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## Will Dryden Go Dry?

2011 JULY 22

by Bill

tags: Dryden, Natural Gas Ban, NY



Now that the moratorium is lifted and New York State is on its way toward Marcellus Shale development, [anti-drilling groups fundamentally opposed to any natural gas development](#) are trying to stop it with last-ditch efforts at the local level. [Overly strict road laws](#) constitute one of the more common techniques, but some areas are actually looking to ban drilling altogether. Recently, the [Town of Ithaca amended its zoning law to ban gas drilling](#) and now the Town of Dryden (Tompkins County, NY) is considering [a similar ordinance amendment](#). Banning gas drilling in trendy Ithaca, where it's unlikely to take place anyway, is perhaps no more than a harmless stunt, but Dryden raises a serious question – is it legal? We think not.

Municipalities are preempted by both Pennsylvania and New York from regulating aspects of natural gas development. Attorney Michael P. Joy, of [Biltekoff & Joy, LLP](#), who is also Ph.D level geologist, recently wrote a [post on this blog](#) clarifying this issue. He noted the Constitution of New York State limits municipal authority to only those specific aspects of law that have been granted by the State, and municipalities cannot go beyond those limits. The State Legislature has vested the New York State DEC with the exclusive authority to regulate all facets of oil and natural gas exploration, drilling, completion and production providing that: “[t]he provisions of this article **shall supersede all local laws or ordinances** relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.” This leaves the door open for road regulations (preferably, negotiated road use agreements that do unnecessarily restrict other local trucking), but not much else.

We have also written on this subject before in our piece on [Potemkin laws](#) where we noted forced pooling and unitization rules that apply in New York, along with clear state policy of controlling well siting, make it quite clear municipal home rule doesn't apply. We indicated this will, in all likelihood, slow down natural gas development while communities such as Dryden are taken to court but they are extremely unlikely to win in the end. The selected communities targeted by anti-gas special interests will pay the price in legal fees for enacting legally indefensible local laws while their funders and supporters (e.g., [the CELDF, which has a horrid track record in court](#)) march merrily along to there next radical cause like [helping Ecuador grant constitutional rights to begonias, bugs and bunnies](#).

Officially, Dryden has not yet passed the ban, but could do so as early as August 2, 2011. The [Dryden Town website](#) implies the board is inclined to pass the resolution with this puzzling statement (emphasis added):

*We have authorized Councilperson Leifer to work with Town Attorney Mahlon Perkins and other attorneys **to draft legislation effectively banning gas drilling** from the Town of Dryden. There are many aspects to be debated and information changes almost as fast as we can absorb it. **We know that the state pre-empts local regulation of gas drilling.***



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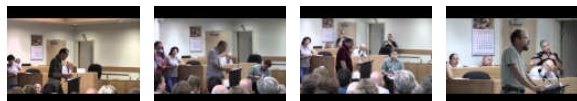
*We know that the state has reaffirmed local control of land use regulation.  
We are researching the extent to which we can regulate the siting of gas drilling.*

April 2011

Would you vote to enact a law you know stands in stark contrast to the plain wording of a statute telling you it has pre-empted your right to do? Most of us wouldn't want to run the risk of being personally liable for such a decision after publicly stating we knew what the law was, but it appears some Dryden officials (not necessarily a majority) are prepared to do precisely what they acknowledge they cannot. They are, of course, being advised by another [Park Foundation funded](#) band of radical lawyers – [the CEDC](#) – but one hopes they will think for themselves rather than bend to the special interests of Park. It is hardly encouraging that the Board says “Accidents and damage have occurred at gas drilling sites in Pennsylvania and other states” and includes a link to an extremely biased website that proudly displays this banner at the top (unusual for Town websites to reference such nonsense):



A public hearing on the proposed ordinance amendment was held on 7/20/11 and drew a mixed crowd of about 130 people. It was clearly evident throughout the meeting that many and, likely most, local residents oppose this ban (see videos below). A group known as the [Dryden Safe Energy Coalition](#), which believes “energy development is truly an opportunity and we are fortunate that parts of the District may benefit” attended to voice its disapproval of the ordinance by handing out packets of information that illustrated the realities of natural gas development. The group is also [petitioning](#) the Town Board to not approve this ban. Below is video from residents opposed to the ban.



Also in attendance was Ben Haith, P.G. a representative of [IOGA-NY](#) and the [Palmerton Group](#). Ben attempted to clarify some of the concerns and exaggerations expressed before him.

The next set of videos are from individuals supporting the ban who repeated one fable after another.



