State Permitting Authority vs. Local Zoning: A Growing Trend for Hydraulic Fracturing Development?

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As the process of hydraulic fracturing becomes more prevalent, several municipal governments are using their local zoning power to restrict or prohibit resource exploration. Many of these new local ordinances conflict with state permitting authority; however, some state statutes may be ambiguous when it comes to regulating oil and natural gas exploration.

The policy debate over the regulation of hydraulic fracturing in shale formations stirs passionate debate among proponents and opponents like few other issues in the energy and environment policy arena. The process—which injects millions of gallons of water, sand or “propping agents” and specialized chemicals into underground reservoirs—has produced an avalanche of natural gas.

Typically, the actors involved in a fracking dispute are environmental advocacy groups pitted against a private company over the extraction process, water pollution concerns, wastewater disposal, chemical disclosure and myriad other complex regulatory issues. Media accounts and trade press articles have largely overlooked a brewing regulatory fight between an unlikely cast of characters—local municipal governments and states. The preponderance of laws covering hydraulic fracturing establishes state primacy in its oversight to determine how the process of oil and gas drilling should be regulated. Left unanswered in many state laws is an explicit determination of where that production can occur and the role local governments can play using its zoning authority.

State Permitting

States have the primary responsibility for regulating hydraulic fracturing, which does not fall under a one-size-fits-all federal standard. Shale formations vary considerably because of geologic, hydrologic, topographical and climactic reasons. Consequently, hydraulic fracturing regulations in states often can be as diverse as the shale formations themselves. In general, states require permits for drilling oil and natural gas wells, service wells and wastewater disposal wells. State legislatures typically delegate power to regulate these activities to an oil and gas division, commission or board that is either headed by an appointee of the governor or an elected official. Technical staff members who review the permit applications are usually experienced engineers, geologists and scientists with years of expertise and training in resource protection and the prevention of environmental contamination. State agencies not only implement federal laws covering environmental protection, but they also have state laws and regulations that mirror provisions found in federal statutes like the National...
Environmental Policy Act that require environmental assessments, public hearings, and requests for public comment and input from local stakeholders on future regulatory or permit actions.  

**Local Regulation**  
States have near-complete control over local governments through settled law, and the powers derived by municipalities come from state constitutions granting various types of authority. Although each state’s constitution and regulatory model is inherently different, policy observers typically break down states into two separate categories: “Dillon’s Rule” states or “home rule” states.

The term “Dillon’s Rule” comes from an 1865 decision rendered by Judge Robert Dillon of Iowa over the issuance of bonds unauthorized by state legislatures, which found that local governments only have authority over matters when a charter or law expressly grants it power. Courts only become involved in legal disputes when the intent of the legislature or the state constitution is not clearly expressed to determine grants of authority. In theory, a Dillon’s Rule state can have either a liberal or a conservative regulatory model. The limiting factor is that a locality’s authority must be expressly determined.

“Home rule” states typically are described as having a more expansive set of powers that are assumed unless it is clearly denied by law. Anecdotally, political scientists and observers note the public often misapplies and confuses the concept of “home rule” because the term is used both as a legal doctrine and as a political motto. Two components are foundational to the notion of home rule granted by a constitutional amendment or legislative action. The first is the ability of a local government to manage its own affairs. Secondly, local governments must be able to avoid interference from the state or a state agency. According to the National League of Cities, 32 states employ Dillon’s Rule to all municipalities, seven states apply the rule on only certain localities and 10 states apply home rule. Florida applies home rule for all issues but taxation. (see chart).

Local ordinances regulating aspects pertaining to hydraulic fracturing are quite common, even in states assumed to be favorable to oil and gas exploration. In Texas, for example, the authority of municipalities to regulate land-use decisions is actually quite broad and is especially prevalent in the Barnett Shale region near Fort Worth. The state oil and natural gas drilling regulator, the Texas Railroad Commission, claims no jurisdiction over noise abatement, roads or traffic issues associated with oil and natural gas drilling. According to the Barnett Shale Energy Education Council, a natural gas industry coalition, nearly all municipalities in North Texas have adopted some type of ordinance related to drilling, with the most common being setback requirements that establish minimum distances a gas well can be located from residences, churches or schools. Other common forms of local control determine the times operators may commence or must finish drilling activities, employment of sound barriers to control noise at well sites, and use of directional lighting to prevent unwanted illumination near residential areas.

**The New York State Supreme Court Case**  
A landmark legal decision by the New York Supreme Court thrust the issue of local government “home rule” to control and limit hydraulic fracturing development into the national spotlight. In February 2012, the court upheld a ban issued by the Town Board of Dryden, N.Y., that included oil and natural gas drilling activities along with heavy industry in an ordinance of prohibited activities within the town’s border. According to a statement by Justice Phillip Rumsey, the existing statute—“the Oil, Gas, and Solution Mining Law”—which gives the state authority to regulate oil and natural gas activities, does not expressly preempt municipal land use decisions and zoning laws.

