

Marcellus Shale Communities – ADDENDUM

February 2011

In follow-up to the research and recently compiled “*Marcellus Shale Communities: Report, Recommendations and Resources for a Collaborative Approach to Planning and Local land Use*,” new information from a seminar featuring speakers Mary Jo Long, Former Law Professor, and Helen Slottje, Attorney of Community Environmental Defense Council, a non-profit public interest law firm http://www.cedclaw.org/?page_id=153 follows.

The following is a digest of important legal information for local governments and citizens looking for guidance on land use regulation and local laws as they relate to hydrofracking in New York State. Although, New York State law concerning regulatory measures that could impact the gas drilling industry has not yet been fully resolved; some important facts, related legal precedents, and advice to communities were conveyed by these two attorneys:

1. Any local zoning regulation developed to address concerns related to hydrofracking must be drafted in such a way that they are carefully tied to concerns for a community's “health, safety, and general welfare”. The key point in establishing local regulatory protections that can stand up in court is that regulation **must not be specific to the gas industry, but general in scope, and applicable to all industry**.
2. Local governments can regulate “solid waste” (and gas drilling waste is legally considered solid waste)
3. Local governments can prohibit land uses that generate tremendous traffic problems as a general law (example: *A Concentrated Heavy Traffic Road Protection Law* allowing no more than 60,000 lbs or 50 trips per day for more than 4 days).
4. Because injection wells result in the discarding of large amounts of “solid waste” underground (80 – 90% of the injected mixture), local governments can regulate by restricting injection wells where private drinking water wells are not subject to federal regulations.
5. Because zoning is a regulation of Land Use and not gas drilling, it can be used under Home Rule to regulate the location of industrial uses to certain districts of the Town. NYS appellate courts have ruled that limiting a use is a reasonable exercise of the police power to protect the community from concerns of health, safety, welfare, comfort, peace and prosperity.
6. Local governments can appoint a local health officer (through public health law) with broad powers to investigate and restrain instances of threats to public health.
7. “Seismic testing laws” can be implemented to require permissions of neighboring land owners.
8. Even without local zoning of any kind, Site Plan Review can be required and initiate a public hearing process on a case by case basis.
9. Because the NYS Public Service Commission does not regulate gas pipelines under 125 PSI, local municipalities can regulate them.