

Court of Appeals
of the
State of New York

NORSE ENERGY CORP. USA,

Appellant,

– against –

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

(For Continuation of Caption See Inside Cover)

**AMICI BRIEF FOR JOINT LANDOWNERS COALITION OF
NEW YORK, INC., NATIONAL ASSOCIATION OF ROYALTY
OWNERS, NARO-NY, UPSTATE NEW YORK TOWNS
ASSOCIATION, INC., SOUTHERN TIER RESIDENTS FOR
ECONOMIC INDEPENDENCE AND THE BUSINESS
COUNCIL OF NEW YORK STATE, INC.**

SCOTT R. KURKOSKI, ESQ.
LEVENE GOULDIN & THOMPSON, LLP
450 Plaza Drive
Binghamton, New York 13902
Tel.: (607) 763-9200
Fax: (607) 763-9211

*Attorneys for Amici Joint Landowners Coalition of New York, Inc.,
National Association of Royalty Owners, NARO-NY, Upstate New York Towns
Association, Inc., Southern Tier Residents for Economic Independence
and The Business Council of New York State, Inc.*

Date Completed: April 18, 2014

COOPERSTOWN HOLSTEIN CORP.,

Appellant,

– against –

TOWN OF MIDDLEFIELD,

Respondent.

APL-2013-00242

Otsego County Clerk's Index No. 0930/11

Appellate Division–Third Department Docket No. 515498

TABLE OF CONTENTS

DISCLOSURE STATEMENTS viii

IDENTITY AND INTERESTS OF AMICI CURIAE ix

QUESTIONS PRESENTED xiii

PRELIMINARY STATEMENT 1

ARGUMENT 9

I. AFFIRMING TOWNWIDE BANS ON ALL OIL AND GAS ACTIVITIES WILL IN EFFECT FOREVER BAR ALL OIL AND GAS PRODUCTION IN NEW YORK IN CLEAR CONTRADICTION TO STATE LAW AND LEGISLATIVE INTENT..... 9

II. DEFENDANTS’ TOWNWIDE BANS CONSTITUTE UNCONSTITUTIONAL TAKINGS OF LAND INTERESTS..... 15

III. NEW YORK WILL LOSE DOCUMENTED ECONOMIC OPPORTUNITIES IF MUNICIPALITIES ARE ALLOWED TO CONTROL DEVELOPMENT OF THE STATE’S NATURAL RESOURCES..... 18

IV. DEFENDANTS’ TOWNWIDE BANS ARE UNCONSTITUTIONAL PURSUANT TO THE DORMANT COMMERCE CLAUSE DOCTRINE..... 23

V. OIL AND GAS PRODUCTION USING HIGH-VOLUME HYDRAULIC FRACTURING AND HORIZONTAL DRILLING BENEFITS NATIONAL SECURITY AND THE ENVIRONMENT..... 25

VI. THE ACTIONS OF THE CITY OF DUNKIRK COMMON COUNCIL DEMONSTRATE THE LEGAL AND POLICY ARGUMENTS IN FAVOR OF PREEMPTION..... 34

CONCLUSION 36

TABLE OF AUTHORITIES

Constitutions

New York Constitution, article I, § 7	16
US Const, art VIII, § 3	23
United States 5th Amendment	16
United States 14th Amendment	16

Cases

<u>Berzal & Co. v State of New York</u> , 8 AD2d 886 (3d Dept 1959)	16
<u>C&A Carbone, Inc. v Town of Clarkstown, N.Y.</u> , 511 US 383 (1994)	24
<u>City of New York v State of New York</u> , 94 NY2d 577 (2000)	23
<u>Consolidated Edison Co. of N.Y. v Town of Red Hook</u> , 60 NY2d 99 (1983) ...	36
<u>Homier Distrib. Co. v City of Albany</u> , 90 NY2d 153 (1997)	24
<u>Lucas v. South Carolina Coastal Council</u> , 505 US 1003 (1992)	16, 17
<u>Matter of Gazza v New York State Dept. of Env'tl. Conservation</u> , 89 NY2d 603 (1997)	17
<u>Matter of Nornew, Inc. v Marsh</u> , 301 AD2d 206 (4th Dept 2002)	22
<u>Matter of Norse Energy Corp. USA v Town of Dryden</u> , 108 AD3d 25 (3d Dept 2013)	7
<u>Matter of Smith v Town of Mendon</u> , 4 NY3d 1 (2004)	16, 17
<u>Matter of Sylvania Corp. v Kilbourne</u> , 28 NY2d 427 (1971)	2
<u>Matter of Western Land Servs., Inc. v Department of Env'tl. Conservation of State of N.Y.</u> , 26 AD3d 15 (2005)	2
<u>Palazzolo v Rhode Island</u> , 533 US 606 (2001)	16, 17
<u>Penn Cent. Transp. Co. v City of New York</u> , 438 US 104 (1978)	17

