

ORDINANCES

Rumble in the Rockies: Anti-Fracking Spreads to Colorado

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On November 6, 2012, residents of Longmont, Colorado overwhelmingly voted in favor of Ballot Question 300, authorizing a Charter amendment to prohibit hydraulic fracturing (fracking) in city limits.[1] The Longmont Public Safety, Health and Wellness Act (Act) is premised on a number of Findings, including:

> The people of Longmont have determined that the best way to safeguard our inalienable rights provided under the Colorado Constitution, and to and ensure the "protection of public health, safety, and welfare, including protection of the environment and wildlife resources" as provided under the Colorado Oil and Gas Act, is to prohibit hydraulic fracturing and the storage and disposal of its waste products within the City of Longmont.[2]

The Findings lead to the "business end" of the Act, which provides:

> It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Longmont. In addition, within the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.[3]

Longmont, a relatively conservative community adjacent to activist-rich Boulder, was the first town in Colorado to take such a stance.[4] It joins a growing list of municipalities nationwide that are attempting to limit or stop fracking within their boundaries.

Fracking has only recently been deployed on a grand scale, and brings with it new challenges—environmental, economic, legal and political. The technology eclipses traditional oil extraction methods: A well is drilled vertically down for a mile or more until the shale level is reached, then tunneled horizontally for several thousand feet. The well pipe is encased in steel and concrete to provide a barrier as it passes through water aquifers, generally located within 300 feet below the surface. Once the drilling is complete, a perforating gun is inserted to the end of the horizontal section. A charge is detonated, cracking the pipe and fracturing the surrounding shale. Then massive quantities of water, sand and other chemicals are pumped in at high pressure, causing more fracturing in the shale fields. Sand particles hold the fractures open and trapped gas is released, flowing back up the pipe to the surface where it is captured and processed.

The pros and cons of fracking are vociferously debated. Proponents point to billions--or even trillions--of cubic feet of proven wet natural gas reserves gas trapped beneath the continental United States, with estimates that have risen steadily over the past decade.[5] It is reachable at low cost. When burned, it produces significantly less carbon than other fossil fuels. Tens of thousands of wells need to be drilled. Extraction, production and distribution infrastructure must be built across the country, generating millions of jobs. Local economies benefit from significantly fattened tax revenues. And America can move to energy independence, or at least begin to approach it.

Opponents cite contrary factors and statistics. Fracking consumes hundreds of millions of gallons of fresh water. It forces massive quantities of undisclosed chemicals into the earth, endangering aquifers. Up to 50% of the water-chemical mixture returns to the surface and must be remediated. The fracking process causes geologic instability, exacerbating seismic activity. Vast amounts of methane are released, harming the atmosphere far more than benefits from reduced carbon. Drilling sites blight pristine vistas and spew harmful emissions towards homes, schools and public spaces. Small towns are overwhelmed. And the lowered cost of natural gas makes fully renewable energy options like wind and solar uneconomic.

Behind the highly visible war between pro-and anti-fracking forces is another more subtle choreography: the skirmish among federal, state and local authorities to control, regulate and in some cases prohibit fracking.

To date, the federal government has essentially abdicated responsibility over fracking. The 1974 Safe Water Drinking Act (SWDA) included a provision specifically governing injection wells. That legislation would seem to have empowered the EPA to curb fracking-related threats to water. This was not to be; in 2005, as the modern fracking era blossomed, the so-called "Halliburton Amendment" was passed.[6] It exempted fracking chemicals from the ambit of the SWDA. To date, federal law has not even required drillers to disclose which additives they are injecting down their wells. In April 2012, the EPA proposed new rules requiring reduced air emissions from oil and gas extraction on federal lands, but the industry succeeded in delaying implementation of these regulations until 2015.[7]

The result is that fracking regulation has largely been left to state and local governments. The assumption might be that large, well-funded statewide watchdog organizations are far more effective bulwarks against industry than puny local

