

**Substate Federalism and Fracking Policies:  
Does State Regulatory Authority Trump  
Local Land Use Autonomy?**

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# State Regulation of Natural Gas

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- 33 producer states – biggest include TX, WY, LA, OK, PA, CO, and NM
- Gas is regulated as a single industry by a multimember conservation commission (West) or an agency housed within a state environmental department (East)
- Regulation often occurs under a legislative mandate that encourages the development of oil and gas resources

# State vs. Local Roles in Fracking

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- Should state officials retain regulatory control at the expense of local land use authority?
- Yes: Uniform state regs allow companies to develop natural gas resources without running into a patchwork of differing policies found in cities and counties
- Should city and county governments be allowed to regulate fracking operations under traditional land use authority?
- Yes: A “one size fits all” approach is inappropriate for the regulation of natural gas

# Maintaining State Control over the Regulation of Fracking: Key Strategies

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- Emphasis on the economic benefits of drilling (jobs, landowner royalties and severance tax rebates to affected communities)
- Assurances that fracking is safe (no recorded cases of groundwater contamination)
- Industry and state agency testimony at local government hearings where regulatory actions are being considered
- Encourage greater use of collaboration between the state agency, industry and local officials
- Emphasize that the state agency has statutory authority to regulate on a statewide basis. Make sure that reps from the state agency or the AG's office tell local officials that legal action will be taken against cities adopting stricter rules than the state

## Efforts to Strengthen Environmental Protection & to Preserve Local Land Use Authority: Key Strategies

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- Emphasize the importance of home rule and local autonomy
- Lobby state agencies emphasizing the need for better enforcement of existing rules and for increased setback requirements for drilling operators
- Adoption of temporary moratoriums by local governments on fracking operations to consider regulatory options
- Adoption of policies by local governments that exceed or trump state regulatory standards
- Consider the possibility of a local or state ballot initiative

**Table 3. Relationships between Residency, Jurisdictional Energy Preferences and Fracking Policies**

|                                      | Support Fracking Use? |     | Regulate Fracking? |     | Regulate Disclosure of Fracking Chemicals? |       |
|--------------------------------------|-----------------------|-----|--------------------|-----|--|-------|
|                                      | r                     | N   | r                  | N   | r  | N     |
| Urban Resident <sup>a</sup>          | -.12**                | 749 | .00                | 688 | .08*                                       | 764   |
| Suburban Resident <sup>a</sup>       | .02                   | 749 | -.06               | 688 | .02  | 764   |
| Rural Resident <sup>a</sup>          | .10**                 | 749 | .07                | 688 | -.10**                                     | 764   |
| Fracking State Resident <sup>a</sup> | .00                   | 749 | .00                | 688 | .00  | 764   |
| Local Government <sup>b</sup>        | .16**                 | 614 | .11**              | 594 | n/a <sup>c</sup>                           | ----- |
| State Government <sup>b</sup>        | .19**                 | 625 | .19**              | 581 | -.09*                                      | 633   |
| EPA <sup>b</sup>                     | -.24**                | 620 | -.27**             | 577 | n/a <sup>c</sup>                           | ----- |

Table X. Media Coverage of Fracking Policies Dealing with State-Local Relations, 2010-2013

|                           | Number of Stories | Local ordinances / regulations | Local opposition to fracking operations | Statewide interests |
|---------------------------|-------------------|--------------------------------|---|---------------------|
| Colorado <sup>a</sup>     |                   |                                |   |                     |
| 2010                      | 0                 | 0                              | 0                                       | 0                   |
| 2011                      | 8                 | 2                              | 4                                       | 0                   |
| 2012                      | 25                | 6                              | 7                                       | 5                   |
| 2013                      | 14                | 4                              | 7                                       | 4                   |
| Pennsylvania <sup>b</sup> |                   |                                |   |                     |
| 2010                      | 4                 | 0                              | 2                                       | 0                   |
| 2011                      | 24                | 4                              | 8                                       | 4                   |
| 2012                      | 16                | 5                              | 5                                       | 4                   |
| 2013                      | 5                 | 0                              | 3                                       | 0                   |
| Texas <sup>c</sup>        |                   |                                |   |                     |
| 2010                      | 5                 | 2                              | 2                                       | 0                   |
| 2011                      | 13                | 11                             | 0                                       | 0                   |
| 2012                      | 7                 | 5                              | 2                                       | 0                   |
| 2013                      | 4                 | 0                              | 0                                       | 0                   |

