

# Fracking in Ohio

## How state law, courts are addressing the issue of fracking in Ohio

INTERVIEWED BY ROGER VOZAR

By some estimates, oil and gas wells will be pumping \$30 billion into Ohio's economy in 2015, creating 200,000 jobs. All that money and activity also promises to keep attorneys busy.

"Companies are still feeling things out. So far, there have been about 500 permits issued and there are only about 80 producing wells. But 101 permits were issued in March alone. There will be a lot more drilling this year," says Michael Schottenstein, an associate with Kegler, Brown, Hill & Ritter.

As companies look to start drilling, property owners with leases signed when offers were lower want to renegotiate more favorable terms. And some communities continue to fight to keep hydraulic fracturing of shale rock formations, a process also known as fracking, from taking place within their borders.

*Smart Business* spoke with Schottenstein about current legislation and the outlook for oil and gas well production in Ohio.

### What's the status of potential fracking bans?

In a recent case in the 9th District Court of Appeals, *State ex rel. Morrison v. Beck Energy*, the court said Ohio Revised Code section 1509.02 gives the Ohio Department of Natural Resources, Division of Mineral Resources Management, exclusive authority over drilling permits, pre-empting local ordinances. Municipalities can regulate things like excavation and right-of-way usage and construction, but have no authority when it comes to drilling.

However, there are still municipalities discussing bans. The city of Munroe Falls has appealed to the Ohio Supreme Court and asked the court to weigh in on the issue, but the court has not said yet whether it will take the case. It's unlikely municipalities will be able to impose outright bans.

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### What are some other legal developments?

The natural gas severance tax increase Gov. John Kasich proposed in his new budget is significant. Drilling companies and other industry players have been trying to stop it because they say it would discourage drilling. The industry may have won the fight for now, though. The budget plan the Ohio House Republicans recently put forward left the severance tax where it is. It's still possible it could get passed if the Ohio Senate makes some changes, but it is unlikely.

Another development involves a line of cases dealing with lease terms and whether perpetual leases are void as being against public policy in Ohio. In *Monroe County*, a judge in the case of *Hupp v. Beck Energy* essentially said that public policy in Ohio so disfavors perpetual leases that any oil and gas lease that allows drilling companies the right to extend the lease indefinitely by paying delay rentals without an obligation to actually drill are void as against public policy.

There's also a federal case from the Southern District of Ohio in which the decision says state law disfavors perpetual leases and will interpret them not to be perpetual when possible, but did not say they are actually void.

These are important cases because a lot of landowners are trying to find ways to get out of leases signed when companies were paying a lot less for them.

### What are leases going for now?

Royalty percentages had historically been about 12.5 percent for the landowner, but we're seeing some up to 20 percent. Reports out of eastern Ohio are that some companies are offering bonus payments of \$5,000 to \$10,000 an acre. Those who entered into a lease 20 years ago, got a small bonus payment and now get a royalty check for \$10 a month, are trying to get a better deal.

Oil and gas leases typically provide for a period of one to five years during which companies can explore to see if there's oil and gas on the property. Leases also usually have a clause that the lease continues as long as oil or gas is produced in paying quantities, which can be an issue if drilling was interrupted for some reason.

### Are their other issues on the horizon?

One major concern is waste disposal. Fracking produces waste, called brine, and it can't just be put it back into the water system. Because this liquid would pollute the water table, drilling and disposal has to be done right and companies must take necessary precautions. A company near Youngstown was recently indicted for dumping brine into the Mahoning River, but if companies don't cut any corners, our water should be safe. Still, expect more litigation, legislation and regulations involving waste disposal in the future. ●