He stated:
“A clear legislative intent to preempt local zoning authority is not apparent from the fact that the OGSML (state statute) does not specifically provide a mechanism for consideration of local concerns. Rather, by construing the OGSML in accordance with its plain meaning—i.e., as superseding only local regulation of operations—it may be harmonized with those statutes that grant the zoning power to local municipalities. Under this construction, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC (the state regulatory agency) regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by law.”

Although New York essentially has a de facto moratorium on fracking until the state Department of Environmental Conservation renders a final regulatory decision on the process, several companies have undertaken leasing activities throughout the state. Anschutz Exploration Co., the plaintiff in the state Supreme Court case, held 22,000 acres of oil and natural gas leases comprising nearly 36 percent of the entire land area of the Town of Dryden. Anschutz argued that New York’s Environmental Conservation Law supersedes all local regulations relating to oil and natural gas exploration and development with the exception of local roads and property taxes. Article 23 of the law specifically states, “The provisions of this article (Article 23) shall supersede 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.”

The political and policy debate over fracking in New York has been very controversial and at least 22 towns have passed their own local bans on the practice since the state’s administrative moratorium has been in place. Those localities, like the town of Dryden, believe that drilling activities could overwhelm residents and do not correspond with its local land use planning. Home rule power is granted under Article IX of the state constitution and a state statute requires the legislature to pass legislation to limit the power of local zoning ordinances.

The judge ruled in favor of the town’s argument that state law does not implicitly preempt local zoning regulations because the plain meaning of the phrase “relating to the regulation of the oil, gas and solution mining industries” does not expressly supersede the authority of municipalities to control land-use decisions in its borders. Despite the ruling in favor of the town, the judge’s ruling did not address challenges by the company, local landowners and lessees that the prohibition on hydraulic fracturing constituted takings of personal property when their private lease agreements valued at more than $5 million were voided by the ban—a significant amount for a town of roughly 14,000 for potential liability costs. Anschutz and local landowners plan to appeal the ruling and to recoup their lost investment. Other localities in New York must now weigh financial and legal considerations in addition to environmental concerns when pushing for outright bans on the use of hydraulic fracturing.

Pennsylvania and Act 13

Due to its location in the resource-rich Marcellus Shale, Pennsylvania has been one of the most active hotbeds of state and local regulatory activity surrounding hydraulic fracturing. A new sweeping statute passed in February 2012 called the Marcellus Drilling Law Act, or Act 13, included substantial payments of more than $200 million per year to communities, counties and local governments from new fees assessed on natural gas production to address and mitigate the impacts on roads and services from the rapid expansion of fracking. In addition to new financial inducements, the legislation also included provisions preventing localities from using their zoning powers to restrict oil and natural gas leasing or development and it prohibits any local ordinances that are stricter than state standards for environmental protection related to fracking. Any local law in excess of state standards can be challenged by drilling companies; however, those disputes would be decided by the state Public Utility Commission.
In response to the legislation, seven municipalities and activists sued the state in March 2012, objecting to provisions in Act 13 that limit land-use control and over the requirements to change local zoning laws to conform to state statute or risk losing shale impact fee funding. The plaintiffs said:

“By crafting a single set of statewide zoning rules applicable to oil and gas drilling throughout the Commonwealth, the Pennsylvania General Assembly provided much sought-after predictability for the oil and gas development industry. However, it did so at the expense of the predictability afforded to Petitioners and the citizens of Pennsylvania whose health, safety and welfare, community development objectives, zoning districts and concerns regarding property values were pushed aside to elevate the interests of out-of-state oil and gas companies and the owners of hydrocarbons underlying each property, who are frequently not the surface owners.”

Officials from Gov. Tom Corbett’s office note that Act 13 passed with support from groups like the County Commissioners of Pennsylvania and the Pennsylvania State Association of Township Supervisors and that the legislation is the first major reform of the state’s oil and gas laws since 1984. Besides generating substantial revenue for communities and counties, the legislation more than doubles existing setback requirements for operations near streams, wells and residences, and it expands “presumed liability” to drilling operators for potentially impairing water quality. The governor’s office said in a statement, the new law “provides long-term regulatory predictability for job creators and capital investors.”

The oil and natural gas industry echoed similar refrains after a state judge in April, 2012, granted a 120-day stay for the portion of the law dealing with local zoning. An attorney representing the Pennsylvania Independent Oil and Gas Association and other drilling companies said in The Pittsburgh Post-Gazette, “This is the most serious and most significant event that (the industry) will encounter with respect to the Marcellus and Utica shale.” Private companies say a patchwork of local rules and a lack of uniformity would add new uncertainty for businesses. Some ordinances, they contend, were designed purposefully to frustrate drilling operations. According to a story in The Philadelphia Inquirer, some local zoning ordinances in Pennsylvania prohibit noises at well sites from reaching 10 decibels during the day or 5 decibels at night—a level equivalent to a cricket’s chirp.

