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Colorado Supreme Court Overturns Hydraulic Fracturing Bans

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Environmental & Regulatory

On Monday, May 2, the ***Colorado Supreme Court*** announced decisions holding invalid and unenforceable two separate ordinances enacted by the Cities of Fort Collins and Longmont, respectively, which prohibited the use of hydraulic fracturing. These decisions establish precedent regarding what has been an on-going battle in the regulation of the Colorado oil and gas industry.

In November 2012, Longmont citizens passed a voter-initiated ban on the practice of hydraulic fracturing. Similarly in 2012, voters in Fort Collins approved an amendment to the city code prohibiting the "use of hydraulic fracturing to extract oil, gas or other hydrocarbons" within the city for the next five years "in order to fully study the impacts of this process on property values and human health." The Colorado Oil and Gas Association ("COGA") filed complaints against both cities alleging that the bans attempted to regulate technical aspects of oil and gas operations reserved to the state, and that the prohibition on fracturing operates as an illegal, de facto ban on oil and gas drilling.

Last summer, the oil and gas industry seemed to gain early ground in the battle when the district court in both cases granted summary judgment in favor of COGA, overturning the bans on the basis that regulation of hydraulic fracturing is under the purview of the state's regulatory body—the Colorado Oil and Gas Conservation Commission. However, the municipalities appealed.

In the decisions announced today, the Colorado Supreme Court affirmed both lower court rulings. It concluded that the regulation of oil and gas operations in Colorado is a matter of mixed state and local concern. Both the Longmont ban and Fort Collins moratorium are preempted because each materially impedes what the Court determined to be the state's expressed strong interest in the uniform regulation of hydraulic fracturing. The Court also held that, in almost all cases, preemption disputes should be resolved by a facial review of the relevant statutes and ordinances rather than an evidentiary hearing. This holding will make it much easier for oil and gas operators to go to court and obtain meaningful relief when their operations are curtailed by overreaching local regulation. Finally, the Court distinguished *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), on the grounds that Colorado's state constitution does not presently have an environmental rights provision of the type relied on by the Pennsylvania Supreme Court.

These decisions will help Colorado oil and gas operators. Tracee Bentley, executive director of the

Colorado Petroleum Council, stated that the Court's decision "curtails arbitrary bans on hydraulic fracturing that could cost local jobs, deprive state and local governments of much-needed tax revenues, and limit access to critical energy resources." While a decisive victory for the industry, the importance of which cannot be overemphasized, additional challenges remain. It is possible that Colorado voters may be asked to vote this fall on ballot measures aimed at amending the Colorado Constitution to change the preemption balance.

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