Driller to NY: Stop Local Bans or We'll Sue

MARY ESCH,Associated Press

ALBANY, N.Y. (AP) — A natural gas drilling company is taking a new tack in the industry's fight against local drilling bans: It's threatening to sue if New York regulators don't step in and extinguish the prohibitions.

John Holko, president of Lenape Resources, sent a letter Thursday to state Department of Environmental Conservation Commissioner Joe Martens saying a moratorium prohibiting natural gas development in the Livingston County town of Avon forced his company to shut down its wells there.

The state enacted a drilling moratorium in 2008 when DEC began an environmental review of horizontal drilling and high-volume hydraulic fracturing, or "fracking." Lenape's wells in Avon, however, are vertical wells that were not subject to that moratorium. The town law doesn't distinguish between types of wells, but Town Supervisor David LeFeber said it was worded to protect Lenape's existing wells.

Regardless, Holko said Avon's moratorium and others like it violate a 1981 law that says state rules supersede local ordinances in the regulation of gas development.

"Lenape is trying to make it clear to DEC that the agency has a legal duty to carry out state law," Michael Joy, Lenape's lawyer, said on Monday. "That duty includes informing local municipal governments that they don't have the authority to regulate the oil and gas industry."

In the past, DEC has sent letters to towns that enacted laws regulating oil and gas development, telling them they didn't have the authority to do so. In its letter to Martens, Lenape attached one such correspondence, sent to the city of Olean in 1984.

David Slottje, an Ithaca lawyer who helps towns draft moratoriums or bans on gas drilling, said in a letter to Martens on Tuesday that since two courts have upheld local bans, DEC doesn't have to tell the towns to repeal them.

More than 30 municipalities in upstate New York have passed bans on gas drilling and more than 80 have enacted moratoriums in anticipation of DEC completing its environmental review and lifting the 4-year-old state moratorium. The actions are in response to fears that fracking, which frees gas by injecting a well with chemically treated water at high pressure to crack rock deep underground, could contaminate water supplies or cause other harm. Drillers and DEC say state regulations and standard industry safeguards protect against harm from drilling and fracking.

Martens has said that local ordinances will be taken into consideration when the agency approves permits for shale gas wells.

Denver-based Anschutz Resources took the town of Dryden to court over its ban and a Middlefield landowner sued over that town's ban. Both laws were upheld by judges who said bans are not regulation, so the state law against local regulation of gas development didn't apply. Albany lawyer Tom West has said the decisions will be appealed.

Local control over gas drilling has also been an issue in other states in the Marcellus Shale region, which includes southern New York, Pennsylvania, Ohio and West Virginia. The gas industry says local laws create a patchwork of regulation that thwarts development.

A Pennsylvania court last week ruled that the state can't restrict localities from using zoning laws to regulate oil and gas drilling within their borders. Ohio townships were stripped of regulatory authority over gas drilling under a law passed in 2004. Ordinances enacted by a handful of West Virginia communities to ban gas drilling were overturned last year by a judge who said the state has sole authority to regulate the industry. Morgantown, W. Va., enacted new zoning ordinances recently that restrict drilling to designated industrial zones; an industry group has said it may challenge that in court.

Deborah Goldberg, an attorney for the environmental group Earthjustice who represents Dryden, said Lenape is wrong in saying DEC has an obligation to take enforcement action against towns that ban drilling.

"To the contrary, the statute plainly gives the agency discretion over enforcement," Goldberg said via email. "Under the circumstances, it would be a waste of scarce resources if DEC were to take action before the appellate courts resolve the pre-emption claims."

DEC apparently agrees.

"The scope of the pre-emption must be left to the courts," DEC spokeswoman Emily DeSantis said by email.

Lenape said if DEC doesn't take action against the town of Avon, the company will do so and will name DEC as a party in the lawsuit.

Lenape's broader goal is to send a message to other municipalities that they don't have the authority to enact gas development bans or moratoriums, Joy said.

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