

THE SUPERCEDURE PROVISIONS OF THE 1981 NYS OIL, GAS, AND SOLUTION MINING LAW PRECLUDE ZONING OF OIL AND GAS WELLS

By: Gregory H. Sovas, President, XRM, LLC

With the advent of the Marcellus shale gas play, there are many new communities in the state that have not experienced oil and natural gas drilling and production. The public, in one way or another, is being educated on the technical aspects of leasing, exploration, and development. While the landowner groups have generally done a very good job of educating their members, there are others who don't stand to benefit from natural gas development or who don't seem to embrace the facts and science for whatever reason. IOGA's educational efforts with the public are extremely important because of the lack of technical information on drilling and hydrofracturing and the misinformation being distributed by individuals with limited knowledge and experience in the oil and natural gas industry.

The overall result of this educational void is that all of the environmental impacts and issues that we thought were resolved are now being reviewed again in a more public light: horizontal drilling, protection of fresh waters,

hydrofracturing, to name just a few. Presumably the public has reviewed the Supplemental Generic Environmental Impact Statement (SGEIS) and concluded that the state can move forward with their findings to allow Marcellus gas development to proceed. Very likely wishful thinking on my part. I presume that most people who have opposed Marcellus development have not read the document; and if they had, they would not have changed their minds.

Along with the education challenges to the technical aspects of exploration and production, elected officials in areas of the state where drilling has not occurred previously, are now being questioned by their constituents concerning the regulatory authority that they may have or not have with regard to oil and gas regulation. Many of these elected officials are asking their lawyers and their association lawyers about the bounds of authority for local governments in the oil and gas regulation business.

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They want to assure their constituents that they will protect and preserve their communities from the environmental impacts of Marcellus development, while capturing the significant economic benefits.


A recent newsletter by a prominent environmental law firm in Albany has suggested that perhaps local governments have more authority than previously thought under the 1981 Amendments to the NYS Oil, Gas and Solution Mining Law in the context of zoning authority vested to municipalities. The conclusion of the newsletter is that a plain meaning interpretation of the qualifying language in the Oil and Gas Law “may support the argument that New York municipalities may regulate the industry outside of the scope of the State’s regulatory program.”

My view, as the primary author of the 1981 Amendments to the NYS Oil, Gas and Solution Mining Law, almost thirty years later, is that localities are superceded from any and all regulation of the oil and gas industry with the exception of local roads and real property taxes. The language of Section 23-0303(2) was very tightly drawn to both limit and accommodate the legitimate concerns of the municipalities.

In the 1970’s, there were many problems with the oil and gas regulatory program in NY that needed to be addressed in legislation. One of the problems was local regulation of the industry including setbacks, differing requirements for drilling and bonding, method of taxation, and zoning. Many of the problems occurred as a result of the state not having adequate staff to oversee oil and gas operations.

In 1980 as the then Bureau of Mineral Resources in the NYS Department of Environmental Conservation (DEC), my staff and I presented a comprehensive legislative proposal to mitigate a number of problems in both the regulation and the economic development of the oil and gas industry. One of the important provisions for the Department was the imposition of new fees to hire additional staff to oversee the industry, and the key provision of support from the industry was the supercedure clause. The industry had been having significant troubles with local governments over a variety of issues as noted above. The primary negotiators of the legislative proposal were Frank Murray, Governor’s Office who is now the NYSERDA President, Assembly Majority Leader Dan Walsh who later became the President of the Business Council and now retired, and Senator Jess Present,

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a wonderful gentlemen and advocate for the oil and gas industry in western NY who has since passed away. There was no question about legislative intent – by the Governor’s Office, the DEC represented by me as the Chief of the Bureau of Mineral Resources, and the Assembly – that the supercedure clause extinguished the right of municipalities to regulate any aspect of oil and gas development including the right to zone oil and gas wells. Shortly after passage of the bill, the issue of zoning was raised to me again, and I called Senator Present to confirm our “Democratic” view of the supercedure clause with regard to zoning. The Senator unequivocally agreed.

Therefore, after almost thirty years of experience in administration and implementation of the 1981 Oil and Gas Law, the state has never been challenged about its authority under the Law with regard to zoning. My view remains that zoning authority is absolutely precluded along with the entire local regulation of the oil and gas industry with the exception of local roads and real property taxes. We do not need to encourage local governments to pursue litigation concerning their zoning authority. It is a waste of time and effort by all. Rather, the industry needs to negotiate road agreements and work with the communities to address their legitimate concerns.

There is not time and space here to debate whether temporal oil and gas wells constitute a land use in any event, as opposed to a surface mining activity that is a

consumptive land use lasting years, decades, and centuries in some cases. However, the law firm newsletter tried to compare and analogize surface mining case law before the 1991 Amendments to the Mined Land Reclamation Law (for which I was also the primary author). The supercession provisions under the state’s Oil, Gas and Solution Mining Law and the 1991 Amendments to the Mined Land Reclamation Law are completely different and were intended to be that way. The 1991 Amendments to the Mined Land Reclamation Law specifically address the authority of the municipalities to zone permissible uses in zoning districts and to issue limited special use permits.

On a positive note, the Albany law firm has met with me to consider my views and has indicated that they will work cooperatively to address my concerns.

In the News

Eagle Energy Partners has changed their company name to **EDF Trading North America, LLC.** Mailing address and contact, **Neil Stultz**, remain the same.

Chuck Moyer with Range Resources Corp. has moved to the Canonsburg office. His new address is: 380 Southpointe Blvd., Canonsburg, PA 15317 / 724-873-3255.



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