Let's quickly dispose of a few of these falsehoods:

- ***The industry is not safe, hydraulic fracturing is not safe, chemicals are not disclosed.*** The truth is that, in Pennsylvania alone, close to 3,000 wells have been drilled and safely hydraulically fractured. Over [15 different states](#) have also confirmed hydraulic fracturing to be safe, as well as EPA Administrator Lisa Jackson.
- ***All of the job opportunities will be filled by out-of-state workers.*** The truth is that Bradford County, PA, the heart of gas drilling in our region, has the lowest unemployment rate in the Commonwealth (slightly over 5%) despite an economic recession gripping the nation. A report titled "[The Pennsylvania Marcellus Natural Gas Industry: Status, Economic Impact, and Future Potential](#)" was released recently that outlines the tremendous impact Marcellus Shale drilling has had in Pennsylvania—generating \$11.2 billion in economic activity in the state in 2010 and supporting nearly 140,000 jobs.
- ***Drilling will over-industrialize the local area and turn it into a wasteland.*** The truth is that areas with gas drilling remain beautiful while experiencing renewed economic vitality. Just follow our two separate journeys through Dimock, PA, the so called "industrial wasteland": [Dimock Residents Determined to Get the Truth Out](#) and [Seeing is Believing](#).
- ***Drilling Will Lead to Increased Air Pollution.*** The truth is that natural gas is a clean burning alternative to other dirtier fossil fuels. A [recent study](#) conducted in Fort Worth, TX, also confirmed that natural gas development and production causes no serious impact to air quality.

So, will Dryden go dry or will it act on the facts and the law? Both offer clear and compelling

arguments against the simplistic ban the CEDF is trying to sell the Town to please its funders. The proposed ordinance amendment is written so naively as to prohibit not only drilling but also pipelines, gas-related offices, storage or use of gas and all sorts of other things. It says, among other things, that “No land in the Town shall be used to ... transfer (or) store natural gas; or ... for natural gas and/or petroleum support activities” and “No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town.” This language would prevent any fuel oil dealer or any propane dealer from locating in the town, along with pipelines, CNG fueling stations or even a gasoline station or office for a company dealing in petroleum products. Perhaps worst, is the notion that the Town of Dryden can declare a state or Federal permit as invalid. Does the Town really think it can supersede the Public Service Commission’s Article 7 process relating to pipelines for example? Well, maybe it should read [this case](#), which says not.

What all of this illustrates is the extraordinarily risky position some communities are being asked to take by groups such as CELDF and CEDF. This proposed language is written from the narrow perspective of anti-gas special interests who do not care what collateral damage is caused or who is dragged into their net as long as that net accomplishes their perspective. Local officials, however, have the responsibility to consider the bigger picture and balance interests. Here’s hoping the good folks in Dryden do just that and reject this hopelessly flawed ordinance that would ban gas drilling against all evidence, law and reason. Declaring Dryden dry will only lead to it being flooded with lawsuits and damages.

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**Bryant** [PERMALINK](#)

July 24, 2011

Bravo !!!! Bill! ,

Some background on Dryden, 75% of Dryden’s population heat there home with Natural Gas.Dryden’s population in 2000 13,532

Dryden’s claim to fame: In 2009, Dryden’s Southworth Library sold an original manuscript of an Abraham Lincoln speech that had been delivered at the White House after his re-election. The document had been in the library’s possession (donated) since 1926. It sold for \$3.44 million dollars, a record-high selling price for an American historical document at an auction.

I am surprised that they would ban anything that would have a dollar attached to it . Such a historical document could have been donated to the library of congress for all to have access to.

The Dryden Town meeting drew 130 people of which some were from out of town, some were against the law. How man does that leave for the law? Less than .01% of the population.

Is this the same folks that helped influence the library to sell the manuscript?

[REPLY](#)



**Bryant** [PERMALINK](#)

August 2, 2011

Dryden Town Supervisor  
Members, Town Board

By E-Mail and hand delivery to Town Clerk

As it appears that the Dryden Town Board will be voting on a complete energy development ban on August 2, 2011, this to present DSEC's position, to amplify Henry Kramer's prior statement, and to put the Board on formal notice that if it passes a total energy development ban it will be engaging in knowing prospective violations of constitutional rights, federal, and state law.

If the Board enacts the proposed ordinance it may subject the Town not only to litigation costs but also to potentially hundreds of millions of dollars of taking liability, which would ultimately have to be borne by the taxpayers. The Board should not take lightly the risk of such potential liability.

Whether or not the Board believes it may somehow legally prevail, the Board should weigh the cost to benefit ratio of adopting this ban. Even assuming, for argument only, that the possibility of success were 50-50, can the Board risk the chance of a nine figure liability? Not reasonably.

First, the ban would violate the Fifth and Fourteenth Amendments of the United States Constitution and constitute a taking requiring just compensation. The ban entirely confiscates mineral rights to an estimated value of \$175 million (valuations may vary, but the significance of the sum involved remains), not including the additional value of royalty rights also likely in the many millions and the costs of litigation. Alternatively, the Board's action may be viewed as a 100% confiscatory tax on wealth in mineral rights, a tax outside the Board's powers, not authorized by and preempted by state law. Board members have fiduciary responsibilities. Given the magnitude of potential damages and the outsized legal risks, it is simply not fiscally prudent behavior to adopt this ban.

