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Marcellus Watch: Drillers go for broke in appeal of bans

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Now that right is up for grabs.

The state's highest court, the Court of Appeals, agreed last week to hear industry challenges to drilling bans enacted in 2011 by the towns of Dryden and Middlefield. Those bans were passed under the towns' home rule authority to exercise land use law. Roughly 60 municipalities have passed similar bans and many more have passed drilling moratoriums.

The industry has repeatedly challenged those bans and lost -- at the trial court level and at the appellate level, where four judges ruled unanimously in May.

Now the energy boys want to go for broke with another appeal. Since the high court will invite amicus curiae briefs from interested parties, we can expect an array of deep pockets to submit novel, sophisticated new rationales for why the state's home rule principle needs to be dumped to serve gas drillers.

The stakes are enormous because the energy industry has already co-opted the state Department of Environmental Conservation and the state Senate. If the Court of Appeals caves on home rule, it will be transferring vast new powers to our energy lords.

Consider a few ways the drilling industry has already undermined the state's governance and environmental protection standards:

• Property rights.

New York State allows drillers to conduct underground trespass for the purpose of theft. A 2005 state law drafted by a lobbyist for drillers and promoted by the DEC empowers an energy company to drill under the home of an unwilling property owner in order to take gas. Notably, that gas need not be from an underground pool that extends under multiple properties. It's just gas from shale underneath that particular landowner's home. The state-sanctioned action -- which may jeopardize the homeowner's mortgage and insurance contracts and is virtually certain to slash the property's value -- is called "compulsory integration." There's no way for an unwilling homeowner to opt out.

• Equal protection.

The principle of legal protection under the law is obliterated by the DEC's plan to establish protection zones (the New York City watershed) and sacrifice zones (the Southern Tier and the Finger Lakes) for gas drilling. The DEC's draft rules would make it vastly more difficult to drill in protection zones, which have more power and money than the sacrifice zones. No gas wells are allowed within 4,000 feet of the NYC watershed. But within a sacrifice zone, the DEC says it's fine to drill only 500 feet from a residence or a private water well. So money buys protection.

• Environmental standards.

When it uses high-volume hydrofracking, the gas drilling industry produces rivers and mountains of toxic waste. Most of it is so contaminated that it would easily meet the definition of hazardous waste were it produced by a less-favored industry. But the energy industry successfully lobbied for a federal law exempting its waste from the definition of hazardous waste, thus dramatically easing disposal requirements. Even so, states are free to enact tougher rules, and the New York State Assembly has voted to do so. Those bills to remove the industry's special exemption from the definition of hazardous waste have never

been signed into law in New York. One reason: the DEC, which actively pushed for the industry's "compulsory integration" bill, hasn't lifted a finger. So disposal of drilling waste is cheaper and easier, at an unspecified future cost to the environment and the health of New Yorkers. Could the DEC possibly make it any more clear that accommodating industry is a higher priority than conserving the environment?

• Industry's legislative veto.

Virtually any new law in New York State that relates to gas drilling must have industry support. Industry-financed leaders in the state Senate will scuttle any bill that doesn't. They've done it time and again, most recently on a bill to establish a formal statewide moratorium on fracking. The Assembly voted overwhelmingly for the moratorium, and even a majority in the Senate voiced support. But Senate leaders with deep energy industry ties blocked the vote. The industry's Senate veto helps explain why New York has no severance tax on natural gas (like Texas, Louisiana, Oklahoma and virtually every other gas drilling state). That veto power kills any and all effective environmental legislation and preserves the state's status as a tax haven for frackers.

So now the Court of Appeals will consider arguments on why it should overturn established law and transfer power from local elected officials to bureaucrats at the DEC. It is playing with fire.

Advanced societies tend to place a high value on "the rule of law" as a check on the arbitrary exercise of power. Admittedly, the "rule of law" -- like "pornography" -- can be difficult to define. But one helpful guide suggests that a society that gives government officers (read DEC bureaucrats) great discretion has a low degree of "rule of law," where societies that grant government officers little discretion have a high degree of "rule of law."

It is fitting that the Court of Appeals gets to pick.

Peter Mantius is a freelance journalist from Schuyler County who follows shale gas drilling issues. He is a former reporter at the Atlanta Journal-Constitution and former editor of two business weeklies in the Northeast. Marcellus Watch is an opinion column.
