



ENERGY CENTER

The Center for Global Energy,
International Arbitration and
Environmental Law

ABOUT	RESEARCH AND PROJECTS	EVENTS	STUDENTS	NEWS	BLOG		
-------	-----------------------	--------	----------	------	------	---	---

Looking Ahead at State-Local Conflicts Over Fracking

 [David Spence](#)  March 18, 2014

A recent [UT Energy Center Law Blog](#) post by Samantha Blons focused on a case brought by a natural gas producer against the City of Dallas, after the city denied the company a natural gas production permit. (A new city ordinance restricts production within the city limits.) The Dallas case is an early example of an impending wave of litigation challenging local ordinances limiting the use of [hydraulic fracturing](#) (“fracking”) to produce oil or gas from shale formations. These kinds of local vetoes of a state-regulated activity are beginning to trigger two types of litigation: claims that the local ordinance is preempted by state oil and gas regulation, and claims that the ordinances amount to uncompensated takings of the producers’ property rights. (The suit against the City of Dallas falls into the latter category.)

According to the environmental group Food and Water Watch, within the last few years more than [400 local governments](#) have enacted ordinances restricting or banning fracking within their borders. More than 200 of these ordinances are in New York State, but they are not limited to the northeast. In addition to the Dallas ordinance, the [City of Los Angeles is drafting an anti-fracking ordinance](#) as of this writing. These bans pose a problem over which political philosophers, welfare economists, and positive political theorists have long puzzled, one that the law is frequently called upon to resolve: namely, how to choose the “best” policy when a majority mildly prefers policy X, and minority strongly prefers policy *not* X.. Polls show majority support for fracking at the state and national levels, but this is often coupled with vehement local opposition.

In a [forthcoming Texas Law Review article](#), I examine these conflicts as fights over the distribution of the costs and benefits of development, and argue that even if these local anti-fracking ordinances are based upon irrational fears, the best way to promote efficient regulation of shale gas and oil production in the long run may be to uphold local ordinances against preemption and takings challenges, as long as we also give local governments the power to capture more of the benefits of fracking.

Local opposition to fracking stems mostly from concerns about the impacts — on water, seismicity, air quality, and local quality of life (e.g., noise, truck traffic, sudden “boomtown” effects) — which are borne mostly (but not exclusively) by locals in producing areas. Many state oil and gas statutes contain language addressing the preemption of local law; at the same time, many states grant local governments varying degrees of home rule, raising the prospect that local governments may be able to exercise independent regulatory jurisdiction irrespective of preemption language in the state’s oil and gas statute. Thus, resolving state-local preemption disputes involves the interaction of state oil and gas statutes with home rule provisions, something that courts seem to struggle with in the fracking context – at least, so far. The case law is all over the place, with some state courts upholding local bans despite strong preemption language in the state statute, and others reading similar statutory language to preempt local ordinances. When anti-fracking ordinances are upheld, we can expect them to trigger regulatory takings claims; though none have yet been litigated, takings claims will further complicate the resolution of these state-local disputes.

How *should* these disputes be resolved? One way to think about this question is to ask, “What decision rule provides the greatest good for the greatest number?” But even that simple rule is not as simple as it seems. Is it better to make *N* people happy by permitting fracking within their state, or to make some subset of *N* people deliriously happy by banning it from their neighborhood? There is no logically correct answer to this question, or to the question of whether it is more efficient or better to uphold local bans on fracking. It depends upon how we conceive of the task of maximizing happiness.

On the one hand, if we conceive of the efficient regulation as that which best translates into policy the preferences (irrespective of their intensity) of voters who collectively bear all (or almost all) of the costs and benefits of production, then that suggests letting the state control policy outcomes, and preempting local bans. If, on the other hand, we conceive of efficient regulation as that which takes preference intensity into account and seeks to maximize collective utility, there is a case for allowing local governments to retain their power to veto or regulate shale oil and gas production, because they experience the effects of fracking most intensely and profoundly, and so care more about the issue.

One problem with letting local preferences prevail, however, is that in the short run, risk aversion may lead some local communities to overestimate the environmental, health and safety risks of fracking. Movies like *Gasland* suggest, incorrectly, that some of the very small risks associated with fracking are quite large. But that sort of misunderstanding ought to be only a short-run problem; in the long run, voters will develop a clearer understanding of the risks of fracking over time, meaning that the case for upholding local vetoes is stronger – that is, more likely to maximize welfare (long run aggregate utility).

Another potential problem is that locals may experience relatively more of costs and fewer of the benefits of fracking, just as non-locals capture relatively more benefits and fewer costs. Tax revenues and other the indirect economic benefits from fracking spread well beyond local borders, while the impacts to local quality of life are, well, local. If we could spread the costs and benefits of fracking more evenly, local regulation ought to reflect a fairer balance of the costs and benefits. Authorizing local governments to tax mineral interests or share in state royalty or tax revenues is one form of compensation. Direct compensation from producers to local communities is another. By upholding local bans against preemption and takings challenges, courts may produce the kind of bargaining that leads to landowners and producers sharing the gains of production with locals.

But what about landowners, whose mineral rights are devalued by an anti-fracking ordinance? They also perceive themselves as losing something by virtue of local bans. Doesn’t requiring compensation for that lost value also promote bargaining that will ultimately lead to a better distribution of the net benefits of fracking? As fans of the [Coase Theorem](#) will recognize, the conceptual answer is yes, but the practical answer is no. Compensating landowners is less likely to trigger useful bargaining because most people’s sense of the fairness is “anchored” on the status quo. That is, when fracking comes to a quiet community, we perceive those who capture the economic benefits of this new activity (including owners of mineral rights) as winners, and those who bear the costs (noise, odors, disruptions, etc.) as the losers. Asking the losers to compensate the winners is a political nonstarter, and offends the majority’s sense of fairness. Accordingly, by upholding local fracking bans, the courts provide an incentive for the winners to compensate the losers, a more politically palatable option.

Of course, in practice, courts will attempt to resolve these disputes by applying preemption and takings doctrine. Meanwhile, anti-fracking ordinances are springing up like weeds all over the country. We will get more efficient levels of regulation in the first place if we allow local governments to regulate *and* to capture more of the economic benefits of fracking. If we do the former and not the latter, local governments will tend to overregulate, strengthening the case for state preemption of local ordinances and for compensation of mineral rights holders.

 [energy](#)  [fracking](#)  [land use](#)  [preemption](#)  [takings](#)  [Texas](#)

Leave a Reply

Your email address will not be published. Required fields are marked *

Name *

Email *

Website

Comment

POST COMMENT

The Energy Center blog is a forum for faculty at the University of Texas, leading practitioners, lawmakers and other experts to contribute to the discussion of vital law and policy debates in the areas of energy, environmental law, and international arbitration. Blog posts reflect the opinions of the authors and not of the University of Texas or the Center for Global Energy, International Arbitration and Environmental Law.

Popular Tags

- Texas
- water
- drought
- energy
- fracking
- endangered species
- natural gas
- groundwater
- court cases
- conservation
- pollution
- TCEQ
- LNG
- climate change
- cases