

New York: Home Rule vs. Marcellus Gas

By **Peter Mantius**, on July 28th, 2011

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Natural Gas Industry Spokesman Scott Cline Speaks at Keuka College (Peter Mantius)

In New York State, the tension between the state's authority to grant drilling permits for high-volume hydrofracking without notifying affected communities and the communities' right to ban unwanted industrial activity is shaping up as the key legal battle over the gas-rich Marcellus Shale.

At stake is whether the gas industry will get relatively free reign to drill statewide or be hemmed in by a patchwork of local ordinances that confine new gas wells to industrial zones.

On July 1, the state Department of Environmental Conservation issued a major portion of its revised draft Generic Environmental Impact Statement (GEIS) for high-volume hydrofracking. The agency plans to begin issuing permits to frack the Marcellus shortly after it finalizes the GEIS later this year or in 2012.

Meanwhile, towns all over upstate New York are busy passing local bans on drilling. They cite municipal home rule law that vests towns with the police power to enact laws to protect and enhance their visual and physical environment.

The city of Buffalo and at least 11 other New York towns have enacted fracking bans, and seven counties ban fracking on county land. Another 20 towns either have bans under formal consideration or have strong movements pushing for a ban or a moratorium on drilling.

The gas industry says they're all wasting their time because the bans won't hold up in court. It points to the law that gives the DEC exclusive authority to issue drilling permits. That law "supersedes all local laws related to regulation of oil and gas development except for local government jurisdiction over local roads and the right to collect real property taxes."



At first, the DEC ignored the obvious legal conflict. In its first draft GEIS issued in 2009, it never addressed local bans. There weren't many to address. But in its July 1 revised draft GEIS, the agency acknowledged home rule's growing significance by requiring applicants for Marcellus drilling permits to "compare the proposed well pad location to local land use laws ..." Any conflict "would trigger additional DEC review before a permit could be issued," the agency said.

Asked whether he thought a local fracking ban would stand, DEC Commissioner Joe Martens has said, "The law is not perfectly clear....I think we'll see some legal challenges along the way that will make that clearer."

The DEC could hardly continue to ignore "home rule" issues after the state General Assembly passed a bill this year (A3245) that would have given the increasingly popular local bans more weight than the DEC's authority to permit gas wells.

Its passage triggered alarms in the gas industry. "We have been warned that this bill may have a chance to make it through the Senate!" one pro-gas industry website declared in June. "This (S3427) is a dangerous bill."



While the Senate never took up the bill before adjourning in June, anti-drilling advocates say reviving the home rule legislation is a top priority. Roger Downs, a lobbyist in Albany for the Sierra Club Atlantic Chapter, told a panel audience in Ithaca July 25 that the bill is likely to come up if and when the state legislature meets in special session later this year.

A new law allowing communities to opt out of gas drilling would continue a pattern the DEC has established since Gov. Andrew Cuomo appointed Martens as the agency's commissioner shortly after his own inauguration in January.

While the DEC under Martens has laid out a path to drilling the Marcellus in New York, it has also banned it sensitive areas, reversing stances the agency had taken before this year. And it has pledged to codify those positions in state law. For example, the DEC is now proposing to ban high-volume fracking:

- In the New York City and Syracuse watersheds. While the DEC has acknowledged the special sensitivity of those unfiltered water systems since April 2010, it had previously stopped short of a ban because it feared the legal repercussions of denying property owners in those watersheds the chance to cash in on gas royalties.
- On the surface of state-owned lands, including state forests. The DEC had been defending the industry's right to drill in the forests despite lawsuits alleging conflicts with the legislative intent behind the establishment of those protected areas.
- Within 500 feet of the boundaries of primary aquifers.

Downs of the Sierra Club speculated that the DEC's new stances may fit with Cuomo's presidential aspirations. He noted that the governor was highly successful during his first legislative session, winning on-time approval of a state budget and signing a law permitting gay marriage in New York State. The rise of his approval rating above 70 percent has fueled talk of a Cuomo presidential run in 2016. Downs said that as a presidential hopeful, he will need to have shown national leadership on fracking, and pressing for a statewide ban would hurt his chances of appealing to moderates nationwide. He's chosen more targeted bans instead. Only time will tell if that strategy extends to the issue of home rule.

Sentiment in favor of a local ban or moratorium on fracking tends to be strongest in and around the Finger Lakes, especially in communities dependent on wineries or lakeside vacationers who want to prevent the noise, air pollution and heavy truck traffic that come with intense drilling. But most of the communities that have enacted bans fall outside the prime target area for Marcellus drilling, according to industry spokesman Scott Cline. The prime territory is just north of New York's border with Pennsylvania around Binghamton, and most communities in that area aren't keen on bans, Cline noted.