<u>Pennsylvania Coal Co. v Mahon</u> , 260 US 393 (1922)	16, 18
<u>Pike v Bruce Church, Inc.</u> , 397 US 137 (1970)	24
<u>United Haulers Assn., Inc. v Oneida-Herkimer Solid Waste Mgt. Auth.</u> , 550 US 330 (2007)	23

Statutes and Local Laws

ECL art 8	7
ECL art 23	2
ECL 23-0301	2, 9, 10, 11
ECL 23-0303	3
ECL 23-0501	10, 11
ECL 23-0503	10
ECL 23-0901	11
ECL 23-2101	1
Energy Law § 3-101	10
Municipal Home Rule Law § 2	14
Municipal Home Rule Law § 20	13, 14
RPTL 590-597	22
Town Law § 130	13
Town Law § 133	13, 14
Village Law art 21	14
Dunkirk Resolution #25-2014	35

Regulations

6 NYCRR part 553	11
6 NYCRR 553.1	11
6 NYCRR 553.2	11

Legislative History

L 1941, ch 501	1
L 1981, ch 846	3
Memorandum in Support of Bill A6928	3
California Senate Bill 4, L 2013, ch 313	4

Secondary Sources, Manuals, Handbooks, Guidelines and Reports

Am. Petroleum Inst., Hydraulic Fracturing Well Construction 4, 25-26

Assn. of Towns of the State of New York, Town Manual (2006) 14

Timothy J. Considine et al., Ctr. for Energy Policy & Emt. at Manhattan Inst.,
The Economic Opportunities of Shale Energy Development
(June 2011) 20, 21

Timothy J. Considine et al., Pennsylvania State Univ., Coll. of Earth and Min.
Sciences, Dept. of Energy and Min. Eng'g, The Pennsylvania Marcellus Natural
Gas Industry: Status, Economic Impacts and Future Potential
(July 20, 2011) 19

Cornell Univ. Coop. Extension, Gas Exploration and Leasing on Private Land:
Tips and Guidance for New York Landowners 20

Dept. of Env'tl. Conservation, Oil, Gas and Solution Salt Mining
in New York State 1

Dept. of Env'tl. Conservation, Revised Draft: Supplemental Generic Environmental
Impact Statement on the Oil, Gas and Solution Mining Regulatory Program
(Sept. 2011) 1, 4, 12, 22, 25

Dept. of State, Land Use Moratoria (2010) 6

Dept. of State, Local Government Handbook (6th ed 2009) 14

Dept. of Taxation and Fin., Overview Manual for Valuation and Assessment
of Oil and Gas Producing Property in New York State (Jan. 2013) 22

FracTracker Alliance, Current High Volume Horizontal Hydraulic
Fracturing Drilling Bans and Moratoria in NY State:
Movements Against HVHF 6

FracTracker Alliance, Current High Volume Horizontal Hydraulic
Fracturing Drilling Bans and Moratoria in NY State:
Movements Supporting HVHF 5

