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Fracking Wars: Federal, State and Local Conflicts over the Regulation of Natural Gas Activities

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I. Introduction

With energy prices on a precipitous rise in recent years,¹ industry and government have high hopes that the discovery of large natural gas deposits in the United States will provide a cheaper fuel option while boosting the domestic economy. Relatively new technology allows gas companies to extract natural gas from formerly inaccessible shale at greater depths than ever before. Hydraulic fracturing, or “fracking,” can now be used to extract natural gas by drilling wells, usually thousands of feet below the surface, then drilling horizontally, and ultimately injecting millions of gallons of water mixed with sand and chemicals at high pressure to break up the shale and release the gas.² Hydraulic fracturing using horizontal wells was first used in Texas to extract gas from the Barnett Shale, and it was imported to eastern states starting in 2003, when the first hori-

zontal well was drilled in Pennsylvania to tap the Marcellus Shale.³ The Marcellus Shale spans 48,000 square miles and contains large amounts of gas reserves primarily underneath West Virginia, eastern Ohio, Pennsylvania, and New York.⁴ As new technologies make these deep deposits accessible for the first time, companies like Shell, ConocoPhillips and ExxonMobil are investing billions of dollars in U.S. shale gas production.⁵

In many communities, enthusiasm over domestic drilling has been met with inflamed opposition.

However, in many communities sitting on top of these gas reserves, enthusiasm over domestic drilling has been met with inflamed opposition from citizens and officials who express health, safety and environmental concerns. A growing number of communities have banned fracking altogether, as discussed

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Fracking Wars: Federal, State and Local Conflicts
over the Regulation of Natural Gas Activities 1

OF RELATED INTEREST 14

RECENT CASES..... 14

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below. Fracking has proved to be a contentious issue in many localities, and many states and municipalities are faced with regulating natural gas drilling for the first time. In addition, states and local governments that have been regulating fracking are refining their rules and regulations. Thus, the regulation of fracking is in flux.

Accordingly, understanding how fracking is regulated takes a bit of patience. Complicating the regulatory climate, all levels of government claim an interest in fracking regulation. While the regulation of the oil and gas industry has traditionally been left to the states, the Environmental Protection Agency (EPA) is currently re-evaluating its role in the process. For example, the EPA has been working on new standards for emissions from gas drilling.⁶ Debate ensues over the proper roles for the federal, state and local governments in regulating how, where and if fracking occurs, and initiatives underway at the federal and state levels could significantly alter current regulatory schemes. The objectives of this article are to provide land use and zoning practitioners with an overview of the current regulatory scheme at each level of government, offer examples of current regulations, and show that the regulation of fracking is subject to substantial change depending on which course the EPA takes and emerging state regulatory frameworks.

II. The Growing (?) Role of the EPA

Fracking is currently exempt from regulation under the principal federal environmental laws,⁷ including the Safe Drinking Water Act (SDWA) unless diesel fuel is used in the process.⁸ As a result, fracking regulation has traditionally been a state function. Change, however, is afoot.

Recently, Congress has been considering amending the SDWA to regulate fracking. In 2011, Congress introduced legislation for the second time that would have removed fracking's exemption under the SDWA and would have brought the regulation of fracking under

the dominion of the EPA.⁹ The so-called FRAC (Fracturing Responsibility and Awareness of Chemicals) Act failed due to opposition from industry, members of Congress, and even some environmentalists who believe that the regulation of fracking should continue to rest with the states.¹⁰ Many environmental groups are advocating for the uniform regulation of gas drilling and more stringent environmental protections for water resources. While these groups support eliminating the SDWA exemption for gas drilling, some states are formally requesting that the EPA leave regulation of fracking to them.¹¹

Aside from Congressional reconsideration of the SDWA fracking exemption, the EPA is also re-examining the scope of its existing authority to regulate fracking involving the injection of diesel fuel, which is a contentious debate itself. While the EPA is currently drafting permitting guidance for fracking operations that use diesel fuels in fracking fluids,¹² the oil and gas industry has indicated that it may sue the EPA over any overly broad guidance the EPA may issue on the matter.¹³ North Dakota is considering such a lawsuit if the EPA requires permits for all fracking operations that use diesel fuels regardless of the quantity of the substances used, a policy that could overburden the state and impair its booming production of natural gas.¹⁴ Oil and gas companies have already sued the EPA over an informal requirement, posted on the EPA's website, that the companies obtain authorization from the underground injection program to use diesel fuel in fracking fluids. These litigants claim that the EPA essentially engaged in rulemaking without notice and comment.¹⁵ The suit could result in the EPA having to proceed with the formal rulemaking process before enforcing permitting of fracking under the SDWA.

The EPA is also currently investigating the impacts of fracking on drinking water, which the agency says is necessary to address broad public concerns.¹⁶ It anticipates having initial results in late 2012 and a final report in 2014.¹⁷ In October 2011, the EPA set out to regulate pretreated waste

sent to publicly-owned treatment works from gas drilling, and the agency also plans to propose wastewater treatment rules in 2014.¹⁸

Federal and state officials have taken varied positions regarding the EPA's proper role in the fracking regulatory scheme. The North Dakota legislature approved a concurrent resolution that urged Congress to limit the EPA's regulation of fracking to drilling operations that use fracking fluid consisting of more than 50% diesel fuel.¹⁹ Some argue that local control is important because it accounts for differences in geology and geography.²⁰ Others, however, welcome the EPA's study on the impacts of fracking on the environment, particularly on drinking water, and are in no rush to allow a potentially risky practice before more information is known.²¹

Even with the states continuing to regulate the drilling process, the EPA has been called on to regulate associated environmental impacts. As a result, the agency is currently considering rules to regulate air pollution and wastewater from fracking.²² Even if the EPA increases its regulation of the industry, states will likely continue to play some role in regulating fracking.²³

III. The States, at the Helm

As explained above, states generally regulate the oil and gas industries within their borders. In 2010 and 2011, some states passed new rules and regulations regarding fracking, including Arkansas, Michigan, and West Virginia.²⁴ Other states, including New York and Delaware, are engaged in study and proposed rulemaking.

West Virginia enacted emergency rules in August 2011 to regulate horizontal gas drilling while it works on long-term regulations.²⁵ West Virginia now has casing and cement standards for wells and also requires permits for horizontal fracking, erosion and sediment control plans, well safety plans, and planned management and disposition of wastewater from fracking operations.²⁶ The state also requires a 30-day public notice period for well

permit applications.²⁷ Although temporary, West Virginia's emergency rules have received praise and support from the EPA, particularly for their provisions addressing water supplies and wastewater.²⁸ Perhaps the state's first shot at regulating fracking will provide guidance for other states that are struggling in this regulatory capacity.

