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OIL AND GAS DRILLING

Boom causes waves in U.S.

But other states' tack on the local-control issue seems calmer.

By Mark Jaffe The Denver Post

Development of oil and gas shale formations has sparked drilling from Pennsylvania to California, and that is leading to a new wave of local oil and gas ordinances and bans.

Towns and cities — from Robinson Township, Pa., population 13,354, to Dallas, population 1.2 million — are enacting rules to limit or control oil and gas development.

Beverly Hills, Calif., home to Hollywood stars and a cluster of wells at Beverly Hills High School, has banned fracking, the technique used to crack shale and free up oil and gas.

The rural New York hamlet of Dryden, home to the northeast's two largest organic dairy farms, has zoned it out of town.

But in many places, local governments and the oil and gas industry are reaching accord and finding ways to balance desires of residents against the demands of business.

"New Mexico, Texas, Oklahoma all have local oil and gas rules," said Barbara Green, an environmental and land-use attorney. "It is a nonissue everywhere except Colorado."

In Colorado, the battle over local control is being fought in the courts and perhaps at the ballot box this fall. Oil and gas companies and the state oppose giving local governments more say over where drilling can occur. Industry supports the Colorado Oil and Gas Conservation Commission as its principal regulator and is wary of a patchwork of rules that they say could limit, or even stop, drilling. "Often, 'local control' is a euphemism for banning oil and gas development," Tisha Schuller, president of the Colorado Oil and Gas Association, said in an e-mail. "In that context, it is unproductive."

State centralization of oversight

When the drilling boom hit western Pennsylvania's Marcellus Shale a few years ago, towns began looking for ways to control it. But to blunt those efforts, the state legislature in 2012 passed Act 13, which centralized all oversight of drilling with the state.

Seven townships challenged the law.

"The aim (of Act 13) was to make Pennsylvania more like Colorado," said John Smith, an attorney who represented Robinson Township in the lawsuit. "It was going to take all municipal rights away."

In December, the Pennsylvania Supreme Court declared unconstitutional the parts of Act 13 that blocked local control, citing the state's Environmental Bill of Rights, on the books since 1971.

The court ruled that under that bill of rights, protecting the environment is an essential aspect of Pennsylvanians' quality of life and a local government has a role in that protection.

Act 13 placed local governments in the position of either violating their constitutional duties or violating Act 13, the court said.

"There is the question of how you drill and where you drill," said John Dernbach, co-director of the Environmental Law Center at Widener University in Harrisburg, Pa. "The Pennsylvania Supreme Court ruled the state says how, and local government has the right to say where."

Robinson Township is evaluating where it will allow drilling.

Pennsylvania, like Colorado, has a so-called split estate, where the owner of the mineral rights may be different from the owner of the surface.

"You just can't ban it," Smith said.

There is a push to add an environmental bill of rights to Colorado's constitution. The group Coloradans for Safe and Clean Energy is collecting signatures to get the measure, Initiative 89, on the ballot — 86,105 valid signatures

are needed by Aug. 4.

The proposed amendment, like Pennsylvania's, states that Colorado's environment is the common property of all residents and that people have a right to clean air, pure water and natural scenic values.

Colorado's bill of rights, however, goes further than the Pennsylvania measure: It gives local government the power to enforce environmental protections with rules stronger than the state's.

"That's new law," Dernbach said. "That tips the balance to local government."

Dryden, an upstate New York farming town and bedroom community for Cornell University, also sits atop the Marcellus Shale.

The town has always banned all industrial development. When oil and gas drilling became a possibility, residents petitioned the town council to make it clear that drilling was included in the ban.

"It was controversial. Some folks had already agreed to mineral leases," said Mary Ann Sumner, a town supervisor.

Still, the town board approved the zoning amendment.

In 2011, Anschutz Exploration Corp., the privately held oil and gas company owned by Philip Anschutz, sued Dryden but soon sold its interests to Norse Energy, a subsidiary of a Norwegian oil and gas company.

On June 30, New York's highest court — the Court of Appeals — upheld Dryden's zoning. Norse Energy declared bankruptcy soon after.

"The court made a fundamental distinction between the regulation of land use and the regulation of an industry," said Deborah Goldberg, an attorney with the environmental law group Earthjustice and who represented Dryden.

The tough zoning was made easier because there is no split estate in New York. "I don't know how much our experience helps you — except for the courage," Sumner said.

"Reasonable" right to use surface

Texas' experience may be more instructive since it has split estate and also a requirement for a "reasonable" right to use the surface without compensation to produce the minerals.

Still, when the Barnett Shale boom hit north Texas, starting in about 2003, towns and cities began adding local regulations. Sixty-seven communities in the region enacted local drilling rules, according to the Texas Municipal League.

"Communities got hit with this wave of drilling, and they responded," said Jim Bradbury, a Fort Worth, Texas, attorney who helped draft that city's oil and gas ordinance.

The state was slower to respond, and when it comes to zoning, municipalities "pretty much have unfettered discretion," Bradbury said.