FracTracker Alliance, Over 1.1 Million Active Oil and Gas Wells in the US	4
Diana Furchtgott-Roth & Andrew Gray, Empire Ctr. for New York State Policy, Manhattan Inst. for Policy Research, <u>The Economic Effects of Hydrofracturing on Local Economies: A Comparison of New York and Pennsylvania</u> (May 2013)	21
IHS, <u>America’s New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy</u> (Sept. 2013)	21
Intl. Energy Agency, <u>Global carbon-dioxide emissions increase by 1.0 Gt in 2011 to record high</u> (May 24, 2012)	31, 32
JLCNY, Map of Town Resolutions Passed to Support NYDEC Efforts and Findings	5
George E. King, Socy. of Petroleum Engrs., <u>Hydraulic Fracturing 101</u> (2012)	4
U.S. Energy Info. Admin., <u>Frequently Asked Questions: How much carbon dioxide (CO₂) is produced per kilowatthour when generating electricity with fossil fuels</u>	30
U.S. Energy Info. Admin., <u>How dependent are we on foreign oil?</u> (last updated May 10, 2013)	26, 28
U.S. Energy Info. Admin., <u>Levelized Cost of New Generation Resources in the Annual Energy Outlook 2013</u> (Jan. 2013)	31
U.S. Energy Info. Admin., Natural Gas Consumption by End Use (last updated Mar. 31, 2014)	25
U.S. Energy Info. Admin., Natural Gas Pipelines in the Northeast Region	24
U.S. Energy Info. Admin., Overview Data for the United States (last updated May 30, 2013)	28, 30
U.S. Energy Info. Admin., <u>Review of Emerging Resources: U.S. Shale Gas and Shale Oil Plays</u> (July 2011)	13

U.S. Energy Info. Admin., U.S. Energy-Related Carbon Dioxide Emissions, 2012 (last updated Oct. 21, 2013)	30, 31
U.S. Energy Info. Admin., <u>U.S. energy-related CO₂ emissions in early 2012 lowest since 1992</u> (Aug. 1, 2012)	31
U.S. Energy Info. Admin., U.S. Net Imports by Country	27
United States Env'tl. Protection Agency, Natural Gas Extraction – Hydraulic Fracturing	9
Bernard L. Weinstein & Terry L. Clower, <u>Potential Economic and Fiscal Impacts from Natural Gas Production in Broome County, New York</u> (Sept. 2009)	21
<u>Newspapers and Periodicals</u>	
Jon Campbell, <u>In Oneida County, Hillary Clinton touts U.S. oil-and-gas production</u> , Democrat and Chronicle, Oct. 8, 2013	29
Stephen Castle, <u>Europe, Facing Economic Pain, May Ease Climate Rules</u> , NY Times, Jan. 22, 2014	32
CBS4 Denver, <u>Hickenlooper Threatens To Sue Any Town, City That Bans Fracking</u> (Feb. 26, 2013)	16
The Economist, <u>The economics of shale oil: Saudi America</u> (Feb. 15, 2014)	28
Melinda Miller & Susan Chiappone, <u>NRG Power Plant to stay open, setting off glee in Dunkirk</u> , Buffalo News, Dec. 15, 2013	34
David Robinson, <u>Binghamton withdraws fracking-ban appeal</u> , Press & Sun Bulletin, Jan. 14, 2014	7, 14
David Robinson, <u>Report backs conversion of Dunkirk power plant to natural gas: NRG wants facility to run on natural gas</u> , Buffalo News, Mar. 26, 2013	34
Mark Stricherz, Colorado Observer, <u>Jewell's Remarks on Fracking Buoy Backers</u> (Apr. 4, 2014)	33

Scott Waldman, Capital, U.S. energy secretary says fracking brings prosperity (Feb. 18, 2014) 33

Meredith Wegener, Drilling Down: New York, Hydraulic Fracturing, and the Dormant Commerce Clause, 28 *BYU J Pub L* ____ (forthcoming Apr. 2014) 24

Tina Zboch, Common Council Enacts Citywide Ban on Fracking, *Chautauqua Today*, Mar. 19, 2014 35

Speeches and Press Releases

Governor Andrew M. Cuomo, Governor Cuomo Announces Dunkirk Power Plant to be Repowered and Expanded to Cost Effectively Meet Reliability Needs, Restoring Payments to Local Governments and Preserving Jobs (Dec. 15, 2013)34-35

President Barack Obama’s State of the Union Address (Jan. 28, 2014)32-33

Remarks by the President in the State of the Union Address (Feb. 12, 2013) 28

Remarks by Tom Donilon, National Security Advisor to the President at the Launch of Columbia University’s Center on Global Energy Policy (Apr. 24, 2013) 29

DISCLOSURE STATEMENTS

Joint Landowners Coalition of New York, Inc. is a domestic not-for-profit corporation and it has no parents, subsidiaries or affiliates.

National Association of Royalty Owners is a not-for-profit corporation. It has no parents or subsidiaries. It is affiliated with numerous chapter organizations, including National Association of Royalty Owners – New York, Inc.

National Association of Royalty Owners – New York, Inc. is a domestic not-for-profit corporation. It has no parents or subsidiaries. It is affiliated with National Association of Royalty Owners.