Speaking July 27 at Keuka College, which is near several communities that have passed drilling bans, Cline said, "It's unlikely you'll see Marcellus drilling in the Finger Lakes." A possible exception to Cline's generalization is the Cooperstown area near Lake Otsego, which has a tourism-dependent economy and does fall in prime Marcellus drilling territory. Four towns in Otsego County have already banned fracking and at least a half dozen others are considering that path. That means Otsego County is a likely flash point for the coming legal battle over the enforceability of local drilling bans. Those who argue pro and con are already forming battle lines.



Buffalo, New York, Skyline



Map of New York Fingerlakes



Helen Slotte, an attorney in Ithaca, has been researching case law and developing legal strategies for fracking bans for at least two years. The team opposing bans includes Tom Shepstone, campaign manager for EnergyInDepth's Northeast Marcellus Initiative. He called the bans "Potemkin Laws" in references to the fake villages meant to impress the Empress Catherine II in the 18th century Russia. Shepstone described the bans as "artificial constructs designed to fool others into thinking local officials have taken meaningful actions when, in fact, they've done nothing but create a temporary obstacle at great risk to the taxpayers who will have to pay the bill for



Attorney Helen Slottje (shaleshockmedia.org)

actions when, in fact, they've done nothing but create a temporary obstacle at great risk to the taxpayers who will have to pay the bill for their foolishness." And Michael P. Joy, an energy attorney with Biltkoff & Joy in Amherst, N.Y., predicted that town drilling bans will prove to be "costly to manage and impossible to win."

But Slottje points to a 1996 court decision that held that a municipality isn't obligated to permit the exploitation of its natural resources if limiting that activity is a "reasonable use of its police powers to prevent damage to the rights of others..." Speaking as a panelist in Ithaca July 25, she said courts have shown "incredible deference to local governments" in similar cases. That pattern of deference suggests that fracking opponents have reason to be optimistic about the bans' chances in court challenges, she added. Slottje said her optimism does not extend to another hot-button legal issue dear to some anti-drilling activists: equal protection. They have suggested challenging the fracking bans in the New York City and Syracuse watersheds as a violation of the equal protection rights of citizens with private water wells who are left exposed to drilling. They shouldn't get their hopes up, Slottje added.

Equal protection arguments are difficult to make stick in court, unless they are brought by an easily identifiable class of victims, such as a particular race or religious group. When the affected class is a good portion of the general population, the courts tend to defer to the state's agenda if they have reasonable justification, she said. So while equal protection challenges are still likely, they face more of an uphill legal battle than home rule cases, Slottje concluded.

Joy of Biltkoff & Joy strongly disagrees that home rule will prevail over state authority. He stresses the provision in New York Environmental Conservation Law that states that the DEC's rights to issue drilling permits "shall supersede all local laws and ordinances."



Peter Mantius

Peter Mantius is a reporter in New York. He covered business, law and politics at The Atlanta Constitution from 1983-2000. He has also served as the editor of business weeklies in Hartford, CT, and Long Island. He is the author of Shell Game (St. Martin's Press 1995), a nonfiction book on Saddam Hussein's secret use of a bank office in Atlanta to finance billions of dollars in arms purchases from Western countries before the 1991 Persian Gulf War.



Tom Shepstone, EnergyInDepth's Northeast Marcellus Initiative (The Times-Tribune)

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virtuallyyme [2 months ago](#)

"Cooperstown area near Lake Otsego, which has a tourism-dependent economy and does fall in prime Marcellus drilling territory." The Marcellus Shale outcrops in Marcellus NY. If the rock is at ground level, there is no gas left in it! Marcellus NY is at approximately the same latitude as Cooperstown. A look at any good map of the Marcellus Shale shows the depth of the Marcellus at Cooperstown at under 2000 feet, maybe under 1000. No pressure in Cooperstown! Except for the NIMBY obstructionist hypocrites there who want to ban gas development there while enjoying all the benefits of fossil fuels on a daily basis. Cooperstown is NOT prospective for Marcellus development.

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Peter Mantius [2 months ago](#) [in reply to virtuallyyme](#)

You're right that the Marcellus Shale is relatively close to the surface in Cooperstown and northern Otsego County. That may discourage some drillers, at least compared to

the southern part of the county, where it runs deeper. But the Marcellus formation is relatively thick -- 300-400 feet -- in most of Otsego County, and landmen have been actively leasing up property there for gas drillers. Another factor: the Utica Shale, which is deeper than the Marcellus, is another attractive drilling target in Otsego County. For a good map showing the Marcellus and Utica formations, see: <http://geology.com/articles/ut...>

3 people liked this.



