

To: Our Clients and Friends

February 29, 2012

New York Trial-Level Courts Uphold Local Laws Banning High Volume Hydraulic Fracturing

A number of local governments in New York State, in response to a highly publicized campaign to prevent the use of high volume hydraulic fracturing to extract natural gas from the Marcellus Shale formation in the State, have enacted local laws prohibiting oil and gas drilling activities within their jurisdictions. Earlier this month, two trial-level courts in New York rejected challenges to those laws. This bulletin summarizes these decisions and then provides a quick summary of hydrofracking regulatory initiatives by the New York State Department of Environmental Conservation (NYSDEC), Delaware River Basin Commission (DRBC) and U.S. Environmental Protection Agency (EPA).

The Dryden and Middlefield Decisions

In 2011, the Towns of Dryden and Middlefield each amended their zoning laws to prohibit use of land within the Towns' jurisdictions for activities related to oil and gas exploration. In Dryden, the prohibition covers a broad range of such activities including: exploration; drilling of wells; storing, transferring, processing or treating oil and gas; storing, transferring, processing or treating oil and gas exploration and production materials; storing, transferring, processing or treating oil and gas exploration and production wastes; disposing of wastes associated with oil and gas exploration or production; and erecting derricks or other structures. In Middlefield, the prohibition is similarly broad, banning "[h]eavy industry and all oil, gas or solution mining and drilling," which includes new wells and surrounding well sites, equipment involved in the re-working of existing wells, water or fluid injection stations, storage or construction staging yards and gas pipes and water lines or other gathering systems and components, and reserve pits, derricks and rigs.

A land owner challenged the Middlefield law (*Cooperstown Holstein Corp. v. Town of Middlefield*, Index No. 011-0930 (Sup. Ct. Otsego Co.)), and a gas exploration company that owned gas leases challenged the Dryden ordinance (*Anschutz Exploration Corp. v. Town of Dryden*, Index No. 2011-0902 (Sup. Ct. Tompkins Co.)). Both plaintiffs argued that the local laws were preempted by the New York State Oil, Gas and Solution Mining Law (OGSML), which provides that it "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." N.Y. Envtl. Conserv. Law § 23-0303[2]. The courts found that the OGSML did not preempt the local prohibitions, holding that the statutory preemption extends only to local

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regulation of oil and gas industry *operations*, not local regulation of *land use*. In the words of the *Middlefield* decision: “The state maintains control over the ‘how’ of [oil and gas drilling] procedures while the municipalities maintain control over the ‘where’ of such exploration.” The *Middlefield* decision paid particular attention to the legislative history of the OGSML, going back to 1963. The *Dryden* decision is primarily grounded in a 1987 New York State Court of Appeals interpretation of the supersession provision of New York’s Mined Land Reclamation Law.

Appeals of these decisions would be heard in the Appellate Division, Third Department, of New York State Supreme Court. The appeals could be expected to argue that the local laws relate to the regulation of the natural gas industry because they prohibit such operations even within areas of the town zoned for industrial use and because they are premised upon second guessing the efficacy of the State’s regulatory scheme.

NYSDEC Expected to Complete Its EIS and Issue New Permitting Regulations This Year

According to NYSDEC, more than 75,000 oil and gas wells have been drilled in New York State since the late 1800’s, of which 14,000 remain active. New wells in the State require NYSDEC permits issued under regulations codified at 6 NYCRR Parts 550-556. In issuing permits, NYSDEC must comply with the State Environmental Quality Review Act (SEQRA), which requires that a discretionary action of a state agency, such as NYSDEC, occur only after the agency has taken a “hard look” at the potential environmental impacts of the action. The “hard look” is taken in the form of an Environmental Assessment and, if necessary, an Environmental Impact Statement. The State has had a *de facto* moratorium in place on the issuance of permits for high volume hydraulic fracturing wells, because no permits can be issued until NYSDEC has complied with SEQRA with respect to such permitting. To comply with SEQRA, NYSDEC has embarked on an elaborate public process to complete a Supplemental Generic Environmental Impact Statement (SGEIS) to examine the environmental impacts of hydrofracking in the State and to impose mitigation measures to address those impacts. The most recent draft of the SGEIS was published in July 2011, after which NYSDEC held public hearings and received tens of thousands of public comments. NYSDEC has stated that it intends to issue the final SGEIS later this year. Concurrently, NYSDEC has proposed extensive revisions to its regulatory standards for new permits. The proposed regulations, which are to be codified at 6 NYCRR Parts 52, 190, 550-556, 560 and 750, are available for review on the NYSDEC web site (www.dec.ny.gov/regulations/77353.html) and are expected to be published in final form after issuance of the final SGEIS. Thereafter, individual permit applications would be considered. Such applications must demonstrate compliance with NYSDEC’s permitting regulations. To avoid preparation of a site-specific Environmental Impact Statement, such applications must also demonstrate compliance with the scope limitations and mitigation measures of the final SGEIS. These scope limitations are expected to preclude, without costly new SEQRA compliance, the permitting of new wells in the New York City and Syracuse watersheds, adjacent buffer areas, within a specified distance of drinking water wells, within the 100-year flood plain and in certain other specified areas.

Delaware River Basin Commission Regulatory Initiatives

In December 2010, the Delaware River Basin Commission, an interstate commission created by compact among the Federal government and the States of New York, New Jersey, Pennsylvania and Delaware, proposed regulations governing hydraulic fracturing within the Delaware River Basin, which stretches from southern New York along the Pennsylvania-New Jersey border to Delaware Bay. Among other things, the proposed regulations would require DRBC approval of freshwater withdrawals from the river

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and/or the basin, regulate the disposal of wastewater, and require the preparation of natural gas development plans to protect certain designated high value areas. A highly charged period of public comment followed the release of the proposed regulations, with several thousand comments submitted. Shortly before the vote on the proposed regulations, the Attorney General of New York State commenced a lawsuit in federal court against various federal agencies involved with DRBC, asserting that "carrying out" the development of the regulations without preparing a draft environmental impact statement constituted a violation of the National Environmental Policy Act. When it appeared that the Commission would be deadlocked, the vote was cancelled in November 2011, and DRBC's regulatory initiative remains in limbo.

EPA Regulatory Initiatives

At the federal level, EPA is also ramping up regulation of air emissions from oil and gas exploration, production, transmission and storage facilities. On July 28, 2011, EPA proposed New Source Performance Standards (NSPS) and revisions to the National Emission Standards for Hazardous Air Pollutants (NESHAPs) for these operations. 76 Fed. Reg. 52,738 (Aug. 23, 2011). EPA is obligated by a federal consent decree (*Wildearth Guardians, et al. v. Jackson*, Case No. 1:09-CV-00089 (U.S. District Ct. D.C.)) to promulgate these regulations by April 3, 2012.

Concurrently, EPA stated that it intends to develop effluent guidelines for discharges of wastewater from the shale gas extraction industry. 76 Fed. Reg. 66,286 (Oct. 26, 2011). These guidelines, once developed, are expected to impose additional restrictions on the discharge of wastewater from hydraulic fracturing wells to surface water bodies.

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