Upstate New York Towns Association, Inc. is a domestic not-for-profit corporation and it has no parents, subsidiaries or affiliates.

Southern Tier Residents for Economic Independence is an unincorporated association of businesses, labor unions, farmers, municipalities and landowners. It has no parents, subsidiaries or affiliates.

The Business Council of New York State, Inc. is a domestic not-for-profit corporation and it has no parents, subsidiaries or affiliates.

IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae are in essence not-for-profit corporations that represent the landowners, farmers, labor unions, municipalities and businesses that are, generally, from the areas of New York that will be most affected by natural gas production. These parties overwhelmingly support oil and gas production given, among other things, the documented economic, national security and environmental benefits.

Joint Landowners Coalition of New York, Inc.

The Joint Landowners Coalition of New York, Inc. (“JLCNY”) represents the common interests of 38 independent landowner coalitions throughout New York whose 77,000 members, in 14 counties, own more than 1,000,000 acres of land over New York’s natural gas deposits. JLCNY’s mission is to foster, promote, advance and protect the common interests of the people as it pertains to natural gas development through education and best environmental practices (see generally JLCNY, <http://www.jlcny.org/> [accessed Mar. 31, 2014]).

National Association of Royalty Owners

The National Association of Royalty Owners (“NARO”) is the only national organization promoting the rights, responsibilities and the definitions of citizens who own natural resources in the United States. NARO’s mission is to encourage

and promote the exploration and production of minerals in the United States while preserving, protecting, advancing, and representing the interests and rights of mineral and royalty owners through education, advocacy and assistance to NARO members, NARO chapter organizations, government bodies and the public (see generally Natl. Assn. of Royalty Owners, <http://www.naro-us.org/> [accessed Mar. 31, 2014]).

National Association of Royalty Owners – New York, Inc.

National Association of Royalty Owners – New York, Inc. (“NARO-NY”) is the New York chapter of NARO. NARO-NY formed in September 2010 to assist New York landowners and mineral owners, particularly with respect to issues related to the development of shale gas in the Marcellus and Utica formations (see generally Natl. Assn. of Royalty Owners – NY, <http://www.naro-ny.org/> [accessed Apr. 17, 2014]).

Upstate New York Towns Association, Inc.

Upstate New York Towns Association, Inc. (“Upstate Towns”) was founded in July 2013 to promote the unique needs and interests of towns in Upstate New York. Its members currently include the towns of Conklin, Sanford, Vestal and Windsor in Broome County; Preston in Chenango County; Deposit, Hancock and

Masonville in Delaware County; Delaware and Fremont in Sullivan County; and Candor, Owego, Spencer and Tioga in Tioga County. Upstate Towns is guided by its three-point plan to promote economic development in Upstate New York in order to create jobs and increase population, to promote increased access to technology in Upstate New York, and to promote an understanding of what freedom means in Upstate New York. It achieves its purpose, primarily, by conducting education and communication programs with elected town officials and town employees.

Southern Tier Residents for Economic Independence

Southern Tier Residents for Economic Independence (“STREI”) is an unincorporated association of businesses, labor unions, farmers, municipalities and landowners with a principal office in the City of Binghamton, Broome County. The mission of STREI is to strengthen the economies of Southern Tier communities through responsible natural gas development. STREI is not associated with the gas industry. STREI’s members include Carpenters Local 277, Plumbers and Pipefitters Local 112, Operating Engineers Local 158, Laborers Local 785, Teamsters Local 693, the Greater Binghamton Chamber of Commerce, Southern Tier Economic Growth, Inc., the Broome County Farm Bureau, the Chenango County Farm Bureau, Unshackle Upstate, Inc., Walking Ridge

Development LLC, Upstate Towns and JLCNY (see generally S. Tier Residents for Economic Independence, <http://www.strei.org/> [accessed Apr. 14, 2014]).

The Business Council of New York State, Inc.

The Business Council of New York State, Inc. (the “Business Council”) is a leading business organization in New York, representing the interests of more than 2,500 member businesses statewide. Its membership is comprised of both large and small businesses, as well as local chambers of commerce, and professional and trade associations. The primary function of the Business Council is to serve as an advocate for its members in policy matters affecting economic development, jobs and the general business climate in the State (see generally Bus. Council of New York State, Inc., <http://www.bcnys.org/> [accessed Mar. 31, 2014]).

