

PUBLICATION

Texas Becomes First State to Ban Fracking Bans

June 16, 2015

On May 18, 2015, Texas Governor Greg Abbott signed House Bill 40 into law, putting restrictions on the ability of municipalities to regulate the oil and gas industry in their jurisdictions. Because the bill passed both the Texas House and Senate with more than a two-thirds majority, it went into effect immediately. H.B. 40, a/k/a the "Denton fracking bill," leaves municipalities with limited power to regulate the oil and gas industry, and clearly establishes that Texas municipalities cannot enact and enforce fracking bans. As fracking bans were gaining momentum throughout the United States, with the passage of H.B. 40, Texas became the first state to enact a ban on fracking bans.

Governor Abbott stated, "H.B. 40 does a profound job of helping to protect private property rights here in the state of Texas, ensuring those who own property will not have the heavy hand of local regulation deprive them of their rights. The law ensures that Texas avoids a patchwork quilt of regulations that differ from region to region, differ from county to county or city to city."

H.B. 40 was a response to an ordinance passed by the City of Denton that banned hydraulic fracturing within the city limits. The city ordinance had support from fifty-nine percent of Denton voters when it passed last November, which made Denton the first municipality to ban hydraulic fracturing. The passage of H.B. 40 essentially guts the city ordinance banning fracking and pre-empts local bans on oil and gas exploration. Under H.B. 40, municipal regulation of oil and gas operations is permissible only if the regulations: (1) pertain solely to surface activity incident to an oil and gas operation; (2) are commercially reasonable; (3) do not effectively prohibit an oil and gas operation; and (4) are not otherwise preempted by state or federal law. The law defines commercially reasonable as "a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas." The state, however, has exclusive jurisdiction to regulate oil and gas operations.

Shortly after passing the city ordinance, the State General Land Office and the Texas Oil and Gas Association ("TOGA") filed lawsuits claiming the ban to be unconstitutional. Even though H.B. 40 nullified the city ordinance, both the Texas General Land Office and TOGA could seek a judgment and legal precedent under H.B. 40. The Denton City Council is scheduled to meet on Tuesday, June 16, to consider the implications of H.B. 40 and the City's response and further handling of the city ordinance banning fracking. Two weeks ago, the City Council, after hearing more than four hours of public testimony, walked away from a repeal of the hydraulic fracturing ban. The City wants to ensure it is in the best position to continue its fight on hydraulic fracturing. Leaving the ordinance in place, as is, could leave Denton and other municipalities vulnerable from being able to curtail hydraulic fracturing if H.B. 40 gets a day in court with Denton's ban.

On May 29, through S.B. 809, Oklahoma became the second state to ban fracturing bans. Oklahoma's bill gives Oklahoma exclusive jurisdiction to regulate oil and gas operations and states that municipalities "may not effectively prohibit or ban any oil and gas operations." The recent state bills passed by Texas and Oklahoma begin to shift the regulatory landscape of fracking bans, but the conflict between municipalities and states over regulation of hydraulic fracturing will continue.