




Local Regulation of Water Quality: A Look Into the Future


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August 5, 2011

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- Long history of local government regulation of water quality
 - Protection of water supplies and watersheds the most common subjects
 - Translates into regulation of various sources of pollutants
 - Regulation of sewer systems, industrial processes and septic tanks

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- More recently: control of discharges from large scale cattle operations, air pollution from vehicles, timber harvesting, mining, oil and gas exploration and production

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- The biggest question is not what to regulate, but whether the local government has the authority to regulate
 - Local governments at the bottom of governmental hierarchy
 - As such, what the superior governments have done is of critical importance

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- Two issues:
 - Whether the local government has statutory authority to regulate a given activity
 - Whether a superior government has preempted regulation by the local government

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- Authority to regulate has two components:
 - Express statutory authority:
 - In New Mexico, it exists for sewer systems, water facilities and watersheds, public nuisances, gasoline stations (underground storage tanks)


- Implied authority
 - Implied from the police power (authority to regulate in favor of the public health and welfare)
 - Implied from the zoning authority (authority to regulate use of buildings)
 - Implied from authority to regulate development and subdivision of land (regulation of water quality, liquid waste disposal, solid waste disposal, terrain management, floodplain development, drilling of water wells)
- Courts have long respected these sources of local government authority to protect water supplies


● Preemption

- Express or implied
 - Express preemption rare in New Mexico
- Implied:
 - Occupying the field
 - Conflict preemption
 - General rule: An ordinance can be more restrictive than a state law, so long as it supplements, complements, or duplicates the state statute but does not conflict with it. *ACLU v. City of Albuquerque*, 2006 NMCA 078, 139 N.M. 761, 137 P.3d 1215.

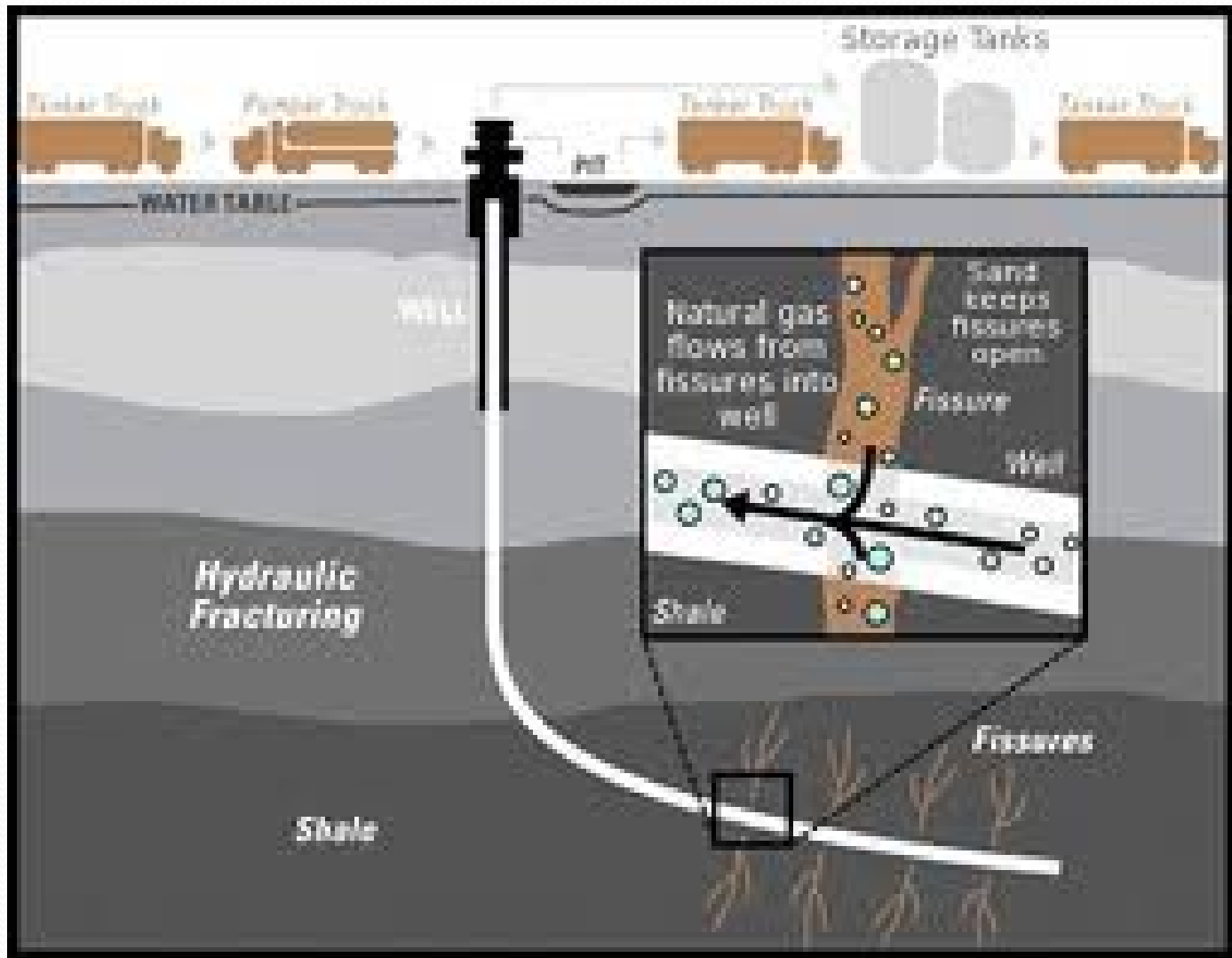
- Federal statutes also may have preclusive effect
 - The Clean Water Act: Provision that expressly saves local regulation of water pollution
 - The Safe Drinking Water Act: Saves local regulation of wellhead protection programs
 - FWPCA: Saves local government authority to impose “additional liability” concerning release of hazardous substances

