

The Doctrine of Preemption and Local Hydraulic Fracturing Regulation in West Virginia: A Narrow Legal Issue with Broad Policy Implications

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Introduction

The Marcellus Shale is a sedimentary rock formation containing significant amounts of natural gas that extends under several states in the Appalachian Mountain range.¹ Interest in extracting natural gas from the Marcellus Shale has recently increased, in part due to rising natural gas prices and the development of new extraction techniques such as hydraulic fracturing.²

Hydraulic fracturing (“fracking”) is a process by which water and other chemicals are forced into the shale bed at high pressure, creating large fractures, so that natural gas can more easily flow to the wellhead.³ While this method has increased the economic viability of extracting natural gas from the Marcellus Shale, the process uses substantial amounts of water.⁴ The use of this water has raised concerns both of the depletion of local water resources, and subsequent possible contamination to the water supply.⁵

Cost-benefit analysis of the economic and environmental effects of natural gas use informs the development of regulations controlling fracking and natural gas extraction. These regulations are created at the federal, state, and local level. Where different levels of government come to different conclusions about the level of regulation that should be in place in the same area, there is an inherent conflict.

¹ WILLIAM M. KAPPEL AND DANIEL I. SOEDER, U.S. GEOLOGICAL SURVEY, WATER RESOURCES AND NATURAL GAS PRODUCTION FROM THE MARCELLUS SHALE, FACT SHEET 2009-3032 1 (May 2009), *available at* <http://pubs.usgs.gov/fs/2009/3032/pdf/FS2009-3032.pdf>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

In June, 2011, an example of such a conflict played out over fracking regulations in Monongalia County, West Virginia.⁶ The city of Morganton enacted an ordinance banning fracking and horizontal drilling within the city or one mile outside of city limits.⁷ Energy companies almost immediately challenged this ordinance as unconstitutional, arguing that the ordinance was preempted by regulations enforced by the West Virginia Department of Environmental Protection (WVDEP), and was thus precluded.⁸ The court held that the “[s]tate’s interest in oil and gas development throughout the state . . . provides for the exclusive area of this law to be within the hands of the WVDEP.”⁹ Thus, the ordinance was invalid and preempted by state regulation.¹⁰

The Legal Basis of Preemption

West Virginia courts have held that “where an ordinance is in conflict with a state law the former is invalid.”¹¹ This same principal holds for state statutes, and is so fundamental that “citation of authorities is unnecessary.”¹² W.Va. Code § 22-1-1(a)(2) states that “[t]he state has the primary responsibility for protecting the environment; other governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment.” The WVDEP is the agency designated by the state to enforce environmental regulations, and its purpose is to “consolidate environmental regulatory programs in a single state agency, while also providing a comprehensive program for the

⁶ Northeast Natural Energy, LLC v. City of Morganton, No. 11-C-411, at 3 (W.Va. filed Aug. 12, 2011), *available at* http://www.frackinginsider.com/Tucker_Marcellus_Order.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 9.

¹⁰ *Id.* at 10.

¹¹ Vector Co. v. Board of Zoning Appeals of Martinsburg, 155 W.Va. 362, 367 (1971).

¹² *Id.*

conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia.”¹³

The city of Morgantown contended that it had the authority to create the ordinance under the “Home Rule” provisions of W.Va. Code § 8-12-2, “characterizing the hydraulic fracturing process as a nuisance.”¹⁴ § 8-12-2 states that the municipality has “plenary power and authority . . . to provide for the regulation and control of the city’s municipal affairs[.]” The city contended that this statute gave them the authority to regulate nuisances, as held by *Sharon Steel Corp. v. City of Fairmont, et. al.*¹⁵ In *Sharon Steel Corp. v. City of Fairmont*, a steel company operating a coking plant in the city of Fairmont sought to challenge the city’s ordinance prohibiting the disposal of hazardous waste within the city.¹⁶ The steel company contended that the local ordinance was preempted by state and federal regulations regarding waste disposal.¹⁷ The Court held that the ordinance was not in conflict with state regulations, and therefore was not preempted because both the relevant state and federal regulations had clauses that preserved the right to bring actions based on common law nuisance.¹⁸

The court determined that the legislature’s intention was to give the WVDEP sole control of enforcing all regulation with respect to the “exploration, development, production, storage and recovery of this State’s oil and gas.”¹⁹ Thus, any municipal ordinances regulating the fracking or the acquisition of natural gas that are inconsistent with the WVDEP’s comprehensive framework for granting drilling permits, as set forth by statute, are preempted.²⁰ Furthermore, the court found that the “Home Rule” provision did not apply in this case, because unlike the relevant

¹³ *Id.* (quoting W.Va. Code § 22-1-1 (b)(2)-(3) (1994)).

