

Gas Drilling, Sustainability and Energy Policy

Part 4: Property Rights and Drilling

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This is the last in a series of articles reporting on discussions hosted by the Cornell Environmental Law Society at their April 1-2 conference.

It doesn't matter whether you lease your land for gas drilling or turn the landman away, whenever gas development activities move into an area, questions of property rights come to the fore. One of the sessions at last month's environmental law conference at Cornell took a closer look at how gas drilling conflicts with property interests.

Once the NYS Department of Environmental Conservation (DEC) completes their environmental review of high-volume horizontal hydro-fracking, municipalities will be scrambling to protect themselves, says Anthony Guardino. Though the state prohibits municipalities from regulating drilling, Guardino says local governments have the tools of land use and zoning at their disposal. He should know, because he deals in municipal law on a daily basis.

The question is: just how much power do towns still have? A town can't require road permits for only gas trucks, Guardino said, but they can use zoning to prohibit certain activities. "Zoning regulates land use," he said, adding that communities have successfully excluded certain industrialized mining activities from areas not zoned for that activity.

There aren't many cases on hydrofracking, though. When Cornell law professor Eduardo Penalver searched the legal databases he came up with only 44 case studies.

Because hydro-fracking is a new technology, the cases tend to focus on nuisance and trespass, Penalver said. Nuisance law protects an individual's use and enjoyment of his land. While they are well-equipped to deal with localized pollution, they don't force polluters to take precautions.

Nuisance laws only deal with events after-the-fact, Penalver explained. "You still have to take them to court and prove harm." Generally this means proving negligence or harm. "Even if an activity is legal, it can still be deemed a nuisance," he clarified, citing noise and odors.

Unfortunately, courts are reluctant to grant injunctions against nuisances that are considered to be economically important. The same holds true in trespass cases. Trespass, Penalver explained, prohibits intentional entry onto your land by another without your permission. For example, a neighbor can't extend an overhang above your property, or place a building on your land. Courts have held that slant-drilling – drilling from neighboring property under your land at an angle to access a reservoir of oil or gas – is trespass.

However, Penalver said, they allow hydro-fracking to extend beneath property boundaries in spite of the fact that, on the surface, such invasion would clearly be ruled as trespassing.

On the positive side, local governments have broad power to regulate land use, Penalver said. "Zoning may be your last, best option." Another positive note is that, given court activity in Pennsylvania, it looks as though drilling may be deemed an "ultra-hazardous" activity, like using explosives. If that is so, then landowners wouldn't have to prove negligence to be compensated for harm. Still, it does little to prevent or regulate potential harm from happening.

Ithaca attorney Helen Slottje, from the Community Environmental Defense Council, addressed the nature of property rights. People often say “It’s my property and I can do anything I want too.” There is an overarching understanding of public welfare, she said. In addition, property ownership does not grant a person the right to use his property in a manner that interferes with another’s use of his land.

“Each landowner has the right to quiet enjoyment of his property,” Slottje said. And the rights property owners have over activities conducted on their land change with time.

“A very fundamental property right is the right to exclude,” Slottje said. But NY law allows compulsory integration: the pooling of unleased landowners into drilling units when 60 percent of the land in a unit is leased. When drilling into conventional reservoirs, where gas and oil flow from unleased land to the well, compulsory integration makes sense. But in shale, drillers must break the rock to release gas and that, says Slottje, involves a trespass.

“When you are integrated, you are left with no right to exclude,” Slottje said. “You are left with toxic compounds beneath your land and you are not even compensated at market value.” [At this time integrated landowners are not paid for use of the land and receive the lowest possible royalty, 12.5 percent.]

Slottje warned municipal officials to avoid getting trapped into thinking they have to provide road use agreements. In a 1969 case, the courts found that a corporation’s claim to the right to profit was not greater than the residents’ right to not be impacted. What that means, she explained, is that no corporation has the automatic right to use local residential roads for high impact industrial traffic. NY law implies that communities can say “no” to heavy trucks, preserving residential roads for local use.

The biggest problem Slottje sees facing municipalities is the increased erosion of enforcement of environmental regulations. “So we’re swinging back to protecting the environment through property rights and home rule,” she said.