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bbalibor.com/bbalibor-explained (last visited Nov. 12, 2012).
2. *Id.*
3. John Waggoner, *Libor Scandal Explained and What Rate-Rigging Means To You*, USA Today, July 18, 2012, http://usatoday30.usatoday.com/money/perfi/credit/story/2012-07-18/libor-interest-rate-scandal/56322230/1.
4. Stephen Gandel, *Wall Street's Latest Sucker: Your Hometown*, CNNMoney, July 11, 2012, http://finance.fortune.cnn.com/2012/07/11/libor-sucker-hometowns/.
5. Nathaniel Popper, *Banks Face Suits as States Weigh Libor Losses*, N.Y. Times, Sept. 4, 2012, http://www.nytimes.com/2012/09/05/business/banks-facing-suits-as-states-weigh-their-libor-losses.html.
6. *Id.*
7. *See In re LIBOR-Based Financial Instruments Litigation*, No. 1:11-md-2262 (S.D.N.Y., Consolidated Amended Complaint filed Apr. 30, 2012).
8. *Id.*
9. *See In re LIBOR-Based Financial Instruments Litigation*, No. 1:11-md-2262 (S.D.N.Y., Charles Schwab Amended Complaint filed Apr. 30, 2012).
10. *See Berkshire Bank v. Bank of America Corp.*, No. 12-cv-5723 (S.D.N.Y., filed July 25, 2012); *Community Bank & Trust v. Bank of America Corp.*, No. 12-cv-4205 (S.D.N.Y., filed May 25, 2012).
11. 15 U.S.C. § 1.
12. 18 U.S.C. § 1961.
13. *See, e.g.*, *In re LIBOR-Based Financial Instruments Litigation*, No. 1:11-md-2262 (S.D.N.Y., Consolidated Amended Complaint filed Apr. 30, 2012).
14. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977).
15. Matt Taibbi, *The Scam Wall Street Learned From the Mafia: How America's Biggest Banks Took Part in a Nationwide Bid-Rigging Conspiracy – Until They Were Caught on Tape*, Rolling Stone, July 5, 2012.
16. *Id.*
17. *United States v. Carollo et al.*, No. 10-cr-654 (S.D.N.Y.).
18. *United States v. Ghavami et al.*, No. 10-cr-1217 (S.D.N.Y.).
19. *See* Max Stendahl, *Former BofA Exec Testifies He Bribed UBS For Rigged Bid*, Law360, Aug. 14, 2012, http://www.law360.com/whitecollar/articles/369478/former-bofa-exec-testifies-he-bribed-ubs-for-rigged-bid; Keith Goldberg, *Ex-BofA Exec Indited In Municipal Bond Bid-Rigging Scheme*, Law360, July 23, 2012, http://www.law360.com/banking/articles/362499/ex-bofa-exec-indicted-in-municipal-bond-bid-rigging-scheme; Press Release, U.S. Securities and Exchange Commission, "SEC Charges Wachovia With Fraudulent Bid Rigging in Municipal Bond Proceeds," Dec. 11, 2011.
20. *In re Municipal Derivatives Antitrust Litigation*, No. 1:08-md-1950 (S.D.N.Y.).
21. *Workers' Comp. Reinsurance Ass'n v. Wells Fargo Bank, N.A.*, No. A11-1260, 2012 WL 1253094 (Minn. Ct. App. Apr. 16, 2012).
22. Michael Van Sickler, *City of St. Petersburg Wins $10.4 Million Verdict Against Big Bank*, Tampa Bay Times, Apr. 4, 2012, http://www.tampabay.com/news/localgovernment/city-of-st-petersburg-wins-104-million-verdict-against-big-bank/1223271.
23. Zac Anderson, Wells Fargo to Pay $24 Million in Sarasota County Settlement, Herald Tribune, Dec. 5, 2012, http://www.heraldtribune.com/article/20121205/ARCHIVES/212051062/-1/opinion09?p=1&tc=pg. M

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groups. But this is often not the case. Many state oil and gas oversight entities are seen as overly accommodating to industry. In some cases, the regulatory groups subsist in large part on fees and other income derived from the very companies they are charged with overseeing. Their mission becomes the "regulation" of drilling but almost never its limitation or prohibition.