QUESTIONS PRESENTED

Q1. Under the doctrines of express preemption or implied preemption, are defendants' townwide bans of all oil and gas activities preempted given that, among other things, State law expressly provides that it "shall supersede all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries," and given that State law outlines a comprehensive and detailed scheme that imposes regulation that is in conflict with defendants' townwide bans?

A1. The lower courts incorrectly determined that defendants' townwide bans are not preempted.

Q2. What are the practical, policy and constitutional considerations that indicate that State law must preempt defendants' townwide bans on all oil and gas activities?

A2. The courts below did not address these important considerations, which are the subject of this brief. It is submitted that if defendants' townwide bans are not preempted, then oil and gas production will be forever barred in New York in clear contradiction to State policies. Moreover, New York will in effect be prevented by its own municipalities from pursuing the documented economic opportunities and prevented from contributing to the national security and environmental benefits, all attributable to domestic oil and gas production. Relatedly, defendants' townwide bans will give rise to constitutional concerns that must be considered.

PRELIMINARY STATEMENT

New York has a long history of oil, gas and solution salt mining wells. Since the late 1800s, “more than 75,000 [of these] wells [have been] drilled in the [S]tate [with] about 14,000 of these . . . still active” (Dept. of Env'tl. Conservation, Oil, Gas and Solution Salt Mining in New York State, <http://www.dec.ny.gov/energy/205.html> [accessed Apr. 3, 2014]). Indeed, the first natural gas well was drilled in 1821 in the Village of Fredonia, Chautauqua County (see Dept. of Env'tl. Conservation, Revised Draft: Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program at 5-5 [Sept. 2011], available at <http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf> [hereinafter cited as SGEIS 2011]).

As a result, New York has strong experience regulating this industry. The origins of oil and gas regulation date back to at least 1941 when New York became a member of the multi-state governmental entity known as the Interstate Oil and Gas Compact Commission (“IOGCC”) (see L 1941, ch 501) whose “purpose . . . is to conserve oil and gas by the prevention of physical waste thereof from any cause” (ECL 23-2101; see generally Interstate Oil and Gas Compact Commn., <http://www.iogcc.state.ok.us/> [accessed Mar. 31, 2014]). In effect, by adopting certain recommendations

proposed by the IOGCC, as well as by making other modifications in conjunction with technological advancements, New York's regulatory scheme has evolved into what is now known as the Oil, Gas and Solution Mining Law (see ECL art 23 [hereinafter OGSML]; see generally Matter of Sylvania Corp. v Kilbourne, 28 NY2d 427, 432-433 [1971]; Matter of Western Land Servs., Inc. v Department of Env'tl. Conservation of State of N.Y., 26 AD3d 15, 16-18 [2005], lv denied 6 NY3d 713 [2006]). The OGSML includes a declaration of policy:

“to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells”

(ECL 23-0301).

The OGSML encompasses significant reforms enacted in the aftermath of the energy crisis of the 1970s. One such modification enacted in 1981 was the addition of the supersession clause, which states that “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of

local governments under the [R]eal [P]roperty [T]ax [L]aw” (ECL 23-0303 [2]; see L 1981, ch 846, § 4). The legislative intent of this clause was clearly to limit home rule authority and, in turn, to leave the regulation of the oil and gas industry entirely to the New York State Department of Environmental Conservation (“DEC”). Indeed, the Memorandum in Support of Bill A6928, specifically containing the supersession clause, states:

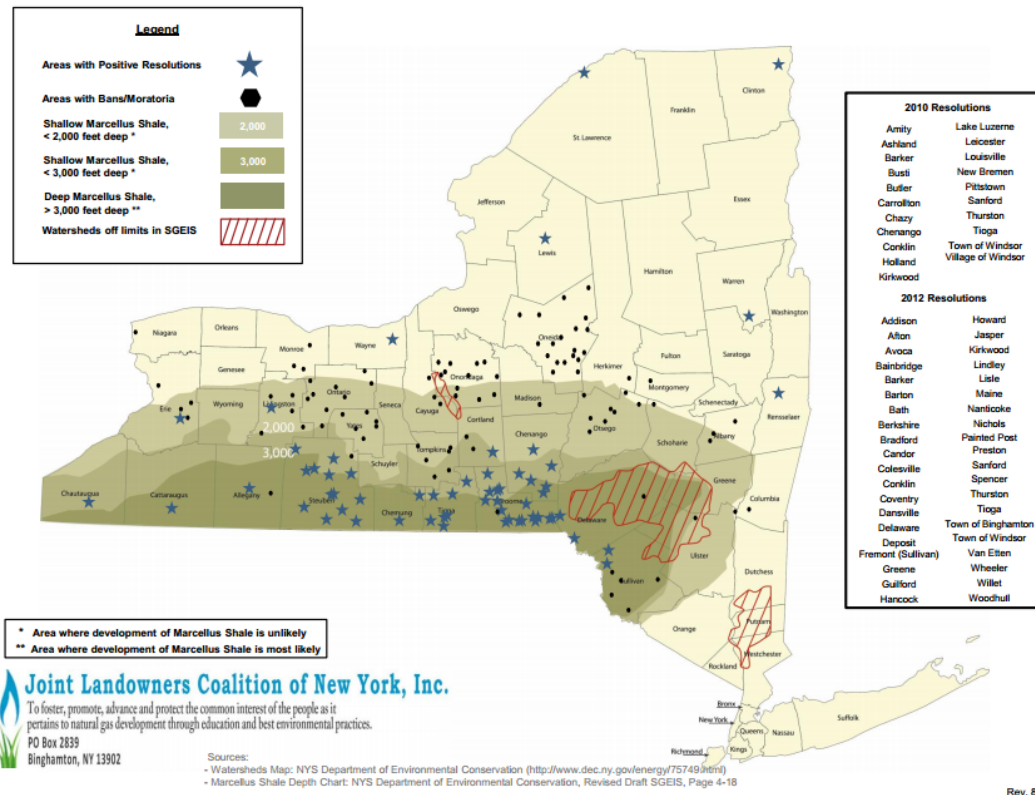
“The provision for supersedure by the [OGSML] of local laws and ordinances clarifies the legislative intent behind the enactment of the oil and gas law in 1963. The comprehensive scheme envisioned by this law and the technical expertise required to administer and enforce it, necessitates that this authority be reserved to that State. Local government’s diverse attempts to regulate the oil, gas, and solution mining activities serve to hamper those who seek to develop these resources, with Statewide repercussions. With adequate staffing and funding, the State’s oil, gas, and solution mining regulatory program will be able to address the concerns of local governments and assure the efficient and safe development of these energy resources.”

Nonetheless, with the technological advancements of high-volume hydraulic fracturing and horizontal drilling, New York municipalities have begun to meddle in the State’s interest in oil and gas production, and infringe on the authority exclusively reserved to the DEC. In this regard, it is noted that any controversy over these drilling methods is really limited to New York. Indeed, estimates suggest that there are over one million such wells in operation in the United States, with over 30 states allowing such

drilling, including even California (see George E. King, Socy. of Petroleum Engrs., Hydraulic Fracturing 101 at p. 2, http://www.kgs.ku.edu/PRS/Fracturing/Frac_Paper_SPE_152596.pdf [2012]); FracTracker Alliance, Over 1.1 Million Active Oil and Gas Wells in the US, <http://www.fractracker.org/2014/03/1-million-wells/> [last updated Mar. 4, 2014]; see also California Senate Bill 4, L 2013, ch 313, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB4).