**Colorado and the Niobrara Shale**

Expanding production from the Niobrara Shale in the Front Range area of Colorado has become another flashpoint in the state versus local regulation debate. The area holds significant resource potential and some analysts predict it could be a major new discovery. According to the Western Energy Alliance, an energy trade association group, the Niobrara Shale could start producing 286,000 barrels of oil per day by 2020 and upward of $50 million in annual severance taxes for the state based on current prices. Several counties along the Front Range, which is home to the Denver metro area and other populous cities, have expressed unease with the growing development in their communities and have passed outright bans and new regulations on oil and gas drilling. Colorado state law allows communities and municipal governments to have a role in regulating noise, stormwater and traffic issues surrounding oil and gas development, but new rules have been put in place by communities in the Front Range area that conflict with state setback requirements and some have even passed resolutions conflicting with state regulations regarding chemical disclosure of fracking fluids used when formations are being drilled.

In response to concerns from local governments and advocacy groups, Gov. John Hickenlooper issued an executive order in February 2012 to create a 12-member task force made up of individuals from industry, environmental organizations and local governments to address ways to improve communication between state regulators and communities, in addition to proposing
recommendations for the general oversight process for hydraulic fracturing. The task force was charged with reviewing setback requirements for wells and production facilities, water quality, noise abatement, wildlife protection, air quality and traffic issues, as well as the state fees and inspection process. The task force issued a report to the governor and legislature in late April after it received more than 1,600 public comments.

The task force recommended including more local government officials in the state Oil and Gas Conservation Commission outreach and planning process for approving permits, and giving local governments additional time to request hearings from state public health organizations regarding permits. Local officials would be allowed to conduct independent inspections and could contact state regulators if they believed possible violations were occurring. The report also encouraged the state to hire more staff focused on conducting outreach to local governments concerning oil and gas development, in addition to providing technical training and briefings for municipalities and the public to address local concerns.

Reaction to the report from advocacy and community groups was mixed; they praised the new inspection authority, but were concerned because the task force did not suggest new action on setback requirements or on the air and water pollution issues they believe are exacerbated by fracking. Industry groups generally praised the task force recommendations, which implied the state should be kept in control of oil and gas leasing operations while giving localities a stronger role and more access to information. An Energywire story quoted the president of the Colorado Petroleum Association, Stan Dempsey, as saying, “We think these are strong, proactive recommendations. These are tools that would provide more communication and certainty to local governments and to industry as well.”

Despite the move to temporarily quell the dispute between the state and local governments over jurisdictional control of fracking, proposed legislation adds a new dimension to the debate—producing counties versus those that institute permitting bans. In April, Rep. Jerry Sonnenberg introduced House Bill 1356, which would withhold severance tax revenue from a county that “restricts or delays the ability of an oil and gas producer to exercise the producer’s property right” to extract oil or natural gas. According to the Colorado Petroleum Association, severance taxes from drilling provided $73 million in 2011 to state coffers. After a legislative hearing on the bill, Sonnenberg plans to amend the legislation to limit the impact only to counties that pass outright bans on new permits from hydraulic fracturing. The Colorado Municipal League and other local government groups oppose the bill, but prospects of its passage are not high However, the bill underscores the magnitude and divergence of opinion policymakers must confront when trying to accommodate greater inclusion of local governments while ensuring effective state authority over oil and gas regulation.

Moving Forward
The issues facing the state regulators in New York, Pennsylvania and Colorado are a sample of an increasing trend of local governments instituting more control over hydraulic fracturing. New technologies like horizontal drilling combined with improvements made in the fracking process have forced unlikely oil patch states to reconsider a broad swath of oil and natural gas regulations on their books.

The first step proactive states should consider is simply reviewing their statutes concerning jurisdictional natural resource regulation and permitting. If statutes include loopholes or ambiguous definitions, state policymakers should not be surprised if localities fill the void at the behest of their concerned constituents—especially if a state constitution inherently grants unique authority to them in the first place. Creating a dialogue with communities and localities about the roles and responsibilities of state regulation and the oversight or inspection process of well operations would be
a smart way to allay fears and give the public a chance to address issues before culminating in a perceived state versus local government crisis.

A lesson from the task force created by Hickenlooper is instructive here, because it highlights the lack of technical expertise local governments may have in natural resource issues. Technical training, briefings and seminars with designated local leaders would be a useful educational tool that could also preempt potential unintended consequences from an ill-advised ordinance or resolution. As the prevalence of new wells expands into developing or residential areas, state policymakers must be aware that local officials also have constituents and will closely guard their land-use planning processes as hydraulic fracturing becomes more ubiquitous.

References:

5 Texas Railroad Commission, "Commission Authority and Jurisdiction Frequently Asked Questions [4]"
10 New York State Environmental Conservation Law [6], Article 23, § 23-0303

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