a Stories published in the Denver Post

b Stories published in the Pittsburgh Post-Gazette

c Stories published in the Fort Worth Star-Telegram

Sources: Lexis-Nexus; Newsbank

# Table X. State Legislative Bills on Natural Gas, 2010 – 2013

|              | # of bills introduced | # of bills dealing with state-local relations | # of state-local bills enacted |
|--------------|-----------------------|---|--------------------------------|
| Colorado     |                       |   |                                |
| 2010         | 2                     | 0   | 0                              |
| 2011         | 3                     | 0   | 0                              |
| 2012         | 8                     | 2   | 3                              |
| 2013         | 9                     | 1   | 0                              |
| Pennsylvania |                       |   |                                |
| 2010         | 34                    | 5   | 0                              |
| 2011         | 71                    | 9   | 0                              |
| 2012         | 17                    | 1   | 1                              |
| 2013         | 14                    | 0   | 0                              |
| Texas*       |                       |   |                                |
| 2010-2011    | 16                    | 0   | 0                              |
| 2012-2013    | 17                    | 0   | 0                              |

\*Biennial legislative sessions

Sources: National Conference on State Legislatures, Energy and Environmental Tracking Database; Texas Tribune, Interactive Database, 83<sup>rd</sup>



# Fracking in Colorado, 2011-2012

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- Development of the Niobrara Shale Play that lies under most municipalities along the front range from Ft. Collins to Colorado Springs
- Proliferation of wells in smaller communities like Erie and Windsor that are unaccustomed to drilling activities
- Local officials scramble to learn about fracking and about land use regulatory options to balance neighborhood concerns with development

# Recent Policy Developments in Colorado

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- Governor Hickenlooper created a Task Force in early 2012 to consider how COGCC could better cooperate with local governments. A working group was subsequently assigned the task of wrestling with the issue of setback requirements
- COGCC adopted a rule allowing local governments to select a “local designated inspector” to supplement existing regulatory actions
- Longmont voters decisively approved a fracking ban in November, 2012 despite \$500,000 spent by industry interests to defeat the measure. A lawsuit to overturn the ban has been initiated by COGA
- COGCC adopted new regulations in early 2013 requiring groundwater testing near drilling sites and setback limits of 500 feet for occupied structures. Proposed drilling within 1,000 feet of schools, hospitals, or government buildings would require a majority vote of all COGCC members to proceed
- Fort Collins City Council adopted a fracking ban in March, 2013 but later

# Fracking Policies in Pennsylvania

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- Governor Tom Corbett campaigned and was elected on a strong pro-energy platform that encourages removal of legal barriers to fracking operations
- Act 13 was adopted in 2012 on a party line vote by the state legislature. The most controversial aspect of the bill is a provision that denies drilling impact funds to any local government that adopts policies at odds with state regs
- The new law was challenged in the courts by the PA Association of Municipalities and by environmental groups like PennEnvironment
- A state court agreed with the plaintiffs in July. The case was appealed to the PA Supreme Court where arguments were heard in October 2012. No decision has been rendered.

# Fracking Policies in Texas

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- The Texas Railroad Commission produces statewide regs dealing with oil and gas drilling operations plus water quality issues while the Texas Commission on Environmental Quality deals with air quality issues linked to fracking
- A Home Rule state that grants discretion to local governments for regulating “conditions of use” such as setbacks
- No examples of state court decisions dealing with the preemption of local authority to regulate fracking
- Lesser degree of organized opposition to the onset of fracking operations than in Pennsylvania or Colorado

# Examples of Local Fracking Regs in Texas

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- Fort Worth and Arlington required oil & gas companies to use “closed loop” systems that store drilling wastes
- Due to drought conditions, Grand Prairie approved a ban on the sale of city water to oil and gas companies for use in fracking operations
- Flower Mound adopted major setback requirements from oil and gas drill sites (1,500 ft.) plus public notice for all drilling applications and a requirement that tracing additives be placed in fracking fluids

# The Role of the Governor in Promoting Statewide Fracking Policies

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- Colorado – high involvement, main focus on COGCC rulemaking
- Pennsylvania – high involvement, main focus on enactment of comprehensive reform legislation
- Texas – minimal involvement except for the fracking chemical disclosure bill

# The Role of the State Courts in Promoting Statewide Fracking Policies

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- Pennsylvania – unclear pending the resolution of the lawsuit challenging Act 13
- Colorado – also unclear pending the outcome of court cases involving the possible state preemption of local government policies. Prior state court decisions supported preemption
- Texas – little involvement in cases thus far dealing with state preemption of local authority

# Unresolved Fracking Issues?

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- Restricting water use in fracking operations under drought conditions
- Efforts to reconcile physician access to fracking chemical information with company concerns about maintaining trade secrets
- Adopt incentive-based policies designed to encourage recycling and increased use of nonpotable water sources