

Landmark Decision for Local Control – Major Setback for Fracking Supporters

By **Peter Mantius**, on July 3rd, 2014

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Anti-fracking protestors, a recent march in Albany, call for Gov. Andrew to ban tracking statewide. (Photo: 350.org)

ALBANY, N.Y. — Towns across New York State and as far away as Texas and Colorado may soon feel the aftershocks of a landmark decision June 30 by the highest court in New York that towns have the authority to ban drilling for natural gas.

The 5-2 ruling by the state Court of Appeals has emboldened opponents of high-volume hydraulic fracturing, for fracking, and they hope to make the most of it.

“Any town that has held off banning fracking for fear of getting sued by the frackers just got a neon green light to proceed with a ban,” said Chip Northrup, an energy investor turned anti-drilling activist from Cooperstown. “While they are at it, they should ban frack waste, since most New York towns are more liable to being dumped on than fracked.”

In Texas, the Denton City Council is expected to consider a petition for a local ban on fracking at its next regular meeting, July 15. Denton has 270 gas wells within its city limits, but 2,000 residents have signed the petition to ban more. And Texas law is deferential to local authority over land use.

In Colorado, on the other hand, the state’s highest court now says local bans cannot pre-empt gas development. But the state legislature could still step into the long tug of war between local and state authority over drilling rights that has pitted the towns of Lafayette and Fort Collins against the governor and triggered a statewide voter initiative.

The New York ruling follows a 2013 decision by Pennsylvania’s highest court to uphold local bans on drilling. It is another major blow to the energy industry’s once-fond hope of wholesale natural gas development in New York’s Marcellus Shale formation.



Frustrated drillers have been campaigning unsuccessfully for six years to obtain permits for high-volume fracking. But Gov. Andrew Cuomo has placed those permits on hold until at least 2015, pending the outcome of a state Department of Health study of fracking’s health impacts, which was launched in 2012.

Meanwhile, more than 100 small and medium-sized communities in western New York have enacted bans or moratoriums on fracking, and former New York City Mayor Michael Bloomberg quietly obtained a special



Chip Northrup. (Photo: Ecowatch.org)



Marcellus Shale Gas Drilling Tower

exemption from state regulators on tracking in the city's watershed.

Supporters of drilling had been counting on the court to sweep away the local bans, if not the city's. They were deeply disappointed.

The Joint Landowners Coalition of New York, made up of property owners with land leased to drillers, said the state's authority to regulate energy development "has been obliterated by the court in favor of a not-in-

my-backyard mentality."

And Thomas West, an attorney who represented drillers in the case, said of the ruling, "It's another nail in the coffin for drilling in New York because there are very few companies that will be interested in making a major investment in New York without certainty at the local level."

But virtually all of the nation's top drillers have already turned their attention elsewhere. And their decision to pack up and leave may have more to do with geology than the governor or the court.

The Marcellus Shale formation is much thinner and closer to the surface in New York than in Pennsylvania, making profitable drilling far more speculative. Recent analyses suggest that only a few pockets near the Pennsylvania border are apt to provide money-making wells at current market prices for natural gas.

Those findings are strikingly at odds with the industry's initial projections about New York's enormous natural gas potential. Five years ago, gas leases near Binghamton sold for thousands of dollars an acre, pumping up groups like the Joint Landowners Coalition with a "gold rush" mentality.

But that get-rich-quick thinking has given way to frustration because drilling has been deferred and lease prices have slipped. Chesapeake Energy Corp., once the most aggressive leaser in the state, has aggressively divested.

Meanwhile, neighboring Pennsylvania has embraced fracking in its Marcellus Shale. That has prompted significant economic development in certain drilling hot-spots, but also triggered intense protests from local residents who claim the process is environmentally catastrophic.

Still, polls show most Pennsylvanians approve of gas drilling. A Quinnipiac poll in June found that those in favor of gas drilling outnumbered those opposed by a margin of 58% to 33%.

In contrast, New Yorkers were split, according to a Quinnipiac poll in May, with 44% in favor and 45% opposed.

But polls do not reflect the intensity of that opposition. The day the court's decision was announced, protestors massed outside a Cuomo fundraiser in New York City demanding a statewide fracking ban.

The court's ruling came in a challenge to local ordinances passed in 2011 by the towns of Dryden, 50 miles south of Syracuse, and Middlefield, 70 miles west of Albany.

Norse Energy Corp., a Norwegian company that went bankrupt after amassing thousands of New York leases that it failed to develop, sued Dryden on the grounds that a statewide mining law supersedes all local zoning. Cooperstown Holstein Corp., a dairy farm that leased to drillers, challenged Middlefield's ban. The plaintiffs lost both cases at trial court and then at an intermediary appeals court. Eight separate judges upheld the bans before the cases reached the Court of Appeals.



Fragments below exposure of fissile Marcellus black shale at Marcellus, N.Y.



Judge Victoria Graffeo

Judge Victoria Graffeo, who was appointed by former Gov. George Pataki, a Republican, wrote the majority opinion for the state's highest court.