New York is debating a proposed regulatory framework of fracking that is also considered more comprehensive than that of many states. The New York Department of Environmental Conservation (NYDEC) first issued a Draft Supplemental Generic Environmental Impact Statement (SGEIS) in 2009, which was created pursuant to the state's Environmental Quality Review Act to study potential impacts of fracking operations.²⁹ After the SGEIS received over 13,000 comments,³⁰ then-Governor Paterson released an executive order precluding the NYDEC from issuing gas drilling permits until it proposed a revised draft supplemental generic environmental impact statement and completed the notice and comment process.³¹ The NYDEC released the Revised Draft SGEIS (RDSGEIS) on September 7, 2011.³² The RDSGEIS and proposed regulations were available for public comment until January 11, 2012,³³ and upon review the NYDEC is expected to issue a final SGEIS.³⁴

The Delaware River Basin Commission (DRBC) proposed regulations on November 8, 2011, to end a moratorium on gas drilling in the Delaware River Basin, which includes New York, New Jersey, Pennsylvania, and Delaware. The moratorium has been in effect since May 2009 and will last until the DRBC, which consists of the governors of the four states and a representative from the U.S. Army Corps of Engineers, adopts final rules governing gas drilling. However, the DRBC postponed the vote on its proposed rules, which was scheduled for November 21, 2011, in response to Delaware Governor Markell's announcement that he would vote against them.³⁵ Furthermore, the State of New York and several environmental groups filed two different lawsuits against the U.S. Army Corps of Engineers, claiming that the DRBC

did not conduct an environmental review before proposing the regulations as required by the National Environmental Policy Act of 1969.³⁶

IV. Local Governments, in the Mix

State law determines the extent of authority that municipalities may exercise, including the extent to which they may enact ordinances or regulations regarding gas drilling.³⁷ States provide their municipalities with varying degrees of authority to enact regulations that may affect the industry. Many states authorize municipalities to enact general land use ordinances that specify where certain industrial development may occur, such as high-impact industry. For example, the Railroad Commission of Texas regulates the gas industry, including production, delivery, and pipeline safety, but in Texas, a municipality may determine, for example, through zoning laws and permitting, whether and where drilling occurs. Coppell, Texas, which sits on the Barnett Shale, requires a permit and only allows drilling in areas zoned Light Industrial or Agricultural.³⁸

States may also more specifically integrate municipal concerns into the state decision-making process. New York's RDSGEIS authorizes municipalities to advise the NYDEC if a fracking proposal is inconsistent with local land use laws. A finding of inconsistency prompts the NYDEC to request additional information in the permit application to determine whether there are adverse environmental impacts that have not been addressed.³⁹

While land use is an area of regulation that is traditionally left to municipalities through broad grants of authority under the enabling statutes, a state may take back or limit that authority. The Pennsylvania legislature is considering legislation that would do just that. In November 2011, the Pennsylvania House and Senate independently passed two bills that would deny municipalities any authority over regulating oil and gas operations.⁴⁰

Municipalities are precluded from regulating aspects of the oil and gas industry that are comprehensively regulated by the state.

Even without such explicit limitations, municipalities are precluded from regulating aspects of the industry that are comprehensively regulated by the state. For example, in 2009, the Pennsylvania Supreme Court determined that the state Oil and Gas Act preempted a municipal ordinance on gas drilling. The court found that the town's ordinance—which regulated the permitting of drilling and site restoration, imposed bond requirements, and imposed well-head and capping regulations—was preempted by the Oil and Gas Act, which created a comprehensive regulatory scheme and therefore superseded all local ordinances purporting to regulate gas well operations. The court specifically found that the ordinance “purport[ed] to police many of the same aspects of oil and gas extraction activities that are addressed by the Act” and did not focus “on zoning or the regulation of commercial or industrial development generally[.]”⁴¹ If the state has a regulatory scheme for the gas industry, such as for permitting or bonding, municipalities may be preempted from adopting similar ordinances.⁴² On the other hand, in a companion case decided the same day, the court found that the Oil and Gas Act did not preempt a zoning ordinance designating where natural gas drilling is permitted, as authorized by the Municipalities Planning Code.⁴³ Such an ordinance “serves different purposes from those enumerated in the Oil and Gas Act.”⁴⁴

Local governments that have been regulating fracking are revising their rules and regulations as the industry grows and develops, in response to problems that have arisen, and to address residents' concerns. Collin Gregory, a gas well coordinator for Arlington, Texas, explained that Arlington recently amended its ordinance because “now there are almost a hundred thousand wells in the Barnett Shale. Earlier, when we had the 2005 or

2006 ordinance, there were hundreds, and a lot of that drilling has moved closer to urban areas, encroaching more and more on citizens.” Santa Barbara County, California recently amended its zoning ordinance to clarify a separate, discretionary permitting track for fracking. Doug Anthony, Deputy Director of the Santa Barbara County Planning and Development Department, explained that in 2011, an oil company conducted fracking illegally on a land use permit that did not entitle it to engage in fracking, which activity required a higher-level permit because fracking has the potential to significantly impact the environment.

In addition, in areas where municipalities have been granted significant authority to regulate gas drilling, companies face the daunting challenge of having to comply with each locality's unique specifications, which can be especially difficult for well sites straddling municipalities. According to Gregory, in terms of adhering to rules in multiple jurisdictions in Texas, “the biggest problem is between municipalities,” not between municipalities and the state.

V. Examples of Regulations at Work

A. Water Quality Concerns

As fracking involves injecting large volumes of water mixed with chemicals deep into the ground, concerns of potential impacts on water resources, particularly drinking water, run high in many communities.⁴⁵ In order to prevent contamination of groundwater and wells, states must take care to ensure that used or stored fracking fluid does not escape. The EPA recently concluded that fracking in Pavillion, Wyoming likely affected groundwater, linking fracking to groundwater contamination for the first time, and residents have been advised not to drink from their wells due to detected hydrocarbons.⁴⁶

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States are starting to require public disclosure of chemicals used in the fracking process.

