the ECL. Essentially the gas company position is that OGSML supersedes local ordinances relating to natural gas drilling except two limited areas of jurisdiction relating to local roads and property taxes.

The town has argued that the exercise of local zoning authority is a permissible action within the town's home rule authority. However, the gas company has asserted that the exceptions carved out for zoning regulation by the courts related to surface mining do not apply in this instance and that the action is preempted by the OGSML.

Regardless of the initial decision in Dryden and other challenges, 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.

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