

Colo. Fracking Initiatives Threaten To Scare Off Developers

By Sean McLernon

Law360, New York (November 04, 2013, 8:30 PM ET) -- Local hydraulic fracturing ballot initiatives coming before Colorado voters Tuesday will have to survive vigorous court challenges even if they win majority support at the polls, but experts say an election victory for fracking opponents will help dissuade developers from investing in the state while litigation moves forward.

Proposed moratoria in the Front Range cities of Boulder, Broomfield and Fort Collins and an outright ban in Lafayette could take hold easily if voters decide they don't want fracking in their communities. The hostile message this would send to the oil and gas industry could make companies think twice about whether it's worth dealing with such regulatory uncertainty.

State officials and industry groups already are challenging a fracking ban that was approved by the city of Longmont last year, arguing that it unconstitutionally interferes with state oversight. The new initiatives will face similar challenges and could be struck down by Colorado courts, no matter how many voters approved the measure.

The problem for oil and gas developers is that the issue won't be solved overnight. With the future of Colorado fracking up in the air, energy companies will start looking to nearby states like Utah, Wyoming and North Dakota, according to Boulder-based Bryan Cave LLP partner Colin G. Harris.

"Colorado is ground zero in the fight against oil and gas development," Harris said. "If you are an operator with nationwide operations, you'd have to ask yourself, is it worth it to go into Colorado at this point?"

Even temporary moratoria like the five-year measures in Boulder, Broomfield and Fort Collins will seriously impact development, Harris said, because leases typically don't last more than five years.

Boulder already has a one-year moratorium in place, and voters will have the chance to extend it for an additional four years. The measures in Broomfield and Fort Collins would stop fracking activities as well as ban any storage of waste products in the area for five years. Lafayette voters, meanwhile, have the chance to put a permanent halt to fracking.

Those four communities will help set the course for the future of oil and gas drilling in the state, and developers have taken notice. The Colorado Oil and Gas Association has spearheaded a well-funded campaign to convince voters to shoot down the proposed restrictions.

If the pro-fracking push falls short, developers will start to re-evaluate their options, according to Denver-based Faegre Baker Daniels LLP partner Colin C. Deihl.

"I think the country is watching, and the industry is certainly watching," Deihl said. "These sorts of bans send a message to industry about where to invest. For Colorado, I think it is a chilling message."

There may not be much practical impact at first, because most fracking activity is taking place elsewhere in the state, but Harris said winning ballot initiatives could build support for similar measures in other areas in Colorado and even outside of the state.

"It's a slippery slope," Harris said. "If the ballot initiatives are successful here, the people who are in support of these will take the fight to other communities."

The oil and gas industry wants to do everything it can to stop any potential ballot creep as soon as possible. If it can't do it at the polls, it will take on the measures in court, like it has already done in Longmont.

Last year, Longmont voters approved amending the local charter to prohibit extracting oil, gas or other hydrocarbons by fracking. They also banned open-pit storage or disposal of fracking waste, including flowback and wastewater.

The Colorado Oil and Gas Association sued to invalidate the ban in December, and Colorado joined the action in July, siding with the industry. A state district court trial is scheduled for August, but the issue likely will end up before the state's highest court.

In the meantime, anti-fracking activists could expand their battle beyond a few communities.

"It shows an effort by the local citizens to get momentum," Denver-based BakerHostetler LLP partner Paul S. Enockson said. "The biggest risk out there is that momentum goes forward and the state may find itself facing a statewide ban."

Enockson said developers are well aware of the risk and will have to consider spending their resources outside of Colorado.

"When you're spending billions of dollars investing in drilling wells and there is that uncertainty out there, you may look to deploy capital expenditure elsewhere," Enockson said.

One silver lining for the state is that it seems to have precedent on its side. Harris said the Longmont measure and the four ballot initiatives wouldn't be able to pass constitutional muster under the current Colorado Supreme Court.

Pointing to the 1992 decision in *Voss v. Lundvall Bros.*, which held that the Colorado Oil and Gas Conservation Act outlawed a local ordinance prohibiting oil and gas drilling in Greeley, Harris said a municipality couldn't enact a rule that impinged on the state's authority to promote oil and gas development in the state.

A five-year moratorium would qualify because of the way the industry operates, according to Harris.

"If you say you can't operate for five years, you're effectively shutting down the industry," Harris said. "No one is going to want to come in."

Florida State University law professor Hannah Wiseman said the issue isn't so cut-and-dried when it comes to moratoria, however. Because Colorado has no express preemption of local oil and gas regulation, the courts will have to decide whether the state implied preemption of local rules by comprehensively regulating oil and gas activity.

“In light of local government's general land use authority to determine where and what types of activity should occur within their jurisdiction, I think there is a good chance of moratoria in particular surviving legal challenges, Wiseman said. “Although under Voss a 'total ban' on drilling is not acceptable, this does not necessarily extend to moratoria, and that case involved somewhat different facts.”

Of course, voters could vote down the ballot initiatives Tuesday, saving the state and industry all of that trouble. Enockson says he expects low turnout because only a couple of statewide issues are on the ballot and no statewide officials are up for election.

“The industry has spent a lot of money up in these four areas to try and increase voter turnout,” Enockson said. “Now we just have to wait and see.”

--Editing by Kat Laskowski and Richard McVay.

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