A noticeable trend in state regulation is to require public disclosure of the chemicals used by the gas companies in the fracking process. States are contemplating how to balance the public's need to know this information with the companies' trade secret rights. Several states have already enacted disclosure rules, including Wyoming, Arkansas, Pennsylvania, Texas, and Michigan.⁴⁷ Wyoming was the first state to pass regulations, which were instituted in 2010, requiring disclosure of chemicals used in fracking fluids, and the state also requires companies to file for trade secret approval.⁴⁸ In 2011, Texas passed the first legislation mandating disclosure, requiring that companies report the total volume of water and chemicals used in fracking, except for proprietary information, on an online chemical registry called FracFocus.⁴⁹

Colorado recently expanded its disclosure rules. Since 2008, Colorado has mandated that oil and gas companies list the chemicals used in drilling at well sites and provide the lists to state regulators and medical personnel if an incident occurs.⁵⁰ In December 2011, the Colorado Oil & Gas Conservation Commission passed new rules requiring companies to post information about the chemicals on FracFocus, including the concentrations of all chemicals used.⁵¹ Proprietary chemicals need not be disclosed, but the type of chemical will have to be listed.⁵²

On the federal level, the proposed FRAC Act, discussed above, would have mandated that gas companies disclose the chemicals used in fracking fluid, except for proprietary information.⁵³ In addition, the EPA recently announced that it will seek public input on possible reporting requirements for chemicals used in fracking.⁵⁴ The Department of the Interior is also considering mandating that companies disclose the chemicals they use in the fracking process, although trade secrets would be protected.⁵⁵

Fracking produces wastewater with high salinity and containing chemicals such as barium.

In connection with the chemicals used in fracking, how to deal with the resulting wastewater remains the subject of some debate. The fracking process produces wastewater with high salinity and containing chemicals such as barium. Much of the wastewater is reused or injected back into the ground, but some of it is treated and discharged into surface water. This wastewater typically cannot be treated at municipal treatment plants, which are not designed to handle such chemical waste.⁵⁶ In 2011, Pennsylvania Governor Corbett requested that drillers stop sending fracking wastewater to treatment plants, which could only partially treat the water before releasing it into rivers.⁵⁷

Currently, states' procedures for disposing of wastewater must adhere to the Clean Water Act and the Safe Drinking Water Act, but their approaches vary. Western states commonly inject wastewater into underground reservoirs, which is the industry's preferred disposal method. However, eastern states do not have the same geology. Another alternative for handling wastewater is disposal to lined pits or ponds. Along the Rocky Mountain Front, after a well is injected with the water mixture, most of the fluid comes back up to the surface before the gas is retrieved. The fluid is often drained into lined holding ponds, and then it may be reused or transferred to old cased mines to be stored indefinitely.⁵⁸ Contrary to this practice, the New Jersey Assembly Environment and Solid Waste Committee recently approved a measure banning treatment, disposal or storage of fracking wastewater in the state.⁵⁹

Given the issues associated with adequately handling fracking wastewater, some states have called on the EPA to play a greater role. Governor Corbett of Pennsylvania, facing problems from increased amounts of wastewater in rivers, asked the EPA to develop technology-based stan-

dards for pretreating fracking wastewater.⁶⁰ This is especially difficult given that such technology must be economically achievable for the industry, and the EPA has acknowledged that this is not currently the case.⁶¹ The EPA is also considering promulgating best management practices (BMPs) for addressing contamination from stormwater runoff at drilling sites.⁶² Fracking in the Marcellus Shale has also led environmental groups to request that the EPA revisit the exemption from hazardous waste rules for wastewater treatment units.⁶³ Kansas, a state that is struggling with how to properly dispose of wastes that are removed from the borehole after drilling (called “drill cuttings”), supports this request.⁶⁴

Large-scale water withdrawals for fracking might impact water supplies.

B. Water Supply Concerns

Some states have expressed concerns about the amount of water used in fracking, given the 2 to 4 million gallons of water used to drill a horizontal shale gas well and extract gas.⁶⁵ Large-scale water withdrawals for fracking in some situations might impact water supplies, industries that depend on water use, and recreational activities.⁶⁶

In light of these concerns, Michigan’s Department of Environmental Quality enacted a rule in 2011 requiring gas companies to provide the proposed total volume of water needed for fracking operations, complete an online water withdrawal evaluation, and explain the source of their water before beginning extraction.⁶⁷ This will hopefully enable the state to better understand and mitigate the impact of drilling on its water resources. Companies must also disclose the amount of water pumped out following the fracturing process, called “flowback.”⁶⁸

In 2011, the Idaho Oil and Gas Conservation Commission passed a rule that might be applied to require gas companies to monitor groundwa-

ter resources before and after fracking.⁶⁹ West Virginia has a more comprehensive approach, mandating that companies report the estimated volume of water they will use for fracking. If they anticipate using more than 210,000 gallons of fresh water in a month, they must submit a water management plan. This plan shall include anticipated sources of water, months when water withdrawals will be made, the additives used in the water for fracking, water uses, and planned disposition of wastewater.⁷⁰

C. Siting Wells

Gas drilling regulations typically provide varying degrees of setback requirements, generally from watercourses and certain land uses. Some states and local governments protect certain natural resources, such as drinking water sources or parks,⁷¹ which can be accomplished by an overlay zone.⁷² For example, Pennsylvania requires natural gas wells to be at least 200 feet from private water wells and 100 feet from watercourses. Governor Corbett proposed an increase in the setback requirements to 500 feet from private water wells and 1,000 feet from public water systems.⁷³ Meanwhile, the NYDEC proposed prohibiting fracking within 4,000 feet of the New York City and Syracuse watersheds; within 500 feet of private water wells (unless the setback is waived by the landowner) and of primary aquifers; within 2,000 feet of public water wells; and in reforestation or wildlife management areas.⁷⁴

Some municipalities are also involved in regulating where gas drilling and operating may occur. For example, Collier Township, Pennsylvania has prohibited gas drilling “within 300 feet of the property line, or upon the property of any residential or public building, church, community or institutional building, commercial building, public park or private recreation area without the written consent of the owner[.]”⁷⁵ Drilling is also prohibited within 1,000 feet of a school or day care center without the property owner’s consent, or

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within 300 feet of these uses with consent.⁷⁶ Although the statute restricts where gas wells can be located, underground activities and processes used in gas drilling can occur in any zoning district.⁷⁷ In Arlington, Texas, well pads must be 600 feet from parks and protected land uses.⁷⁸ In Coppell, Texas, gas drilling may not occur within 1,000 feet of a habitable structure, residential or non-residential.⁷⁹ Arlington and Coppell have limited authority to reduce these distances.⁸⁰