Second, the ban would be in violation of the state's preemption of the regulation of drilling. In the May Dryden newsletter, the Town Supervisor so acknowledged. Legal authorities give ban ordinances little chance of surviving court challenge. The wiser course, when faced with legal doubt, is not to act.

Third, the ban as a zoning ordinance is in violation of many of the holdings of the New York Court of Appeals in the Udell zoning case, a copy of which was previously supplied the Board. Read the case and it should guide the Board.

Fourth, the ban is ultra vires, that is outside the authority of a town board. There is no authorization in state law for the Town to enact a complete ban, on the contrary Town action is preempted. An Article 78 proceeding may follow.

Fifth, a Town may not, by local ordinance, nullify, or make entirely nugatory, state created and recognized mineral rights and general laws. To do so would, in effect, nullify state law and state created rights within Dryden. If towns could do this, they could pick and choose which state laws would apply.

Sixth, section 5 of the proposed ban which would have the Dryden ban trump state and federal permits and actions, as a matter of black letter law, is invalid. It is reasonable to conclude that the Town Board will be knowingly attempting to override and destroy constitutional, federal, and state rights.

Seventh, the ban is discriminatory. It shifts the entire alleged environmental protection costs onto land and mineral rights holders instead of the general population. This is not an incidental shift but an overwhelming burden, extinguishing millions of dollars of thousands of individuals' property rights. If such an action is taken, it must be a general charge on the population of the Town. The survey on which our comprehensive plan is built calls for compensation for takings. Further, such compensation was provided when the Town bought development rights, recognition of the injustice of unpaid taking.

Eighth, adoption of this ban would cloud the land titles of thousands of Dryden residents who have signed leases on 41% of Dryden land. A ban is a classic force event and may prevent these leases from ever expiring. A ban could thus condemn many Dryden residents to land sale and mortgage difficulties for

years to come, a harsh and selective punishment.

Ninth, the Town may not be insured for any act it takes which it knows, or reasonably should know, is illegal. The Town is notified it will be in violation of constitutional and legal rights if it enacts the ban.

Tenth, if Town Board members, having notice, violate constitutional and legal rights, they may lose their qualified immunity and be subject to suit in their personal (possibly uninsured) capacities.

In conclusion, the Town should affirmatively anticipate that federal and/or state court action against it is highly probably, if not virtually certain, on one or more of the above cited or other claims. You cannot extinguish hundreds of millions of dollars of property values held by thousands of residents and separate mineral rights held by both in and out of state people without anticipating legal actions. The energy industry has its own causes of action and may also sue.

It is highly probable that this overly broad ban, as written, will have unforeseen or unintended consequences. For similar reason, the County Legislature deferred action on a road law.

The more sensible alternative and responsible fiduciary response is to defer any action on a ban until ban challenges elsewhere are litigated. Certainly, the State is far from ready to begin permitting wells, so there is no need for haste. You have at a minimum into 2012, if not longer.

The Town should take notice that a ban is inconsistent with environmental advocates' position favoring the development of natural gas under the Kyoto protocols. It is also inconsistent for the Town and individuals to use energy from elsewhere while refusing to allow its regulated development locally. And, failure to develop domestic energy means foreign energy dependence, foreign wars to protect vital energy interests, and the sapping of revenues the government could use to pay debt and provide programs.

DSEC's mission is to offer balanced, data driven information on safe energy development, to logically and numerically evaluate benefit-to-risk ratios, free of emotional bias or ideology, and to bring together people interested in an analytical approach to energy issues. A ban does not serve to meet this mission. It does not allow for a "middle way" in which there is lawful, safe, regulated energy development. Legally, we believe a total ban is an unnecessary high risk strategy for the Town and which in its uncompensated takings is unjust.

The Board is now on notice. It is DSEC's hope the Board will do the prudent thing and recognize there is both division of opinion in Dryden and significant large scale dollar risk. Both drilling without regulation and refusal to drill are equally extreme solutions. We oppose both. Please opt for deliberate moderation and do not adopt in haste this radical total ban.

Sincerely yours,

Dryden Safe Energy Coalition  
By Henry S. Kramer, Tracy Marisa

REPLY



**Kathryn Mapes** PERMALINK

August 5, 2011

Are you aware that Pennsylvania fracking water was dumped into Cayuga Lake? A front page article on fracking that appeared in the NY Times several months ago mentioned that fact. I called Walter Lang, whose name appeared in said article, and he explained what happened to me. If I remember correctly, both the Bolton and the Auburn water plants were responsible, but said they

wouldn't do it again. I don't understand how they were able to do this without the community knowing. Years ago, the Ithaca community was able to keep fluoride out of the Ithaca water. It seems as though the community should be able to protect the watershed now. Kathryn Mapes

[REPLY](#)



**Tom** [PERMALINK](#)

August 6, 2011

What do you mean by "dumped"? Surely, you know any such water was treated before discharge. This kind of hyperbole is what reduces anti credibility to near zero.

[REPLY](#)

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