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New York Appellate Court Throws Curveball at Fracking Debate

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The Appellate Division of the New York Supreme Court, Third Department, unanimously rejected an appeal from Norse Energy Corporation, and affirmed the Town of Dryden's right to prevent fracking through land use and zoning restrictions.

Norse Energy argued that the Town's restriction was preempted by the State's Oil, Gas and Solution Mining laws, which prohibit municipalities from enacting laws or ordinances “relating to the regulation” of these industries. However, the court held that the Town's zoning ordinance banning “all activities related to the exploration for, and the production or storage of, natural gas and petroleum” was not a regulation on the oil and gas industry but was an allowable land use and zoning restriction.

The decision severely limits any incentive energy companies have to invest resources into development of the New York portion of the Marcellus Shale, where 55 municipalities have bans on fracking in place, 102 municipalities have existing moratoria, and 92 municipalities are currently moving to put some level of prohibition in place. After seeing Norse Energy stripped of the ability to control its method of gas production on over 22,000 acres of land due to a ban by local government, companies will likely avoid leaving such a large investment in such uncertain hands.

Although states typically develop a much more uniform framework for this type of regulation, New York has been unable to finalize its statewide regulatory scheme as the current 5-year moratorium on fracking continues. Although the fracking debate has calmed in many areas, the debate has reached a boiling point in other states. Many states have enacted legislation requiring improved monitoring and disclosure during the fracking process, while other states are considering, or have implemented, statewide moratoriums on the practice while they attempt to better understand it. While these states will likely centralize regulation of fracking in state government, it is important to keep an eye on legislative developments in these states to avoid the precarious situation evolving for energy companies in New York.