Separation requirements have proved problematic in other areas of land use when they have virtually precluded the undertaking of certain activities, such as sexually oriented businesses, residency of sex offenders, and the sale of alcohol near religious institutions.⁸¹ In addition, there are intriguing, unaddressed questions regarding the transfer of wealth and land economics as a result of land separation rules.⁸²

D. Traffic

Along with wells and gas lines, fracking operations often result in heavy vehicular traffic and, consequently, road degradation. Municipalities have implemented regulations to minimize transportation impacts, such as by regulating when trucks are allowed on the roads. Collier Township, for example, requires a gas drilling applicant to provide proposed routes of all trucks to be used for hauling; the trucks' estimated weights; evidence of compliance with weight limits on its streets or a bond and an excess maintenance agreement to ensure repair of road damage; and evidence that the intersections on the proposed routes have sufficient turning radii.⁸³

New York law authorizes local governments to establish reasonable rules and regulations to protect local roads from damage.⁸⁴ Such rules must apply generally and not target the oil and gas industry specifically.⁸⁵ In addition, the RDSGEIS requires an applicant for a gas drilling permit to submit a transportation plan that identifies the number of anticipated truck trips generated by the applicant's operations, the times of day the trucks

would be operating, the trucks' proposed routes, and the roads' ability to accommodate the trucks.⁸⁶ The NYDEC proposes that no permit shall be issued unless it and the New York State Department of Transportation are satisfied that the plan is adequate to ensure safety and a reduction of the impacts of traffic on local roads. The RDSGEIS acknowledges that "local municipalities may not have the funds, equipment, or staff to survey local roads on a regular basis[]" and, therefore, requires the operator to perform a baseline survey of the local roads.⁸⁷

E. Noise, Visual Impacts & Odors

Noise resulting from fracking operations is sometimes a concern among municipalities, which may consider restricting drilling activities to certain hours, or other reasonable regulations to minimize noise. According to Gregory, most of the complaints from residents in Arlington, Texas regarding gas drilling are about noise. In response, Arlington's regulation of noise from drilling has evolved to allow for different limitations during the day versus at night, and to make it easier to distinguish a complaint from a violation. It now establishes minimum noise levels that shall be monitored and limits "[s]ite preparation, well servicing, truck deliveries of equipment and materials, and other related work conducted on the well site" to between the hours of 7:00 a.m. and 6:00 p.m.⁸⁸

Collier Township also sets minimum ambient noise levels based on time of day and stage of operation.⁸⁹ Companies must monitor and report their noise levels to the Township, and if noise exceeds permissible levels, they may be required to erect barriers or sound walls around drilling rigs.⁹⁰ The ordinance also restricts, prior to the commencement of drilling, construction activities involving excavation of or repair work to access roads from 7:00 p.m. to 7:00 a.m.⁹¹

Some municipalities are regulating use of lights, particularly near public roads and adjacent properties. Cecil Township, Pennsylvania requires gas drilling operators, "to the extent practicable, to

direct site lighting downward and inward toward the drillsite, wellhead, or other area being developed so as to attempt to minimize glare on public roads, and adjacent buildings within three hundred (300) feet of the drillsite, wellhead, or other area being developed.”⁹² New York has proposed mitigating visual impacts on sensitive areas, such as historic preservation sites.⁹³ Arlington, Texas requires that drilling sites be kept clean of trash and debris.⁹⁴

Some municipalities require operators to minimize odors from gas drilling and utilize the industry’s best practices in this regard. In Arlington, Texas, operators must minimize “dust, vibration, or noxious odors, and shall be in accordance with the best accepted practices incident to drilling for the production of gas and other hydrocarbon substances in urban areas.”⁹⁵ Collier Township’s gas drilling ordinance requires companies to take all precautions to minimize odors perceptible on property within 500 feet of the wellsite while drilling and fracking.⁹⁶ In addition, should a person residing or working on a nearby property complain of an odor, the company must meet with the Township to establish an effective “odor control plan,” and the drilling operator must pay for investigative costs associated with assessing the odors.⁹⁷

F. Impacts and Fees

Impact fees can offset expenses incurred by state and local governments as a result of gas drilling operations, such as the need to widen and maintain roads that are being more heavily used. For example, in November 2011, the Pennsylvania Senate approved a bill that would assess an impact fee of \$50,000 per well for the first year of production, \$40,000 for the second year, \$30,000 for the third year, \$20,000 for years four through ten, and \$10,000 for years eleven through twenty.⁹⁸ After distributions to conservation districts, the state fire commissioner, and the fish and boat commission, counties and municipalities with drilling operators would receive 55% of the remainder.⁹⁹ Within two

days, the Pennsylvania House approved an impact fee on natural gas drilling of up to \$40,000 per well in the first year of drilling, \$30,000 in the second year, \$20,000 in the third year, and \$10,000 in years four through ten.¹⁰⁰ Seventy-five percent would go to county and municipal governments with gas drilling operators, and 25% would go to the state.¹⁰¹ It remains to be seen whether or how these bills will be reconciled.

Some municipalities may require applicants for gas drilling permits to post bonds for fees, penalties, violations, or damage to roads. Arlington, Texas, for example, requires security in the form of cash, a bond, or an irrevocable letter of credit.¹⁰² Collier Township requires gas drilling companies to post security to guarantee repair of damage to streets.¹⁰³ The Township may also require the applicant to agree to repair the road to the extent reasonably determined by the Township’s engineer, and it may require that the applicant take preventive measures such as shoring bridges or placing protective mats over utility lines.¹⁰⁴

VI. To Ban or Not to Ban?

With unanswered questions and fearful citizens, moratoria and bans on fracking have been enacted, largely across the Marcellus Shale. New York has a moratorium on fracking until June 2012 and has continued to ban fracking in the New York City and Syracuse watersheds. New Jersey currently has a one-year moratorium on fracking.¹⁰⁵ Internationally, France has outlawed fracking altogether, South Africa has a moratorium on fracking throughout the entire country, and Switzerland has indefinitely suspended authorizations to prospect for shale gas.¹⁰⁶

Some states are temporarily holding back on issuing gas drilling permits until further studies of environmental impacts can be done. For example, in June 2011, Maryland Governor O’Malley issued an executive order calling for a study of fracking in the Marcellus Shale and instituting a three-year moratorium on gas drilling while the studies are ongoing.¹⁰⁷

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Whether a municipality has the authority to ban fracking varies among states, and depends on the authority granted to municipalities and the state's regulatory framework.

