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Image Source (http://blogs.cas.nyu.edu/adrian/files/2012/02/hydrofracking-impacts-water-quantity_1753.jpg)

By: Travis Van Ort, Staff Member

There is a new twist in the debate over hydraulic fracturing (hydrofracking) and how to regulate the process. In February, two courts in New York issued opinions that upheld local regulation of hydrofracking.[1] A state Supreme Court judge in Oswego County ruled that the local municipality was “legally able to ban hydrofracking through its zoning law,” and another state Supreme Court judge, in Tompkins County, “found that state mining laws do not prevent local governments from enacting fracking bans under zoning laws.”[2] This likely will not be the last word on the issue, as the New York rulings are expected to be appealed.[3]

This is not the first attempt by a municipality to regulate or ban the use of hydrofracking within city or town limits. For instance, in August, a court in West Virginia overturned the Morgantown city ordinance that prohibited hydrofracking within city limits; in the ruling, the judge indicated that the West Virginia Department of Environmental Protection has “exclusive control over [that] area of law.”[4]

The rulings in New York raise three important concerns: the first two are practical concerns and the third is a policy concern. First, the banning of hydrofracking in areas where natural gas companies have already bought land or acquired leases for the purposes of drilling may expose the regulating municipality to liability. A company that is a party to the Tompkins County case indicated that it may “pursue a ‘takings’ claim against the town” for taking private property without just compensation.[5] The company claims it has spent over \$5 million to secure land leases in the area. [6]

The second concern is the potential chilling effect local regulation could have on drilling for natural gas, at least in New York. New York overlies three important shale gas plays – the Marcellus, the Utica, and the Devonian shales[7] – and if these Supreme Court decisions are upheld on appeal, local regulation could inject a significant level of uncertainty into natural gas drilling in New York. One of the attorneys in the aforementioned cases suggested that “[n]o company will invest in leases if they can just be abrogated by a town board vote,” and “[t]hese decisions could be the kiss of death for the drilling industry coming [to New York State].”[8] While the complications from local regulation may not be as dire as has been suggested, it seems likely that increased local regulation or banning of hydrofracking will lead to a decrease in interest in exploiting the gas under New York State and a decrease in drilling. Since more than 20 local governments have already banned or limited hydrofracking[9] and others are attempting to implement a ban,[10] this is no small concern.

The last concern is a policy concern. Given the importance of natural gas, especially shale gas (which requires hydrofracking to be commercially viable), to meeting US energy needs now and in the future,[11] these types of local level restrictions have the potential to severely complicate the extraction of gas in some of the key shale gas plays. The US Energy Information Agency (EIA) suggests that in the future the US could produce more natural gas than it consumes.[12] If the US is unable to produce as much gas as the EIA predicts because of local level bans or restrictions on hydrofracking, any shortfall between domestic production and consumption will have to be made up either through conservation and efficiency programs, the substitution of domestically produced sources of energy like coal, or energy imports.

[1] Brian Nearing, *Local Drill Ban Wins 2nd Victory*, TIMES UNION, Feb. 24, 2012, <http://www.timesunion.com/default/article/Local-drill-ban-wins-2nd-victory-3360224.php>.

[2] *Id.*

[3] *See id.*

[4] Charles Young, *Judge Denies Injunction to Uphold Fracking Ban*, THE DAILY ATHENSANUM, Aug. 23, 2011, <http://www.thedaonline.com/news/judge-denies-injunction-to-uphold-fracking-ban-1.2550997#T1G693meqRd>.

[5] Mireya Navarro, *New York Judge Rules Town Can Ban Gas Hydrofracking*, N.Y. TIMES, Feb. 21, 2012, <http://www.nytimes.com/2012/02/22/nyregion/town-can-ban-hydrofracking-ny-judge-rules.html>.

[6] *Id.*

[7] *See What is Shale Gas and Why is it Important?*, U.S. ENERGY INFO. AGENCY, Feb. 14, 2012, http://www.eia.gov/energy_in_brief/about_shale_gas.cfm.

[8] Nearing, *supra* note 1.

[9] Glenn Coin, *Central New York Municipalities Take Steps to Control Hydrofracking*, THE POST-STANDARD, Aug. 21, 2011,

http://www.syracuse.com/news/index.ssf/2011/08/central_new_york_municipalitie.html.

[10] Jordan Carleo-Evangelist, *Albany Gas Drill Foes See Veto-proof Vote*, Times Union, Feb. 24, 2012, <http://www.timesunion.com/default/article/Albany-gas-drill-foes-see-veto-proof-vote-3359000.php>.

[11] See *What is Shale Gas and Why is it Important?*, *supra* note 7.

[12] *Id.*

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