About two-thirds of the local rules require setbacks of drilling rigs from homes greater than the 500-foot buffer required in Colorado. Thirteen communities in the Barnett Shale have 1,000-foot setback requirements.

Dallas and its suburb Flower Mound have 1,500-foot setbacks.

A second measure proposed for Colorado's November ballot, Initiative 88, would mandate a 2,000-foot setback.

"A 2,000-foot setback is effectively a ban on drilling," said Doug Hock, a spokesman for Calgary, Alberta-based Encana Corp., one of the largest producers in Colorado.

There was an effort in the Texas legislature to give the state control over siting oil and gas drilling. The bill faltered in the face of opposition from the big cities, Bradbury said.

"Texas is a strong home-rule state, but it is also a big oil and gas state," said Bennett Sandlin, the executive director of the Texas Municipal League. "No one wants to go to court on this, so both sides are trying to cooperate."

The one place where the sides are facing a battle is Denton — a college town 40 miles north of Dallas — where a citizen petition has put a drilling ban on the ballot for November.

Denton adopted a 1,200-foot setback, but many approved well sites predate the ordinance, said Adam Briggie, a member of the Denton Drilling Awareness Group.

"There is no way an ordinance is going to work. We've got EagleRidge drilling 200 feet from homes. That's too close," said Briggie, a philosophy professor at North Texas University.

The city and EagleRidge, a privately held Dallas-based company, have a "standstill" agreement not to drill while "certain disputes and issues" are negotiated.

In Colorado, citizens of Longmont voted in 2012 to ban fracking and were sued by the state's oil and gas association and the Colorado Oil and Gas Conservation Commission. On Thursday, a Boulder County District Court judge struck down the ban but issued a stay in anticipation of an appeal.

In a Greeley oil-drilling case and a Summit County hard-rock mining case, the state's Supreme Court has ruled that local governments do not have the power to issue outright bans.

There were no legal issues or opposition when the Beverly Hills City Council in May unanimously voted to ban fracking.

"There wasn't much discussion," said city spokeswoman Theresa Kosterman.

Officials with Denver-based Venoco Inc., which operates the oil wells on the high school grounds, had no comment. The Beverly Hills City Council in 2011 had already voted to end oil production in 2016, when Venoco's lease expires.

"We have no plans to do any fracking there," said Steve Greig, Venoco's government relations manager.

California cities take action

Beverly Hills was the first California municipality to ban fracking, but it won't be the last, said Rachel Hooper, a California land-use attorney.

Santa Cruz County, on the California coast, has passed a ban. Butte County, north of Sacramento, is working on one. The cities of Los Angeles and Compton are working on moratoriums. There is no split estate in California.

"Applications are just flooding in — there is a proposal for 7,000 wells in Santa Barbara — and communities feel they have to respond," Hooper said.

The interpretation of statute and court ruling by Colorado officials and by the oil and gas industry is that the state has primacy over drilling operations.

Under their land-use powers, counties and cities have some powers — but not to stop drilling in a residential neighborhood.

"Communities with substantial oil and gas development already have been working successfully with the state and the operators in their area to ensure responsible regulations," the oil and gas association's Schuller said. "It's often the communities without oil and gas where the noise is the loudest as they look for a fix to a problem that doesn't exist."

Still, when Longmont in 2012 adopted oil and gas rules that included a ban on drilling in residential areas, the state sued, saying the city had overstepped its powers. This suit, which is separate from the frackingban case, is pending.

"We have a federal system," said Dave Neslin, a corporate energy lawyer and former executive director of the Colorado Oil and Gas Conservation Commission. "Different states have different laws."

Colorado regulators have taken steps, Neslin said, such as adding advanced notice to neighbors, controls on drilling noise and lights, and tougher cleanup standards, as well as requiring drilling rigs to be set farther back from homes and schools.

"There has been a lot done to address local concerns," Neslin said.

Not enough, say some local officials and grassroots activists. "Local government has the local forum, local planning," Green said. "You can't exempt one industry from that." Green helped Gunnison County draft and defend its oil and gas regulations, which faced legal challenges from drillers and state officials. The Gunnison rules include setbacks of wells from waterways, erosion controls and wildlife protections. The courts trimmed some rules but upheld the county's right to adopt an ordinance as long as it did not conflict with state regulations. "People have bought into the state's and industry's much more limited view of what they can do locally," Green said.

The push for an environmental bill of rights is part of an effort to give local governments more leverage and legal

standing.

There is an ongoing tension between state and local control, said Paul Teske, dean of the University of Colorado Denver's School of Public Affairs.

"Should something be controlled at the local level or at the state is always a question," he said. "There is not a right answer or wrong answer from the technical side. It is a political decision."

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Residents living in the Windsor Hills neighborhood of unincorporated Los Angeles County suspect damage to their homes may have been caused by possible fracking done in the Inglewood Oil Field, foreground. Al Seib, Los Angeles Times



A decorated oil derrick stands at Beverly Hills High in 2003. Associated Press file