On the local level, dozens of municipalities in the Marcellus Shale region have banned fracking, largely in New York and then Pennsylvania, including Buffalo, Ithaca, and Geneva in New York, and Pittsburgh, Cresson, and Washington Township in Pennsylvania.¹⁰⁸ In addition, several counties have banned fracking on county land in New York, and Mountain Lake Park, Maryland banned natural gas drilling.¹⁰⁹ Some of these municipal bans are being challenged in court. Whether a municipality has the authority to ban fracking varies among states and depends on the authority granted to municipalities and the state's regulatory framework.

Morgantown, West Virginia banned fracking within one mile of the city, but in August 2011, the Circuit Court of Monongalia County struck down the ban as preempted by state law. The court held that the city did not have the authority to completely ban fracking because the industry is regulated solely by the West Virginia Department of Environmental Protection (WVDEP), which had issued permits for wells to be used for gas drilling to the plaintiff.¹¹⁰ State law that fully occupies a particular area of legislation will preempt a conflicting municipal ordinance in the same field. Under West Virginia law, the purpose of the WVDEP is to "consolidate environmental regulatory programs in a single state agency," and WVDEP has sole discretion to perform all duties related to the exploration, development, production, storage and recovery of oil and gas in the state.¹¹¹ As a result, the court found that state law "sets forth a comprehensive regulatory scheme with no exception carved out for a municipal corporation to act in conjunction with the WVDEP[.]"¹¹²

A few similar lawsuits are underway in New York. Dryden and Middlefield have passed zoning laws banning fracking, which are currently

being contested in court.¹¹³ Opponents of these municipal bans in New York argue that the state law intended to give state agencies full authority to regulate the gas industry, denying municipalities authority to ban fracking. The counterargument is that the state law is meant to govern the processes of fracking, such as how deep the companies can drill or how the wells must be built, but not whether an area is zoned to allow for it.¹¹⁴ Many municipalities in New York are waiting to see how these contested bans hold up in court before taking action themselves.

VII. Conclusion

The regulation of fracking is changing regularly. With the EPA becoming more involved, the oil and gas industry may see greater uniformity in its environmental regulatory requirements. Which states' precedents would become the national norm, if any, is unknown. However, if the federal government significantly increases its involvement, the states' abilities to adopt their own regulatory frameworks, based on their respective priorities, unique geologic features and citizens' concerns, may be weakened. Furthermore, there are currently major differences among states as to the extent to which municipalities are authorized to pass land use regulations that impact gas drilling operations. As states adopt new regulations or conform to new federal requirements, they may alter the scope of local governments' authority to pass regulations impacting the industry. Consequently, gas drilling rules and regulations should be regularly reviewed and updated in light of new knowledge with regard to scientific developments and the industry's progress, as well as to evolving legal mandates. The oil and gas industry maintains that fracking can be safe and beneficial if done right, while all levels of government fight to figure out what that means.

NOTES

1. See Madlen Read, *Oil Sets New Trading Record Above \$147 a Barrel*, USA Today (July 11, 2008), <http://tinyurl.com/7ukpp5x>; International Energy

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- Agency, *The Age of Cheap Energy Is Over, IEA Director Warns* (Apr. 21, 2011), www.iea.org/index_info.asp?id=1928.
2. See NYDEC, REVISED DRAFT SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT, §§1.1, 5.3, 5.4 (2011) (hereinafter RDSGEIS), available at <http://www.dec.ny.gov/energy/75370.html>.
 3. See RDSGEIS at §§5-5, 5-52; Emily C. Powers, *Fracking and Federalism: Support for an Adaptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. POL'Y 913, 919 & 923 (2010).
 4. National Park Service, *Development of the Natural Gas Resources in the Marcellus Shale*, 1-2 (Nov. 2009), available at <http://tinyurl.com/7hjxgb>.
 5. Paul M. Barrett, *Could Shale Gas Reignite the U.S. Economy?*, BLOOMBERG BUSINESSWEEK (Nov. 3, 2011), <http://tinyurl.com/6zg86x9>.
 6. See EPA, *Oil & Natural Gas Air Pollution Standards*, <http://www.epa.gov/airquality/oilandgas/actions.html> (last visited Dec. 13, 2011).
 7. See Powers, *supra* n. 3 at 913-14 & n.4 (listing fracking exemptions from federal laws).
 8. See 42 U.S.C.A. § 300h(d)(1)(B) (exempting from regulation "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations").
 9. See S.587, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00587;> H.R. 1084, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01084>.
 10. Jonathan D. Silver, *Federal Oversight of Fracking in Dispute*, PITTSBURGH POST-GAZETTE (Apr. 2, 2011), <http://tinyurl.com/brwxsr9>.
 11. See H.R. 6025, Reg. Sess. (Kan. 2011) (resolution urging Congress "to preserve the primacy of the Kansas Corporation Commission to regulate hydraulic fracturing"); H. Con. Res. 3008, 62nd Legis. Assem., Reg. Sess. (N.D. 2011) (urging Congress to clearly delegate responsibility for the regulation of fracking to the states).
 12. See EPA, *Hydraulic Fracturing Outreach*, <http://tinyurl.com/cjx3cr7> (last visited Dec. 13, 2011).
 13. See Bridget DiCosmo, *Citing New Data, Democrats Seek Strict EPA Scrutiny of Diesel in Fracking*, Inside EPA (Oct. 26, 2011).
 14. Bridget DiCosmo, *North Dakota Eyes Suit if EPA Pursues Broad Definition of Diesel Fracking*, Inside EPA (Nov. 11, 2011).
 15. See *IPAA v. EPA*, No. 10-1233 (D.C. Cir.); Amena H. Saiyid, *EPA in Settlement Talks with Industry Over Permits for Using Diesel in Fracking*, 42 ER 2587 (Nov. 18, 2011) (oral argument postponed pending settlement negotiations).
 16. Patrick Ambrosio, *Anastas Says EPA Hydraulic Fracturing Study Necessary to Address Broad Public Concern*, 42 ER 2649 (Nov. 25, 2011).
 17. Ambrosio, *supra* n. 16.
 18. Derek Hawkins, *EPA to Probe Fracking Water Treatment for Future Rules*, Law360 (Nov. 16, 2011); see Robinson & Cole LLP, *EPA Plans Regulation of Hydrofracking Wastewater, States Move Forward with Hydrofracking Regulation* (Dec. 2011).
 19. H. Con. Res. 3053, 62nd Legis. Assem., Reg. Sess. (N.D. 2011), available at <http://tinyurl.com/6oc8pcp>.
 20. See Pamela Engel, *Pennsylvania Officials Discuss Fracking Regulation at House Subcommittee Hearing*, Kansas City InfoZine (Nov. 18, 2011), <http://tinyurl.com/7vef6m6>.
 21. See Engel, *supra* n. 20.
 22. See EPA, *Oil & Natural Gas Air Pollution Standards*, *supra* n. 6; Hawkins, *supra* n. 18.
 23. In addition to effects from the EPA regulating fracking directly, Collin Gregory, a gas well coordinator for Arlington, Texas, explained that if the EPA imposes more stringent standards on emissions from coal burning, the use of coal would decrease, and states and local governments would likely see a large jump in natural gas production and permit applications.
 24. See Ark. Oil & Gas Comm'n, *General Rules & Regulations* (Nov. 1, 2011), available at <http://tinyurl.com/bsn5rzw>; Mich. Dep't of Env. Quality, *Supervisor of Wells Instruction 1-2011* (June 22, 2011) (hereinafter Mich. DEQ Instruction), available at <http://tinyurl.com/cwt3hqp>; W.V. Dep't of Env. Protection, *Rules Governing Horizontal Well Development*, § 35-8-3 (hereinafter WVDEP Rules), available at <http://tinyurl.com/d26tndq>.
 25. W.V. DEP, *DEP Files Emergency Rule for Horizontal Drilling* (Aug. 22, 2011), <http://tinyurl.com/d5scuwo> (last visited Dec. 13, 2011).
 26. WVDEP Rules, §§ 35-8-3, 35-8-4.
 27. WVDEP Rules, § 35-8-5.1.
 28. See Bridget DiCosmo, *EPA Support Could Boost West Virginia Fracking Rules as Potential Model*, Inside EPA (Nov. 22, 2011).
 29. RDSGEIS, Executive Summary at 2.
 30. NYDEC, *SGEIS on the Oil, Gas and Solution Mining Regulatory Program*, www.dec.ny.gov/energy/47554.html (last visited Dec. 13, 2011).
 31. N.Y. Exec. Order No. 41 (Dec. 13, 2010).
 32. SGEIS on the Oil, Gas and Solution Mining Regulatory Program, *supra* n. 30.
 33. SGEIS on the Oil, Gas and Solution Mining Regulatory Program, *supra* n. 30.