NYGasRush [2 months ago](#)

Some excerpts from the website (www.iogany.org) of the Independent Oil & Gas Association of New York, describing their PAC (Political Action Committee). (Note: before reading this, it is recommended that you open all windows near you as the smell that will develop as you read may become quite unbearable!):

- "... formed in January of out of a desire to support legislators who were friends of our industry."
- They have had "frequent meetings addressing specific issues confronting our industry. These include regulatory concerns with the DEC and proactive efforts to change, and even introduce, laws that affect us."
- "... we have been in Albany numerous times, meeting with legislators and the NYSDEC on the bonding issue in an attempt to hammer out a mutually acceptable financial security program to take some pressure off operators. We continue to make progress in this area."
- "We can now gain an audience with those legislators that we feel are aligned with our cause.... we must be able to support their endeavors in Albany, and help their campaign efforts in order to remain in office."
- "... we represent small, independent oil and gas operators and producers...."

My comments pertaining to these guys: (1) Chance of something going wrong (REGARDLESS of all those statements by everyone wanting this drilling, and by legislators and the DEC, etc.)? -- Think back on Gulf Oil, with the "impossible" actually happening! (2) If ... no, WHEN ... something goes wrong, do NOT reflect on Gulf Oil, with our president ultimately forcing the huge BP corporation to cough up billions of bucks for reparations. First, remember the finger pointing on that (drillers, valve manufacturers, blow-out preventer manufacturers, makers of materials of casings, pipes, cement, etc.) That WILL happen again! And it will actually be worse this time. Scenario: rural homeowners or farmers on wells can no longer use their water supply due to contamination not experienced before fracking was begun a mile away, but drillers, equipment makers, company geologists, gas companies will all say, "Can't be from us, and you (you lowly homeowner) can't prove otherwise! Second, these "small, independent oil and gas operators and producers" don't have the "deep pockets" of a BP, and would probably exit via the bankruptcy route if faced with a substantial suit.

By the way, did you read the impact on roads in PA? (See <http://www.pressconnects.com/article/20110726/NEWS01/107260384>) Traffic concerns aside, there has been massive deterioration of pavement and bridges due to the truck traffic, and villages, towns, counties and even the state have been unprepared for this impact on work schedules and budgets. Chesapeake Energy pointed out how helpful they have been, having spent (they say "invested" -- huh??) more than \$144 million since 2009 repairing and rebuilding road infrastructure in northern PA. Somehow, I doubt that they had a road inspection vehicle following every 80,000 lb water or waste truck on every trip, just to see if a pothole was developing or a weld starting to break on every bridge crossed! Surely, complaints came first.

One final concern. The way this whole thing is developing for New York State, when the green light is given (WHEN, not IF!), there will apparently be hundreds of operations starting all at once around the state -- as if we even NEED so much gas immediately! But just picture it, folks.

6 people liked this.



reasonable [2 months ago](#)

There will be a limited number of permits issued. The DEC works on a pull system, they only issues a permit when the workload created by active drilling pads decreases to allow them the time to oversee a new well.

Towns have control over their roads. Create good County and Town road use agreements as recommended in the dSGEIS. They work well.

There are certainly places within most towns where locating a pad is inappropriate. Towns should identify those locations and articulate why they should be exempt from surface disturbance. Certainly though there are places in any town where the activity will not have any adverse impact. In those places let's go forward. If a town feels that that is not possible then the landowners should be compensated.

2 people liked this.



Brian Brock [2 months ago](#) [in reply to reasonable](#)

Would that it is true the DMN would only permit what they can handle. In fact in ECL Article 23, under that statute DMN shall (not may) issue permits once a valid application is submitted. If you read the IOGCC review of the NYSDEC oil and gas waste regulatory programs from 1994 (no follow-up review), the NYS AG audit of DEC program to lease land for gas drilling in 2005 (follow-up in 2009), and their reply to the STRONGER questionnaire about O&G program in 2009, DEC in general and DMN in particular are understaffed and have been unable to fulfill their responsibilities to oversee vertical drilling. That was with 20 DMN inspectors, and they now down to 16. Recently DEC staff elsewhere was cut 10%.



Gudrun Scott [2 months ago](#)

Especially if Cuomo thinks he is running five years from now in 2016 maybe he better read about climate change and how important and impossible the fossil fuel solution will be looking at that time.

Brane

Space: Think it's hot now? Just wait a few years!

space. THINK IT'S NOT NOW? JUST wait a few years!
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