

Fracking “Banned” in New York State? Think Again!

by Virginia Rasmussen

On December 17, 2014 Governor Andrew Cuomo of New York announced that his administration would “ban” hydraulic fracturing in the state. To some of our POCLAD readers interested in the long, traumatic saga of communities struggling to protect lands and people from the many assaults of this fossil fuel extraction technology, the news brought celebration. But just how much whooping is warranted?

Not so much!

Hydraulic fracturing or hydrofracking or “fracking” involves the high-pressure injection of millions of gallons of chemical-laced water and sand into deep rock formations setting free oil or natural gas that can’t be captured through conventional drilling. **The steadfast opposition by thousands of individuals and hundreds of national, statewide and local anti-fracking organizations over the last eight years surely contributed to the Cuomo administration’s move against this technology.** But threats of land and water contamination, large fresh water withdrawals, economic upheaval in drilling communities, uprooting of lands for pipelines and compressor stations, and the poisonous consequences of disposing of liquid and solid wastes from fracking processes persist over wide swaths of

the state that lay atop the Marcellus and Utica shale formations.

There’s nothing that rings of real democracy in the Governor’s pronouncement. No law written or supported by the public has been passed by the NYS Assembly and Senate and signed by the Governor. The action is closer to an extension of the moratorium than to a permanent prohibition.

The form this “state-level ban” will take, what it will cover, and how long it will last is up in the air. It will be implemented as a regulatory or administrative rule by none other than the Department of Environmental Conservation (DEC), one of those regulatory agencies that doesn’t allow the people to say “NO” to a corporate harm but, with a lot of luck and exhausting labor, merely mitigate it.

When Is a Ban Not a Ban?

When a “ban” is not permanent, it is not a ban but a “pause.” When a “ban” is subject to judicial reversal, it is not a ban. When a “ban” might be altered by a shift in the balance sheets at fossil fuel corporate offices, it is not a ban. When a “ban” can be overridden by a state statute permitting the technology to proceed in some fashion, it is not a ban. When a “ban”

is vulnerable to a different weighing of the scientific evidence by regulatory agencies, it is not a ban.

Additionally, this “ban” applies to high-volume hydrofracking but we have not been told how that will be defined. Will it apply to only those processes using more than 80,000 gallons of chemically-laden water per well bore? Will as many as 300,000 gallons be permitted? This is not a ban.

What of the many activities within the exploration, drilling and distribution stages of this assaultive technology will be banned? No mention is made of prohibiting the land being chewed up for pipelines, the disposal of toxic flowback wastes in landfills or by ground injection, the grab of public water resources for drilling purposes, or the building of noisy compressor stations.

Local Strategies to Keep the Frackers OUT

As Attorney David Slottje of the Community Environmental Defense Council, Inc. (CEDC, Ithaca, NY) said in warning of the shortcomings of the Cuomo decision: “The DEC giveth, and the DEC can taketh away.” The CEDC is a small legal foundation in the state offering pro bono legal assistance to local jurisdictions

wanting to zone out industrial development posing dangers to the health, safety and welfare of residents. This right of local governments resides within NYS Home Rule law through the jurisdiction's zoning powers. Two hundred and fourteen communities in the state have passed either a moratorium or a ban based on this zoning authority. Another community has banned fracking by enacting a community rights-based law with the support of the Community Environmental Legal Defense Fund, Inc. (CELDF, Mercersburg, PA).

These prohibitions against fracking by local governments have withstood lawsuits in the highest court of the state, the New York Court of Appeals. The suits were brought by landowners seeking royalties by giving drillers access to their property, and oil and gas corporations claiming protections of the Fifth Amendment's "takings" clause. **But the court also reminded us that towns can only exercise powers granted to them by the states and that such powers can be withdrawn should the legislature choose.**

Who Gets to Define Our Energy Future?

All in all, the status of hydraulic fracturing in New York illustrates yet again the power of the extractive fuel corporations over the decisions that drive our energy future. This knowledge is helping us pull ourselves together as citizens, as people who should possess the sovereign right to

govern and to make those decisions for ourselves. The understanding that such governing authority rests in the boardrooms and executive offices of corporations, implemented by the political operatives they finance, grows deeper by the year.

This picture will not change as long as corporations have the inalienable rights of natural persons, possess the rights and protections of the Constitution, and exert influence over legislators and regulators to define energy and economic policy.

Regulatory roadblocks are no substitute for demanding the rights and meeting the obligations of governing ourselves.

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By What Authority (ISSN: 524-1106) is published by the Program on Corporations, Law & Democracy. The title is English for *quo warranto*, a legal phrase that questions illegitimate exercise of privilege and power. We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. Today, a minority directing giant corporations and backed by police, courts, and the military, define our culture, govern our nation and plunder the earth. **By What Authority** reflects an unabashed assertion of the right of the sovereign people to govern themselves.

POCLAD is a group of 10 people instigating democratic conversations and actions that contest the authority of corporations to govern. Our analysis evolves through historical and legal research, writing, public speaking and working with organizations to develop new strategies that assert people's rights over property interests.

BWA is a tool for democracy proponents to rethink and reframe their work. To that end we encourage readers to engage us with comments, questions and suggestions.

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