

New York, Pennsylvania courts uphold township fracking bans; Michigan next?

by Ellis Boal, updated 7/14/04

On June 30 New York state's highest court held that two rural home-rule towns lying atop the Marcellus shale can ban fracking by zoning. This, despite a preempting New York statute which says the state oil-gas law

shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries....

The court in [Matter of Wallach v Town of Dryden](#) carefully noted:

The Towns both studied the issue and acted within their home rule powers in determining that gas drilling would permanently alter and adversely affect the deliberately-cultivated, small-town character of their communities.

Towns in New York are equivalent to townships in Michigan.

HISTORY OF NEW YORK CASE

Five years after a developer began acquiring oil and gas leases in Dryden New York, the town held a public hearing in 2011. The result was a prohibition on use of land within its borders for oil-gas exploration, extraction, and storage.

The same year the town of Middlefield learned leases had been executed there. The town board investigated, and decided to zone out oil, gas, and solution mining. The board reasoned that the area:

is known worldwide for its clean air, clean water, farms, forests, hills, trout streams, scenic viewsheds, historic sites, quaint villages and hamlets, rural lifestyle, recreational activities, sense of history, and history of landscape conservation.

The town board concluded that industrialization, such as hydrofracking, would:

eliminate many of these features [and] irreversibly overwhelm the rural character of the

Town.

According to the ruling, New York's preemption statute governs only the "safety, technical and operational aspects" of oil and gas activities. The court decided to follow a previous ruling about sand mining which held:

In effect, local laws that purported to regulate the 'how' of mining activities and operations were preempted whereas those limiting 'where' mining could take place were not....

The court added:

We see no inconsistency between the preservation of local zoning authority and the [state's] policies of preventing "waste" and promoting a "greater ultimate recovery of oil and gas"....

Of great interest, the decision was made without regard for the safety or dangers of the controversial extraction practices that sparked fierce opposition and led to the bans:

These appeals are not about whether hydrofracking is beneficial or detrimental to the economy, environment, or energy needs of New York, and we pass no judgment on its merits.

The 5-2 majority opinion was authored by Judge Victoria Graffeo, [viewed generally as liberal](#).

PENNSYLVANIA DECISION

The decision follows on the heels of a similar decision of the Pennsylvania supreme court last winter in [Robinson Township v Pennsylvania](#), striking down that state's "Act 13."

Act 13, put into effect in 2012, allowed wells, pipelines, impoundments, and seismic-testing explosives to take place "of right" in every zoning district, even residential ones. One section of the law asserted the oil and gas laws "occupy the entire field of regulation, to the exclusion of all local ordinances."

Six townships and a borough sued.

Four court justices concurred in striking down Act 13, as against three dissenters. The four did not have unified reasoning.

The 3-justice lead opinion invoked the "public trust" doctrine in the Pennsylvania constitution, which requires all branches of government -- including counties and townships -- to consider in advance the environmental effect of any proposed action:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The opinion held Act 13's preemption provision required local governments instead:

to ignore their obligations under [the constitution] and further direct[ed] municipalities to take affirmative actions to undo existing protections of the environment....

In ringing tones the three-justice opinion added:

[F]ew could seriously dispute how remarkable a revolution is worked by this legislation.... By any responsible account, the exploitation of the Marcellus Shale will produce a detrimental effect on the environment, the people, their children, and future generations and potentially on the public purse, potentially rivaling the environmental effects of coal extraction.... Protection of environmental values, in this respect, is a quintessential local issue....

The one concurring justice's view was that Act 13's preemption violated constitutional substantive due process. He wrote:

I believe that in a state as large and diverse as Pennsylvania, meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level. ... [T]hese industrial-like operations include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials, constant bright lighting at night, and the potential for life- and property-threatening explosions and gas well blowouts.

The bottom line of all four justices is the same: Townships and boroughs in Pennsylvania are now free to ban fracking.

IMPLICATIONS FOR LOCAL BANS IN MICHIGAN

Legal commentators in [2012](#) and [2014](#), writing without benefit of the New York decision, have concluded that prospects for local frack bans in Michigan are nil or dim.

Reporters in the popular media have said the same, except less carefully. MSU Extension [mis-stated the key statute](#) in 2012, and the Detroit News [misquoted it](#) in 2014.

I disagree.

Michigan's oil-gas law is called "Part 615 of the Natural Resources and Environmental Protection Act" or "NREPA Part 615" or simply "Part 615."