"We are asked in these two appeals whether towns may ban oil and gas production activities, including hydrofracking, within municipal boundaries through the adoption of local zoning laws," Graffeo wrote. "We conclude that they may because the suppression clause in the statewide Oil, Gas and Solution Mining Law does not pre-empt the home rule authority vested in municipalities to regulate land use."

That legal theory was first advanced by Helen and David Slottje, a husband-and-wife team of attorneys from Ithaca, less than 15 miles from Dryden.

The Slottjes argued that zoning rights are derived from home rule guarantees written into the state constitution. While the legislature does have the legal authority to extinguish those rights, she said, it must do so explicitly. In her view, the mining



law fails that test.

That means that while state officials have full authority to regulate gas drilling under the mining law, municipalities still have the authority to ban it entirely through zoning.

Graffeo and the majority agreed with the Slottjes and the unanimous lower courts.

At a hearing in June, Chief Judge Jonathan Lippman had said, “You don’t bulldoze over the voice of the people in an individual municipality that wants to say how they live their lives.”



Helen and David Slottje. (Photo: North Country Public Radio)

Notably, the majority did not take a stand on the merits of fracking as a mineral extraction technique. The ruling strictly dealt with the question of local land use authority versus state regulatory authority.



Judges Robert S. Smith and Eugene Piggot

In dissent, Court of Appeals Judges Eugene Piggot and Robert S. Smith held that the state mining law actually does give the state Department of Environmental Conservation full authority over how and where to drill, superseding home rule guarantees in the state constitution.

“Where zoning ordinances encroach upon the DEC’s regulatory authority and extend beyond the municipality’s power to regulate land use generally, the ordinances have run afoul” of state law, Piggot wrote.

Piggot and Smith were appointed by Pataki, while Lippman was appointed by former Gov. David Paterson, a Democrat.

It is not yet clear how the court’s ruling will affect services related to fracking, including the disposal of fracking waste products, the storing of fracking equipment, sand and chemicals, and even the supply of

hundreds of millions of gallons water for the process.

The drilling industry in Pennsylvania has been pressing hard to use New York State for all those functions, and counties just north of the state border have sometimes eagerly complied.

For example, the Chemung County landfill, which sits about five miles east of Elmira and two miles from the Pennsylvania border, is seeking permission for a major expansion in order to boost imports of drilling wastes from Pennsylvania that are likely to be radioactive.

The DEC has stated that it does not regulate radioactive material unless it has been “processed and concentrated,” and it has ruled that drilling waste does not meet that test. The county earns hefty fees for the waste service and discounts the risks, as does the landfill operator, Casella.

A few miles away, the town of Horseheads granted permits to Schlumberger to establish a major fracking chemical supply depot on a site above the aquifer that supplies Elmira’s drinking water. The DEC deferred to the town to take the lead regulatory role in the case, and the town promptly waived an environmental impact statement.

Meanwhile, about 20 miles to the north in Watkins Glen, Houston-based Crestwood Energy has applied for permits to store compressed natural gas and liquid petroleum gas, or LPG, from Pennsylvania drilling in once-abandoned salt caverns next to Seneca Lake.

Although company maps and other documents show massive rubble piles at the bottom of each of the caverns that would be used to store highly-pressurized volatile compounds, the Federal Energy Regulatory Commission and office of the New York State geologist have vouched for the structural integrity of the caverns. The DEC has been reviewing the LPG application for five years.

The landfill and LPG project has spurred spirited local protests.

Northrup argues that those groups should push local politicians to enact municipal bans now that the Court of Appeals has removed the legal risk of doing so. And the bans, he says, should extend beyond mere fracking to drilling-related hydrocarbon storage and waste dumping.



A high school class in Watkins Glen protests Crestwood Energy’s plan to store pressurized liquid petroleum gas in old salt caverns filled with rubble. (Photo: GasFreeSeneca.org)



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.

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Mary Beilby · 7 months ago

The Cortland Standard is reporting today that the Homer Town Board asked its town attorney last night to draw up a zoning law on fracking and a moratorium until the new zoning law can be considered. The Appeals Court decision was cited as the impetus for this action. 7-3-14

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Stan Scobie · 7 months ago

Folks,

Walter Hang, the principal of Toxics Targeting, is quoted as saying “Today’s decision serves up the Southern Tier on a silver platter to allow shale gas development to begin,” (tomwilber.blogspot, June 30, 2012),

Indeed, what happens in towns that do not have a ban but do have zoning? There are several right on the PA/NY border in Broome County: Windsor, Kirkwood, Conklin, Town of Binghamton, and Vestal. All are above the likely most productive part of the Marcellus shale. None have a ban.

Despite vigorous efforts in several Southern Tier towns no ban effort in the most gassy areas of NY has been successful. A common boilerplate answer has been to vote in another town board. Of course that is a very long-term strategy and has been tried relatively unsuccessfully.

The more immediate answer lies in the full answer to the question that Susan Arbetter (Capitol Pressroom, July 2, 2014) asked of Attorney Tom West, the lead plaintiff attorney for the Lawsuit. West had recently said if they lost, "it would be over."

However, pivoting smartly, he told Arbetter that indeed there was a rational plan for the drillers he represents, but it was secret as he did not want to divulge strategy. In other words, it was not over, and they were not just going away.

Here is their Plan B

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