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34. RDSGEIS, Executive Summary at 29.
35. Commission Cancels Planned Vote on Landmark Hydraulic Fracturing Rules, *Inside EPA* (Nov. 22, 2011).
36. See *Delaware Riverkeeper Network v. U.S. Army Corps of Engineers*, No. 11-3780 (E.D.N.Y. Aug. 4, 2011) (complaint filed); Lawrence Hurley, *N.Y. Fracking Lawsuit Raises NEPA Questions*, *N.Y. TIMES* (June 1, 2011), <http://tinyurl.com/3cz78xu>.
37. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 28 S. Ct. 40, 52 L. Ed. 151 (1907) (“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.”).
38. See Coppel, *Texas Ordinance No. 2009-1228*, § 9-26-7(A) (2009).
39. RDSGEIS at 7-145.
40. S.B. 1100, Reg. Sess. (Pa. 2011) (explicitly preempting “local ordinances and enactments purporting to regulate oil and gas well operations regulated by this chapter”); H.B. 1950, Reg. Sess. (Pa. 2011) (same).
41. *Range Resources Appalachia, LLC v. Salem Tp.*, 600 Pa. 231, 964 A.2d 869, 876-77 (2009).
42. See *Range Resources-Appalachia*, supra n. 41, 964 A.2d at 875.
43. See *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855, 866 (2009).
44. *Huntley & Huntley, Inc.*, supra n. 43, 964 A.2d at 866.
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53. See supra n. 9.
54. Pat Ware, *EPA Partially Grants Petition to Initiate Reporting Rule for Fracking Chemicals*, 42 *ER* 2650 (Nov. 25, 2011).
55. Erin Fuchs, *DOI Backs Fracking Despite Looming Rule Changes*, *Law360* (Nov. 16, 2011).
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57. Michael Rubinkam, *Fracking Wastewater Disposal to be Regulated, EPA Says*, *HUFF POST* (Oct. 20, 2011), <http://tinyurl.com/7nahgat>.
58. Eve Byron, *Concerns Grow About Fracking Along Rocky Mountain Front*, *BILLINGS GAZETTE* (Nov. 14, 2011), <http://tinyurl.com/c9xqsxl>.
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61. Bridget DiCosmo, *Agencies’ Upcoming Fracking Rules Could Inform EPA Water Standards*, *Inside EPA* (Nov. 2, 2011).
62. Bridget DiCosmo, *EPA Eyes Options to Push State Use of Stormwater BMPs for Drilling Sites*, *Inside EPA* (Nov. 9, 2011).
63. *Activists Ask EPA to Revisit RCRA Waiver for Wastewater Treatment Units*, *Inside EPA* (Oct. 3, 2011).
64. Bridget DiCosmo, *Kansas Backs Activist Call for EPA to Repeal Waiver for Oil, Gas Waste*, *Inside EPA* (Nov. 2, 2011).
65. Jacquelyn Pless, *Regulating Hydraulic Fracturing: States Take Action*, 3 (Dec. 2010), available at <http://tinyurl.com/ctaz443>; see also RDSGEIS, § 5.7 (estimating that “average water use per well in New York could be 3.6 million gallons”).
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67. Michigan DEQ, *Supervisor of Wells Instruction 1-2011*, at 2 (2011), available at <http://tinyurl.com/cwt3hqp>.
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71. See, e.g., RDSGEIS, Ch. 7, § 7.1.11.2 (proposing site-specific review for environmental impacts for drilling projects involving a well pad located within 150 feet of a stream, storm drain, lake or pond).
72. See, e.g., Collier Township Draft Gas Well Overlay, available at <http://tinyurl.com/c3wh5et>.
73. See Governor's Marcellus Shale Advisory Commission Report, 107 (July 22, 2011), available at <http://tinyurl.com/cxzsoh5>.
74. RDSGEIS, Executive Summary at 2; §§ 7.1.5, 7.1.11.1.
75. Collier Township, PA Ordinance No. 592 § 1703.29.d(1) (2011) (hereinafter Ordinance No. 592).
76. Ordinance No. 592, supra n. 75 at § 1703.29.d(1)(a).
77. Ordinance No. 592, supra n. 75 at § 200(2).
78. See Arlington, TX Ordinance No. 10-012, Art. VII, § 7.01(B) (hereinafter Ordinance No. 10-012), available at http://www.arlingtontx.gov/planning/gas_drilling.html.
79. Coppell, TX Ordinance No. 2009-1228, §§ 9-26-2, 9-26-7(D)(1), 9-26-14(B)(4).
80. Coppell, TX Ordinance No. 2009-1228, § 9-26-14(B) (allowing reduction to no more than 500 feet from any habitable structure and 300 feet from any non-residential structures without unanimous consent of nearby property owners); Ordinance No. 10-012, supra n. 78 at Art. VII, § 7.01(B)(1) (supermajority vote can reduce setback to not less than 300 feet).
81. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-27, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982) (Massachusetts law providing that premises within 500 feet of a church or school shall not be licensed for the sale of alcohol upon the objection of the church or school violates the Establishment Clause); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (“[T]he First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value[.]”); *Mann v. Georgia Dept. of Corrections*, 282 Ga. 754, 653 S.E.2d 740, 741-45 (2007) (statute prohibiting sex offenders from residing anywhere within 1,000 feet of a child care facility, church, school, or area where minors congregate constitutes a taking because, under the law, “there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected”).
82. See, generally, *Bormann v. Board of Sup'rs In and For Kossuth County*, 584 N.W.2d 309 (Iowa 1998) (holding that a right-to-farm law was a taking because giving immunity to maintain a nuisance is, in effect, an easement, which is a property right; the state's authorization of the easement is therefore a taking of property without compensation); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3d 590 (1970) (following the finding that defendant's cement plant constituted a nuisance, granting an injunction that would be vacated upon defendant's payment of permanent damages, which would address “[a]ll of the attributions of economic loss to the properties on which plaintiffs' complaints are based”).
83. Ordinance No. 592, supra n. 75, § 1703.29.j.
84. N.Y. Env. Cons. Law § 23-0303(2) (2011); N.Y. VAT Law §§ 1640(a)(5), (a)(10), (a)(20).
85. See *Envirogas, Inc. v. Town of Kiantone*, 112 Misc.2d 432, 447 N.Y.S.2d 221, 222-23 (Sup 1982), judgment aff'd, 89 A.D.2d 1056, 454 N.Y.S.2d 694 (4th Dep't 1982).
86. RDSGEIS, § 7.11.1.1 at 7-136.
87. RDSGEIS, § 7.11.1.1 at 7-136.
88. Ordinance No. 10-012, supra n. 78, Art. VII, § 7.01(E)-(F).
89. Ordinance No. 592, supra n. 75, § 1703.29.r.
90. Ordinance No. 592, supra n. 75, § 1703.29.r.
91. Ordinance No. 592, supra n. 75, § 1703.29.q.
92. Cecil, PA Ordinance No. 2-2010, § 3(10).
93. See, e.g., RDSGEIS, § 7.9 at 7-121 to 7-124 (design and siting measures include “screening, [i.e., using objects to conceal other objects from view,] relocation, camouflage or disguise, maintaining low facility profiles, downsizing the scale of a project, using alternative technologies, [and] using non-reflective materials”).
94. See Ordinance No. 10-012, supra n. 78, Art. VII, § 7.02(C).
95. Ordinance No. 10-012, supra n. 78, § 7.01(A)(6).
96. Ordinance No. 592, supra n. 75, § 1703.29.y(2).
97. Ordinance No. 592, supra n. 75, § 1703.29.y(2).
98. S.B. 1100, Reg. Sess., § 2302(B) (Pa. 2011).
99. S.B. 1100, Reg. Sess., § 2314 (Pa. 2011).
100. H.B. 1950, Reg. Sess., § 2302(C) (Pa. 2011).
101. H.B. 1950, Reg. Sess., § 3508 (Pa. 2011).
102. See Ordinance No. 10-012, supra n. 78, Art. VI, § 6.01(B)(1).
103. Ordinance No. 592, supra n. 75, § 1703.29.k.
104. Ordinance No. 592, supra n. 75, § 1703.29.k.
105. See *Marcellus Shale Protest, Bans & Moratoria*, <http://marcellusprotest.org/bans-and-moratoria> (last visited Dec. 18, 2011) (hereinafter *Bans & Moratoria*).