In Colorado, the responsible entity is the Colorado Oil and Gas Conservation Commission (COGCC). In a textbook example of the regulatory vacuum which angers local residents, COGCC requires only a 350-foot setback for fracking activities. In other words, the state's own watchdog agency has thus far deemed it acceptable to site hydraulic fracturing operations, with their attendant air pollution, water-chemical flowback remediation, truck traffic, noise and other externalities—only one football field away from homes, schools and parks.[8] It was this inadequate setback that most energized the Longmont voters to override the state's regulatory agency.

A similar revolt has emerged in California, where new fracking regulations are being proposed by the State's Division of Oil, Gas and Geothermal Resources. Eco-activists argue that the proposed rules allow a "trade secret" loophole, meaning that the industry need not disclose which chemicals and additives it is pumping into the earth. They also assert that the new regulations do little to protect water and air quality and actually eliminate fracking from existing statutory restrictions.[9]

Guerilla tactics by local property owners and politicians is a problem for the oil and gas producers. Given that industry would often prefer to woo (or coerce) a single entity in the state house rather than confronting dozens of energized individual citizens' groups around a state, this can result in odd bedfellows.

The Longmont situation is a case in point. When the Longmont City Council passed initial restrictions on oil and gas activity early in 2012, Colorado Governor John Hickenlooper directed state attorneys to sue the city, challenging its authority. In November 2012, as Longmont voters adopted the outright ban on fracking, Hickenlooper said the State of Colorado would not sue Longmont—but would support any lawsuit brought by the oil and gas industry. That has occurred, as the Colorado Oil and Gas Association promptly sued Longmont. The suit not only alleges an unconstitutional taking of property but the illegal expansion of municipal power into an area which is already superseded by state statutes.

It is unclear how the Colorado court battle will end, but it is certain to proliferate: Other cities in Colorado, including Greeley and Colorado Springs have now passed Longmont-like bans. Litigation in two states, New York and Pennsylvania, which abut the massive Marcellus shale field in the Eastern United States, may provide some insights. In New York, a home rule jurisdiction with more than 150 fracking bans already in effect, a pair of 2012 cases have held in favor of the municipalities, finding that the state's oil and gas regulatory scheme does not foreclose reasonable local zoning limitations.[10]

Admittedly, these suits are in their infancy and await several layers of appellate battle. Other New York suits are already underway: in November, natural gas developer Lenape Resources sued the Town of Avon, challenging its moratorium against expansion of fracking. [11] Lenape also sued the New York Department of Environmental Conservation (DEC), requiring DEC to invalidate the local moratorium and assert state dominance of the political landscape. But for the moment, the Empire State is hospitable to local restric-

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tion and even prohibition of hydraulic fracturing.

The local-state battle has unfolded differently in neighboring Pennsylvania. There, after suffering several defeats in the courtroom as local zoning laws were found not to contravene state oil and gas regulations, the Pennsylvania legislature adopted Act 13 in February 2012. Act 13 unequivocally wrested control over oil and gas activities, whether zoning-based or otherwise, away from municipalities and returned it to Harrisburg.[12] The law was short-lived. A group of seven localities, headed by Robinson Township, promptly sued to enjoin implementation of Act 13. In July 2012, the Commonwealth Court of Pennsylvania held that the salient provisions of Act 13 violated Article 1 of the Pennsylvania Constitution as well as the Fourteenth Amendment, finding that it was an improper exercise of the Commonwealth's police power and denied the municipality due process.[13] That decision, which some view as turning traditional notions of state pre-emption upside down, is now on appeal.

The way forward for Longmont and other municipalities is hardly clear. While there is no safe harbor for localities as they battle state legislatures and the oil and gas industry, zoning appears to be their best stratagem. As New York's recent cases demonstrate, local zoning can hold its own against a state preemption argument. Even where the state has expressly reserved to itself the power to "regulate" oil and gas activity, a zoning ordinance which reasonably restricts or prohibits drilling is not a "regulation" thereof.[14] For the moment, even legislation such as Pennsylvania's Act 13 cannot run roughshod over the municipalities' right to protect the health and well-being of its residents through zoning.