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- Oil and gas regulation and production

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- The problem: Resources located without regard for municipal boundaries
 - Product has to be transported from where it exists in some cases thousands of feet through other formations, including ground water supplies
 - Drilling and production implicates high pressure
 - Drilling involves use of many chemical and materials that would be harmful in groundwater


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- Drilling mud
 - Hydraulic fracturing
 - Acidization














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- None of these activities is necessarily threatening to surface or groundwater supplies if done correctly
 - An incident, if it occurs, has a high potential to threaten water supplies

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- Oil and gas regulation
 - Local government regulation of the activity dates from the earliest oil and gas conservation statutes --- the 1930s
 - Conflicts between exploration activities exist in increasingly populated producing areas (New Mexico, Pennsylvania, Alabama), and make this an emerging problem

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- Conflicts will certainly intensify in the future, particularly so if oil shale and other resources become objectives
 - Regulation in places like Santa Fe, Oklahoma City, Los Angeles evidence a growing interest on the part of local governments to ensure that production is protective of water supplies

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- Typical subjects of regulation:
 - Noise
 - Safety
 - Appearance of facilities
 - Setbacks
 - Protection of water supplies

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- Oil and gas regulation is often focussed on protection of water supplies
 - Oklahoma City: spacing from oil and gas production activities, stringent rules for drilling near watershed of municipal wells
 - Measures to control use and disposal of drilling materials
 - Protection from spills and leaks
 - Regulation of fracturing and acidizing
 - Strict rules on injection and disposal wells

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- A number of local governments regulate the location of oil and gas drilling and production
 - Residential zones
 - Parks
 - Hospitals
 - Watersheds and water sources

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- Growth Management techniques
 - Santa Fe County

- Carlsbad, New Mexico
 - Highly protective ordinance
 - Focusses on City well fields – established a well field protection area, numerous activities prohibited within area
 - Oil and gas drilling in the area requires three recirculating strings in addition to the production string
 - Triple strings must extend through all water producing zones




- Lovington

- Close regulation within the City's water well field
- Leakage survey
- Closed loop systems
- Disposal wells prohibited



- Santa Fe County

- Extremely protective ordinance
- www.santafecounty.org/oilandgas
- Closed loop systems
- Baseline water quality testing
- Fracturing, limitation of pressure, restrictions on frac' fluid
- Setbacks from groundwater recharge areas, alluvial aquifer, acequia, perennial or ephemeral water courses, creeks, arroyos, playa lake or wetland

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- Santa Fe County, cont.
 - Regulation of salt water disposal
 - Mud, produced water

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- Other areas of future regulation:
 - large scale cattle operations
 - timber harvesting
 - Mining

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- Questions?