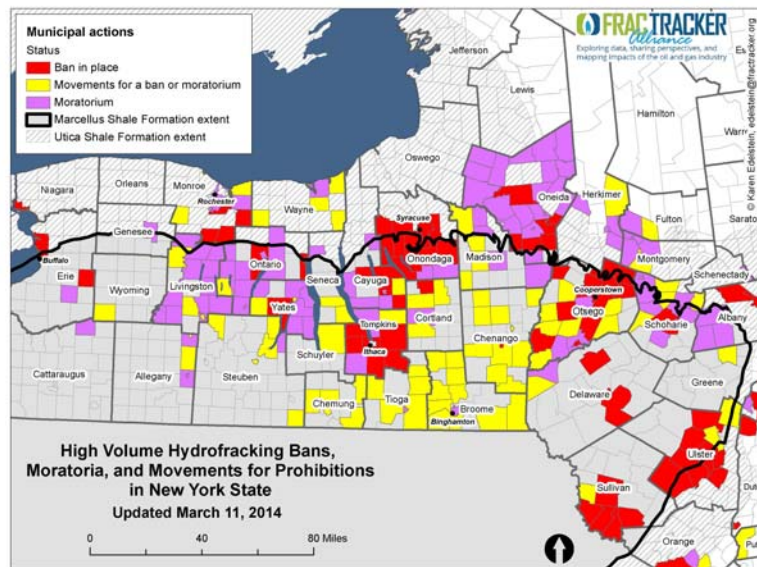
By way of background, “[h]ydraulic fracturing technology was first developed in the late 1940s” and “[t]he first horizontal well in New York was drilled in 1989” (SGEIS 2011 at pp. 5-5, 5-24, supra; see George E. King, Socy. of Petroleum Engrs., Hydraulic Fracturing 101 at p. 2, http://www.kgs.ku.edu/PRS/Fracturing/Frac_Paper_SPE_152596.pdf [2012]). In sum, high-volume hydraulic fracturing and horizontal drilling simply allow for greater access, recovery and production of oil and gas resources (see SGEIS 2011 at Executive Summary, pp. 1-4, supra; see also Am. Petroleum Inst., Hydraulic Fracturing Well Construction, <http://www.api.org/policy-and-issues/policy-items/exploration/hydraulic-fracturing-well-construction.aspx> [accessed Apr. 17, 2014]). As the graphic below demonstrates, there is significant support for the use of these

technological advancements in New York as over 40 municipalities – in the heart of the Marcellus Shale in New York – have passed positive resolutions, in effect, confirming that the benefits of natural gas development can be realized in New York if the DEC is allowed to continue safely and efficiently regulating this industry:



(see JLCNY, Map of Town Resolutions Passed to Support NYDEC Efforts and Findings, <http://www.jlcny.org/site/attachments/article/1349/JLCNY%20NYS%20Map%208.7.12.pdf> [accessed Apr. 7, 2014]; see also FracTracker Alliance, Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State: Movements Supporting HVHF, <http://www.fractracker.org/map/ny-moratoria/> [accessed Apr. 3, 2014]).

With respect to the cases at hand, in 2011, defendant Town of Dryden and defendant Town of Middlefield enacted total townwide bans on all oil and gas activities within their borders, including, but not limited to, bans on the exploration, extraction, storage, transportation, processing, and treatment of oil and gas. Underscoring the importance of these cases, other municipalities have followed suit. As the graphic below demonstrates, it is estimated that New York municipalities have enacted 75 bans and 102 moratoria, and that there 87 “movements” for bans and moratoria:



(FracTracker Alliance, Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State: Movements Against HVHF, <http://www.fracktracker.org/map/ny-moratoria/> [last updated Mar. 26, 2014]).¹

¹ A moratorium is a temporary ban (see generally Dept. of State, Land Use Moratoria, http://www.dos.ny.gov/lg/publications/Land_Use_Moratoria.pdf/ [2010]). It is noted that, contrary to the data set forth by FrackTracker Alliance, the moratorium enacted by

In response to defendants' enactments, plaintiff Norse Energy Corporation USA and plaintiff Cooperstown Holstein Corporation commenced the proceedings at issue, arguing that the townwide bans are preempted by State law.² Plaintiffs argue that the townwide bans are expressly preempted given the plain language of the supersession clause, as well as given the legislative intent and statutory history of the OGSML. Relatedly, plaintiffs also argue that the townwide bans are impliedly preempted pursuant to two similar, yet distinct, doctrines. In this regard, plaintiffs argue that the doctrine of field preemption applies given the broad scope and purpose of the OGSML, as well as given the regulations promulgated pursuant thereto and given the application of the State Environmental Quality Review Act (see ECL art 8 [hereinafter SEQRA]). Plaintiffs lastly argue that the doctrine of conflict preemption applies because the regulatory scheme provides that the well permit applicant

the City of Binghamton has since expired (see David Robinson, Binghamton withdraws fracking-ban appeal, Press & Sun Bulletin, Jan. 14, 2014, available at <http://www.pressconnects.com/article/20140114/NEWS01/301140034/Binghamton-withdraws-fracking-ban-appeal>).