(The more successful of the local anti-fracking zoning ordinances would appear to limit truck traffic and other externalities of fracking rather than instigating a direct, wholesale ban on the practice. In that regard, Longmont's anti-fracking amendment, quoted at the beginning of this article, may not be worded optimally).

A second attribute of zoning is that it may not necessarily enervate a takings claim. The applicable takings standard in most instances is whether a restriction on property usage effectively deprives the owner of *all or substantially all* economic value. If the land owner is left with some other viable commercial use in addition to the use being foreclosed, the municipality might prevail. As a leading Colorado case held, a landowner is not constitutionally entitled to use its property in a manner that results in the maximum attainable profit.[15] (However, this maxim is severely challenged where plaintiffs such as COGA own only sub-surface mineral rights and allege that the Longmont fracking ban will deprive them of at least $50 million in profits.)

In addition to outright bans, local voters can put pressure on their elected officials to make changes at the state level. In testimony before the COGCC on January 13, 2013, Colorado Second District Congressman Jared Polis specifically requested that COGCC's new rulemaking begin with a minimum 1,000 foot setback for fracking operations under optimal conditions and increase it from there.[16]

Given that there appears to be little appetite by the federal government to take a leadership position on the issue, fracking will continue to be the subject of a wide range of state-specific actions, both in the legislature and the courthouse. Municipalities have a significant role to play in that process.

Notes

1. http://www.denverpost.com/recommended/ci_21943036 (last accessed January 19, 2013)
2. Longmont Colo., Code Of Ordinances, art. 16.2 (2013).
3. *Id. at art. 16.3.*
4. http://www.nytimes.com/2012/11/26/us/with-ban-on-fracking-colorado-town-lands-in-thick-of-dispute.html?_r=0 (last accessed January 16, 2013)
5. The most recent statistics from the United States Energy Information Administration are 317 billion cubic feet of proven wet natural gas for 2010, up 12% over 2009, with oil reserves of 25 million barrels. http://www.eia.gov/naturalgas/crudeoilreserves/pdf/table_4.pdf.
6. Section 322 of the Energy Policy Act of 2005 states: Paragraph (1) of section 1421(d) of the Safe Drinking Water Act (42 U.S.C. 300h(d)) is amended to read as follows:
"(1) UNDERGROUND INJECTION.—The term 'underground injection'—
"(A) means the subsurface emplacement of fluids by well injection; and
"(B) **excludes**
"(i) the underground injection of natural gas for purposes of storage; and
"(ii) **the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.**" (emphasis added).
7. http://online.wsj.com/article/SB10001424052702303513404577351842495583760.html
8. COGA, in its Industry White Paper, identifies the COGCC as the entity protecting the public, and states "There is a robust regulatory framework in place to prevent any environmental effects." http://www.coga.org/pdfs_facts/hfwhitepaper.pdf (last accessed January 17, 2013).
9. http://ecowatch.org/2012/5-flaws-fracking-california/ (last accessed January 17, 2013).
10. Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S. 2d 458 (N.Y. App. Div. 2012); Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S. 2d 722 (N.Y. App. Div. 2012).
11. http://online.wsj.com/article/SB10001424127887324705104578147522916196866.html
12. Local Ordinances Relating to Oil and Gas Operation (Act 13), ch. 33, 58 Pa.C.S.A. § 3302 (2012).
13. Robinson Township v. Commonwealth of Pennsylvania, No. 284 M.D. 2012, http://www.pacourts.us/OpPosting/Cwealth/out/284MD12Amended_7-31-12.pdf (last accessed January 17, 2013).
14. *Anschutz, supra; Cooperstown, supra; see also Frew Run Gravel Prods., Inc. v. Town of Carroll, 71 N.Y.2d 126 (N.Y.1987).*
15. *Van Sickle v. Boyes,* 797 P.2d 1267 (Colo.1990).
16. http://polis.house.gov/news/documentsingle.aspx?DocumentID=316499 (last accessed January 19, 2013)

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