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Land use and drilling - local ordinance or state regulation?

By Steven A. Walton, Esq.

At a time when more and more municipalities craft ordinances and the gas industry lobbies the Pennsylvania legislature for stricter limitations on those attempts to regulate at the local level, the Pennsylvania General Assembly is considering measures of its own.

Senate Bill 1100 and House Bill 1950 could receive floor votes when the General Assembly returns to session Nov. 14th. Both bills include provisions that effectively strip municipalities of the authority to regulate the oil and gas industry operating within its borders. Senate Bill 1100 includes a “model ordinance” to be adopted by municipalities and was once tied to receipt of an impact fee. Recent amendments to Senate Bill 1100 removed the impact fee “carrot” but the model ordinance provisions remain. House Bill 1950 is more direct. The bill provides that no local ordinance or other local enactment of any municipality [with the exception of ordinances adopted under the Flood Plain Management Act] may regulate oil and gas operations. The preemptive effect of House Bill 1950 is clearly noted - “[a]ll local . . . ordinances and other local enactments that regulate oil and gas operations are . . . superseded and preempted.”

Nearly everyone agrees that the Marcellus Shale play represents a potential economic boon for Pennsylvania. Nearly everyone also agrees that unfettered exploration and extraction of natural gas without reasonable regulation and environmental stewardship could be catastrophic. The devil, however, is in the details.

The operations of the gas exploration companies and recent incidents at well sites in the region have drawn the attention of citizens and the municipal governments that serve them, and both have begun to voice their concerns.

The stage has been set by the recent bills introduced in the Pennsylvania General Assembly for a conflict between local municipalities, the oil and gas exploration companies, and the Pennsylvania legislature as to how much say municipalities can or should have over drilling operations within their borders.

The drilling companies’ position is clear. At a 2010 Tele-Town Hall Meeting hosted by State Senator Jim Ferlo, the President of Atlas Energy, Richard Weber, stated emphatically that the gas industry in Pennsylvania

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does not want to have to deal with every municipality in regulating the industry. In a statement issued to Channel 4 Action News in September 2010, Kathryn Z. Klaber, President and Executive Director of the Marcellus Shale Coalition, said that “[i]n order to ensure that the potentials of the Marcellus are fully realized, we remain focused on modernizing Pennsylvania’s legislative and regulatory framework.”

The Oil and Gas Act seems to support them both with regard to local regulation. Oil and gas exploration in Pennsylvania is regulated by the Pennsylvania Department of Environmental Protection under the umbrella of the Oil and Gas Act. Section 601.602 of the Oil and Gas Act provides that except for ordinances adopted pursuant to the Pennsylvania Municipalities Planning Code or the Flood Plain Management Act, all local ordinances seeking to regulate oil and gas well operations otherwise regulated by the Oil and Gas Act are preempted.

But, again, the devil is in the details.

Pennsylvania courts have decided cases in recent years involving the extent to which local ordinances are invalidated by the Oil and Gas Act. The most recent of which was Penneco Oil Company, Inc.’s challenge of Fayette County’s Office of Planning, Zoning and Community Development’s ordinance. In 2006, Fayette County adopted a zoning ordinance that permitted oil and gas operations in certain zoning districts only by way of a grant of a special exception by the Zoning Hearing Board. Penneco Oil Company filed a complaint in 2007 against Fayette County alleging that the zoning ordinance is preempted by the Oil and Gas Act and requesting that the trial court declare the zoning ordinance invalid. The Court of Common Pleas of Fayette County granted Fayette County’s motion for summary judgment in 2009 and determined that the ordinance was not preempted by the Oil and Gas Act based on two Pennsylvania Supreme Court cases (*Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009), and *Range Resources v. Salem Township*, 600 Pa. 231, 964 A.2d 869 (2009)). In 2010, Penneco Oil Company and others appealed the decision to the Commonwealth Court of Pennsylvania which ultimately upheld the trial court’s determination.

The courts drew a basic roadmap for ordinances. In its most simplistic terms it is a “how-versus-where” distinction. Following the *Penneco* decision, municipalities were free to craft ordinances with restrictions on gas drilling in certain zoning districts geared to preserving the character

of residential neighborhoods, encouraging beneficial and compatible land uses, and to protecting the public’s health, safety and welfare. For example, municipalities may require operators to comply with generally applicable permitting requirements for roads used by overweight vehicles, ensure that roads utilized remain free of mud and debris, ensure the safety of persons in areas established for road crossing and/or adjacent to roadways, direct site lighting so as to minimize glare on public roads and adjacent buildings, and erect noise barriers and the like. What was (and is) off-limits are ordinances that impact technical aspects of well functioning and matters such as registration, bonding, and well site remediation.

But if we have learned nothing else from the Marcellus Shale phenomenon, it is that the only constant is change.

