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Barry Rabe | August 6, 2012 12:21pm

Fracking, Legislation and the Court



The ink was barely dry on far-reaching new Pennsylvania legislation to regulate hydraulic fracking practices before a state appellate court recently overturned key provisions as an unconstitutional encroachment on traditional land-use policies.

This ruling serves as a reminder that few governance issues are as contentious as governmental battles over land-use decisions. Federal and state policies that restrict land-use preferences have routinely been assaulted by waves of litigation, many aiming to return authority to private and local hands.

But many of the very organizations so outraged by top-down governmental control have been remarkably quiet as the Commonwealth of Pennsylvania enacted far-reaching legislation that dramatically shifted one major form of land-use from local to near-total state control. This is why last week's decision by the Commonwealth Court to overturn key legislative provisions will only serve to draw more attention to this issue, as a larger national debate likely begins on all facets of governance related to fracking.

In this case, the issue involves state desire for maximal extraction of natural gas through hydraulic fracking techniques. Pennsylvania was the "Saudi Arabia of oil" before Saudi Arabia was formed, dominating world production in the late 19th and early 20th Centuries (to learn more, read Daniel Yergin's book, *The Quest*).

Aggressive use of fracking in the Marcellus Shale may well provide the state a route back to an energy-intensive economy, one also offering some significant environmental benefits given the upsides of natural gas.

But the Pennsylvania legislature and Governor Tom Corbett went off the deep end earlier this year by enacting Act 13, a sweeping statute covering many aspects of fracking governance. Among the most significant provisions was a remarkably detailed and complex set of measures designed to strip local governments of basic land-use controls long protected under Pennsylvania's planning code that emphasizes local authority.

These new provisions include tight constraints on how localities may address such issues as restricting vehicle access routes, well site operation hours, conditions for site screening and fencing, or limiting structural height or noise from facility operations. Every aspect of this legislation was designed to establish uniform land-use approaches to fracking operations, even in densely-populated areas. It severely constrains local governments and private land-holders from making independent judgments.

The state went even further by blocking local authority to challenge any state regulatory decisions related to shale gas permits and threatening localities with immediate loss of their share of "local impact fee" revenues in the event of any local encroachment on state authority. Indeed, this legislation is a model for its ability to look at every conceivable regulatory provision as a venue for shifting authority from private and local hands toward state regulatory agencies.

The passage of Act 13 in March led to a near-immediate turn to the courts by local governments. This included expressions of support for the challenge from legislators who had just voted in favor of the bill but began to see immediate impacts back home. The Commonwealth Court's majority opinion concluded that Act 13 "violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications."

Invariably, the state will appeal and the battle will continue in Harrisburg and elsewhere. But this case serves as a reminder that many basic governance issues related to shale gas are largely in state hands. Surveys suggest that the citizens of Pennsylvania would prefer a very different state policy approach, though they are generally supportive of continued pursuit of shale gas development.

For decades, states have argued that they were engaged in a "race to the top," finding creative ways to integrate local land-use and environmental protection needs with economic and energy development

opportunities. Thus far, Pennsylvania appears to be racing in the opposite direction.

How much authority should state governments have in determining land-use decisions linked to energy development? Should they treat all proposed energy sources, from shale gas drills to wind turbines, in the same way?

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Barry Rabe examines the adoption and implementation of policies relevant to climate change, environmental protection and energy, with particular attention to the role of state governments in the American federal system. His work also examines other federal systems such as Canada as well as the link between public opinion and policy development. He is also the J. Ira and Nikki Harris Family Professor of Public Policy, Gerald Ford School of Public Policy, and the Arthur F. Thurnau Professor of Environmental Policy, School of Natural Resources and Environment, at University of Michigan.

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**Leland Snyder** • 15 days ago

This is an example of taking rights away from the citizen ship. It's ok to standardize the rules. It's not ok to prevent townships from banning or impose greater restrictions on fracking. Most higher ups in Penn state government go to work for the gas companies after they say "It's all my fault". It's a broken system.

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**Maggie H** • 7 days ago

Better check out the who;e picture before you go touting the up side of natural gas. What they have to do to get it makes it as if not dirtier than coal and the amount of methane poured into the atmosphere is criminal! "Aggressive use of fracking in the Marcellus Shale may well provide the state a route back to an energy-intensive economy, one also offering some significant environmental benefits given the upsides of natural gas."

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