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106. Bans & Moratoria, supra n. 105; *France Bans Hydraulic Fracturing for Shale Gas, Oil*, 42 ER 1510 (July 8, 2011).
107. Bans & Moratoria, supra n. 105; David Hill, *O'Malley's Executive Order that Halts Fracking Seen as Political Maneuver*, WASH. TIMES (June 12, 2011), <http://tinyurl.com/5ur869k>.
108. Bans & Moratoria, supra n. 105.
109. Bans & Moratoria, supra n. 105; Sustainable Otsego, <http://tinyurl.com/7snpqw3> (last visited Dec. 18, 2011).
110. N.E. Natural Energy, LLC v. Morgantown, WV, No. 11-c-411 (Monongalia Cty. Cir. Ct. 2011).
111. W.V. Code §§22-1-1(b)(2)-(3), 22-6-2(c)(12).
112. N.E. Natural Energy, LLC, supra n. 110, at 6.
113. Peter Mantius, *Dryden and Middlefield Fracking Bans Tested*, DC BUREAU (Nov. 11, 2011), <http://tinyurl.com/89234e8>.
114. See Mantius, supra n. 113.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Powers, *Fracking and Federalism: Support for an Adaptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. & Pol'y 913 (2011)

Nicholson and Blanson, *Tracking Fracking Case Law: Hydraulic Fracturing Litigation*, 26 Nat. Resources & Env't 25 (Fall 2011)

RECENT CASES

Eighth Circuit Court of Appeals holds that ordinance requiring that race cars stored outdoors be enclosed by a fence did not effect a taking.

Vinton Watson owned several “figure eight” race cars, and stored them in a rented shop and parking lot in the City of Indianola, Iowa. After receiving complaints about the appearance and noise of the cars, the City passed an ordinance requiring race cars to be enclosed by a fence in

outdoor areas where two or more vehicles were present. Watson sued in state court, alleging that the ordinance effected an uncompensated regulatory taking. The suit was removed to federal court. After a bench trial, the court issued a decision in favor of the City.

On appeal, the Eighth Circuit Court of Appeals affirmed. Watson argued that the ordinance constituted a physical invasion-type regulatory taking. The court rejected this claim, noting that the ordinance did not require Watson to allow the City or anyone else to enter the property and install a fence. Consequently, the ordinance did not erode Watson’s right to exclude others from the property, which is central to establishing a physical invasion takings claim. Watson argued that he was compelled to permit a physical intrusion because he had to install a fence in order to continue storing race cars on his property, but the court noted that he was not required to continue storing vehicles on his property, and so long as he still could choose whether to build the fence or forgo placing more than one vehicle outside, he could not establish the required compliance necessary for his claim.