¹⁴ *Northeast Natural Energy*, No. 11-C-411, at 2.

¹⁵ *Id.* at 8.

¹⁶ *Sharon Steel Corp. v. City of Fairmont, et al.*, 334 S.E.2d 616, 619 (W.Va. 1985).

¹⁷ *Id.*

¹⁸ *Id.* at 622-23.

¹⁹ *Northeast Natural Energy*, No. 11-C-411, at 6.

²⁰ *Id.*

statute in *Sharon Steel*, which explicitly stated an exception for common law nuisance claims, “there is no exception carved out by the WVDEP, whose all inclusive purpose is to regulate the mining of gas and oil.”²¹

Implications and Effects of the Decision

According to Judge Tucker, who tried the case, “the legal issue in this case is very narrow, and does not permit consideration of environmental concerns.”²² However, the possible effects that this decision will have on how environmental concerns are viewed and regulated in West Virginia are broad. The court, for better or worse, set a precedent that the environmental and economic concerns of the state preempt those of local municipalities. However, the interests that these different levels of government have in regulating the possible effects of fracking, and their priority, are potentially different or contradictory.

The environmental benefits of natural gas use play out at a global scale. Natural gas emits less than half of the carbon dioxide per megawatt hour as a typical coal plant.²³ Natural gas “burns cleanly, and emits the lowest amount of carbon dioxide per calorie of any fossil fuel.”²⁴ Estimates have been made that the doubling of the use of natural gas to replace coal could lead to a 19 percent displacement in carbon dioxide emissions.²⁵ Increases in atmospheric CO₂ levels due to the burning of fossil fuels are widely held to be a contributing factor in global climate change.²⁶ Thus, the theoretical environmental benefit of increased natural gas use is a reduction

²¹ *Id.* at 8.

²² *Id.* at 10.

²³ FRANK VERRASTRO, DEVELOPING AMERICA’S UNCONVENTIONAL GAS RESOURCES: BENEFITS AND CHALLENGES 3 (2010), available at http://csis.org/files/publication/101209_Verrastro_UnconventionalGas_Web.pdf.

²⁴ KAPPEL AND SOEDER, *supra* note 1, at 5.

²⁵ VERRASTRO, *supra* note 23, at 3.

²⁶ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 135 (S. Solomon, et al. eds. 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm.

in the rate of global climate change, due to a comparative decrease in carbon dioxide emissions.

In contrast, the environmental costs of fracking are more limited in geographic area. Fracking requires significant amounts of water to create the fractures that release the gas, cool the drill bit, and carry cuttings from the borehole.²⁷ How this use will affect local water supplies is a subject that has not been well studied.²⁸ In addition, the transportation of this water to remote places raises problems of erosion and road maintenance.²⁹ How this water should be disposed, and the affect of contaminants introduced into the water in the process of fracking, are further subjects that are not well researched.³⁰ Those who are immediately impacted by these issues of water use and contamination are, by nature, those who must use the water. Thus, the direct environmental cost of fracking is limited in area to those whose water supply, land, and roads might be adversely affected.

Because fracking affects the local environment differently than it does at a global or even state level, a cost-benefit analyses of its effects might have a different outcome depending on the scale at which it is assessed. Thus, regulation at a state level may approach these questions with different priorities, and come to different conclusions, than regulation at a local level. When state regulations preempt local ordinances regarding environmental effects, there is the potential for unfairness, because the consequences are different for locals than they are for persons or entities further removed.

Conclusion

²⁷ KAPPEL AND SOEDER, *supra* note 1, at 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

The doctrine of preemption states that “when a state law fully occupies a particular area of legislation . . . no local ordinances will be permitted to contravene it.”³¹ Because statute proscribed all encompassing power to the WVDEP in enforcing regulations with respect to oil and gas exploration and drilling within West Virginia, the ordinance enacted by the city of Morgantown banning fracking was precluded.³²

While the legal issue presented is narrow, and not dependent on any environmental concerns,³³ the decision itself has large implications on how these concerns are viewed and regulated. Because the environmental effects of natural gas drilling and fracking are different based on the scale of consideration, there is the potential for unfairness. Whether the West Virginia court’s approach to the issue of preemption will serve as a model for other courts considering challenges to local fracking bans remains to be seen. The issue of exactly how much power a municipality has, or should have, in regulating environmental consequences that primarily affect those within a limited area is likely to develop in the near future as challenges to local fracking bans play out in other states with access to the Marcellus Shale.

³¹ *Northeast Natural Energy*, No. 11-C-411, at 7.

³² *Id.* at 9.

³³ *Id.* at 10.