A Pennsylvania court is currently hearing a lawsuit filed by Range Resources against Cecil Township and South Fayette Township filed a Petition in Allegheny County Common Pleas Court on November 3, 2011, asking the judge to bar two members of South Fayette Township’s three-person township Zoning Hearing Board from hearing an appeal from Range seeking to overturn South Fayette’s oil and gas drilling ordinance. In each case, Range Resources argues that the municipality’s ordinance is overly restrictive and preempted by the Oil and Gas Act.

What can be synthesized from the to-and-fro between the Pennsylvania General Assembly, local governments, the gas industry, and in the courts is that some legislative directive is likely. But for now the question remains what, if any, say local governments will have with respect to the safety, health and welfare of its citizenry.

About the author: Steven A. Walton is Chairperson of the Legislative Committee of the Fayette County Marcellus Shale Taskforce and an Associate with Rothman Gordon.

This article previously appeared on the Fayette County Marcellus Shale website.



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Final Rule for notification of employee rights

The National Labor Relations Board has issued a Final Rule requiring most private-sector employers to notify employees of their rights under the National Labor Relations Act by posting a notice.

Employers should begin posting the notice on January 31, 2012. Copies of the notice will be available on the NLRB website and from NLRB regional offices by November 1.

Similar postings of workplace rights are required under other federal workplace laws. The 11-by-17-inch notice is similar in content and design to a notice of NLRA rights that must be posted by federal contractors under a Department of Labor rule.

The notice of rights will be provided at no charge by NLRB regional offices or can be downloaded from the Board website and printed in color or black-and-white. Translated versions will be available, and must be posted at workplaces where at least 20% of employees are not proficient in English.

Employers must also post the notice on an intranet or an internet site if personnel rules and policies are customarily posted there.

Questions and Answers:

Does my company have to post the notice?

The posting requirement applies to all private-sector employers (including labor unions) subject to the National Labor Relations Act, which excludes agricultural, railroad and airline employers. In response to comments received after the proposed rule was announced, the Board has agreed to exempt the U.S. Postal Service for the time being because of that organization's unique rules under the Act.

When will the notice posting be required?

The final rule takes effect 75 days after it is posted in the Federal Register, or on January 31, 2012.

There is no union in my workplace; will I still have to post the notice?

Yes. Because NLRA rights apply to union and non-union workplaces, all employers subject to the Board's jurisdiction (aside from the USPS) will be required to post the notice.

I am a federal contractor. Will I have to post the notice?

The Board's notice posting rule will apply to federal contractors, who already are required by the Department of Labor to post a similar notice of employee rights. A contractor will be regarded as complying with the Board's notice posting rule if it posts the Department of Labor's notice.

I operate a small business. Will I have to post the Board's notice?

The rule applies to all employers subject to the Board's jurisdiction, other than the U.S. Postal Service. The Board has chosen not to assert its jurisdiction over very small employers whose annual volume of business is not large enough to have a more than a slight effect on interstate commerce. The jurisdictional standards are summarized in the rule.

How will I get the notice?

The Board will provide copies of the notice on request at no cost to the employer beginning on or before November 1, 2011. These can be obtained by contacting the NLRB at its headquarters or its regional, sub-regional, or resident offices. Employers can also download the notice from the Board's website and print it out in color or black-and-white on one 11-by-17-inch paper or two 8-by-11-inch papers taped together. Finally, employers can satisfy the rule by purchasing and posting a set of workplace posters from a commercial supplier.

What if I communicate with employees electronically?

In addition to the physical posting, the rule requires every covered employer to post the notice on an internet or intranet site if personnel rules and policies are customarily posted there. Employers are not required to distribute the posting by email, Twitter or other electronic means.

Will I have to maintain records or submit reports under the Board's rule?

No, the rule has no record-keeping or reporting requirements.

How will the Board enforce the rule?

Failure to post the notice may be treated as an unfair labor practice under the National Labor Relations Act. The Board investigates allegations of unfair labor practices made by employees, unions, employers, or other persons, but does not initiate enforcement action on its own.

What will be the consequences for failing to post the notice?

The Board expects that, in most cases, employers who fail to post the notice are unaware of the rule and will comply when requested by a Board agent. In such cases, the unfair labor practice case will typically be closed without further action. The Board also may extend the 6-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. If an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

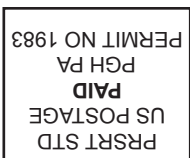
Can an employer be fined for failing to post the notice?

No, the Board does not have the authority to levy fines.

Was there a public comment period? What was the response?

The Board received more than 7,000 public comments after posting a notice of the proposed rule in the Federal Register. A detailed description of the comments and the Board's response to them, including responsive modifications to the rule, may be found in the Preamble to the Final Rule.

Source: National Labor Relations Board: <http://www.nlrb.gov/news-media/fact-sheets/final-rule-notification-employee-rights>



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