Watson also maintained that the trial court should have found an exactions taking under *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), because the ordinance was effectively conditioning his use of the property as a place to store race cars upon building a fence. The court found this argument meritless. *Nollan*, said the court, applies only when the government demands that a landowner dedicate an easement allowing public access to his or her property as a condition of obtaining a development permit or other license. The ordinance at issue did not require Watson to dedicate any portion of his property to the City’s or the public’s use, nor did it materially affect his right to exclude others. *Iowa Assur. Corp. v. City of Indianola, Iowa*, 650 F.3d 1094 (8th Cir. 2011).

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Western District of New York holds that zoning board's refusal to allow building of church facilities in an area zoned light industrial was not a substantial burden within the meaning of RLUIPA.

The Wesleyan Methodist Church of Canisteo operated a church in the Village of Canisteo. It deemed its existing church facilities inadequate, and desired to purchase a parcel of land in the Village to build new facilities in a district zoned as "light industrial." Church buildings were not permitted in this area.

Wesleyan Methodist requested that the Village rezone the area to permit churches. The Village referred the matter to the Planning Board, which recommended that the Village deny the request because it would "ultimately change ... the entire Light Industrial District." The Planning Board also noted that there was a "very small amount of suitable land within village limits for light industrial use." The Village denied the request to rezone, and suggested that Wesleyan Methodist apply for a variance.

Wesleyan Methodist applied for a variance but was denied. The Zoning Board of Appeals (ZBA) found that Wesleyan Methodist had not met the requirements for a variance, including the requirement that an applicant show "hardship." The ZBA found that Wesleyan Methodist had created its own hardship by seeking to build in an area that was not zoned for churches.

Wesleyan Methodist sued the Village and the ZBA in the U.S. District Court for the Western District of New York, alleging, inter alia, that they had violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by imposing a substantial burden on the church's religious exercise. The defendants moved to dismiss the suit, contending that Wesleyan Methodist had not stated a claim under RLUIPA.

The court granted the motion to dismiss. The court held that it was clear from the complaint

that the light industrial zoning requirements were a generally applicable burden that was neutrally imposed on churches and secular organizations. The court also noted that Wesleyan Methodist had acknowledged, in its communications with the Village, that it had several alternatives to remedy the inadequacy of its existing facilities, including building new structures on its existing property. Wesleyan Methodist insisted that the complaint plausibly pleaded that the parcel on which it wanted to build was the only suitable location for its new church. The court disagreed because the complaint did not contain this allegation, and observed that Wesleyan Methodist had declined the court's offer to allow it to amend its complaint to include such an allegation. *Wesleyan Methodist Church of Canisteo v. Village of Canisteo*, 792 F. Supp. 2d 667 (W.D. N.Y. 2011).

Court of Appeals of North Carolina holds that permanent diversion of river by regional water authority effected taking of hydroelectric power plants' riparian rights.

The Piedmont Triad Regional Water Authority was a public water authority consisting of a county and five municipalities. The Authority was formed to develop a public water supply for the Piedmont Triad region of North Carolina. The Authority used its power of eminent domain to divert water from the Deep River and create a lake. Several downstream riparian owners, who operated hydroelectric power plants on the Deep River, sued the Authority for inverse condemnation, alleging that by diverting the river it had taken their riparian rights. The trial court held, inter alia, that the Authority had taken the plaintiffs' riparian rights and that they were entitled to compensation from the Authority.

On appeal, the Court of Appeals of North Carolina affirmed. The court rejected the Authority's argument that the riparian owners did not have a property interest in the natural flow of water and that a reduction in water flow is not a com-

pensable taking. The case cited by the Authority, said the court, did not stand for the proposition that a reduction in water flow is not compensable, because in that case the plaintiff had been unable to show that the disturbance in the natural water flow was permanent. The court also noted that the doctrine of reasonable use, under which an upstream riparian owner is entitled to make reasonable use of water without incurring liability to downstream owners, does not apply in condemnation proceedings.

The Authority also maintained that the state's water impoundment statutes, and the certificate issued by the state Environmental Management Commission authorizing diversion of the river's flow, superseded the riparian owners' common-law rights. The court, however, held that the statutes and the certificate merely authorized the Authority's exercise of its eminent domain power to divert the water; they did not excuse it from the duty to compensate the riparian owners. *L & S Water Power, Inc. v. Piedmont Triad Regional Water Authority*, 712 S.E.2d 146 (N.C. Ct. App. 2011).

Appeals Court of Massachusetts holds that statute limiting conditions or restrictions on the use of real property to a term of 30 years did not apply to condition imposed pursuant to grant of special permit.

The trustees of the Geneva H. Killorin 1992 Trust owned a lot in Andover. In 1940, a special permit had been granted allowing a mansion on the lot to be converted into apartments, with the condition that the lot not be further subdivided (the lot had previously been created by the subdivision of a larger parcel). The trustees wished to

further subdivide the lot, but the Zoning Board of Appeals denied their application for modification of the 1940 special permit decision. The Superior Court Department affirmed the Board.

On appeal, the Appeals Court of Massachusetts affirmed. The trustees argued that the restriction on subdivision imposed in 1940 was no longer effective, because of a state statute generally limiting conditions or restrictions on the title or use of real property to a term of 30 years. The question, said the court, was whether the statute applied to conditions or restrictions imposed by a government agency as part of the process of granting a special permit to allow something that would otherwise conflict with local zoning laws.

The statute at issue, noted the court, stated that conditions or restrictions on the use of real property were limited "to the term of thirty years after the date of the *deed or other instrument or the date of the probate of the will creating them*" (emphasis by the court). This, said the court, strongly implied that the restrictions controlled by the statute were those created by deed, will, or other instrument. The 1940 subdivision restriction was not created by deed, will, or other instrument, but by a decision of the Board granting a special permit. The court went on to say that the statute relied on by the trustees appeared in a title dedicated to the formal requirements and effects of deeds or other instruments of conveyance of real property, and not to the effect of municipal regulations on the use of property. The court found further support for its interpretation of the statute in case law, and distinguished cases cited by the trustees. *Killorin v. Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655, 955 N.E.2d 315 (2011), review denied, 461 Mass. 1103 (2011).