² The proceeding against Town of Dryden was initially commenced by Anschutz Exploration Corporation, but “[d]uring the pendency of [the] appeal [to the Appellate Division Third Department], Anschutz assigned its interest in certain oil and gas leases in the Town to [Norse Energy], who was thereafter substituted in the proceeding by order of [the Third Department]” (see Matter of Norse Energy Corp. USA v Town of Dryden, 108 AD3d 25, 28 n 2 [3d Dept 2013], lv granted 21 NY3d 863 [2013] [citations omitted]).

determines the well location in conjunction with DEC oversight, which is in inherent conflict with the townwide bans enacted by defendants.

Defendants' townwide bans are expressly and impliedly preempted as is fully explained with particularity in plaintiffs' briefs on this appeal. Amici curiae's purpose is to make clear that the lower courts erred because affirming townwide bans on all oil and gas activities will lead to numerous detrimental consequences of practical significance, including, among other things, allowing New York's municipalities to drive policy in contradiction to the State's declared interests.

Amici curiae are landowners, farmers, labor unions, municipalities and businesses that believe that decisions regarding the production of New York's natural resources must be made by the experts at the State level and not by New York's municipalities, each possessing varying degrees of expertise, and each making decisions in an individual vacuum without consideration for the important State interests and policies at issue. This Court must reverse the lower courts' decisions so that, if our State leaders so decide, they can bring overwhelming economic and environmental benefits to New York and have an opportunity to help strengthen the nation's

security.³ Relatedly, this Court must reverse so as to not create problematic constitutional issues.

ARGUMENT

I. AFFIRMING TOWNWIDE BANS ON ALL OIL AND GAS ACTIVITIES WILL IN EFFECT FOREVER BAR ALL OIL AND GAS PRODUCTION IN NEW YORK IN CLEAR CONTRADICTION TO STATE LAW AND LEGISLATIVE INTENT.

Given the demands of the State regulatory scheme, as well as given the time and monetary investments required to obtain a well permit and proceed to production, it follows that such production will never occur in New York if municipalities can enact townwide bans on all oil and gas activities. This will be the practical effect of affirming the lower courts' decisions because the process of obtaining a permit and proceeding to production is onerous and takes years of planning. No operator will undertake this investment if municipalities can enact townwide zoning bans in a few short weeks. This result would be contrary to, among other things, the policy objectives of the OGSML – which include “provid[ing] for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had” (ECL 23-0301) – and

³ The United States Environmental Protection Agency supports this general sentiment, stating that the “[r]esponsible development of America’s shale gas resources offers important economic, energy security, and environmental benefits” (United States Env’tl. Protection Agency, Natural Gas Extraction – Hydraulic Fracturing, <http://www2.epa.gov/hydraulicfracturing> [accessed Apr. 3, 2014]).

the policy objectives of the Energy Law – which include “foster[ing], encourag[ing] and promot[ing] the prudent development and wise use of all indigenous state energy resources including . . . on-shore oil and natural gas[, and] natural gas from Devonian shale formations” (Energy Law § 3-101 [5]).

With respect to obtaining a well permit, the OGSML mandates that, prior to even submitting the application, the drilling operator must amass control, typically through leases, of 60% of the acreage in a spacing unit (see ECL 23-0501 [2]). In this regard, to commence with horizontal shale gas drilling, for example, the operator must obtain control over a spacing unit of “up to 640 acres with the initial horizontal wellbore or wellbores within the target formation approximately centered” (ECL 23-0501 [1] [b] [1] [vi]). Further, all spacing units must be “of approximately uniform shape with other spacing units within the same field or pool, and abut[] other spacing units in the same pool, unless sufficient distance remains between units for another unit to be developed” (ECL 23-0503 [2]). To the extent that this uniform shape and spacing requirement is not satisfied, then the DEC – potentially, after an adjudicatory hearing – must “determine [that] the proposed spacing unit satisfies the policy objectives [in the declaration of policy of the OGSML at ECL] 23-0301” (ECL 23-0503 [3]). Moreover, if

after obtaining the permit the operator does not have 100% control over all the owners in the spacing unit, either by lease or voluntary agreement, then there must be a public hearing – to occur prior to drilling – in which, only “after detailed study and analysis,” the DEC must determine that “integration of interests in spacing units . . . is necessary to carry out the policy provisions of [the OGSML at ECL] 23-0301” (ECL 23-0901 [2]).

After the statutory requirements pertaining to the spacing unit are satisfied, the operator must next determine where to locate the well within the spacing unit. In this regard, there are additional legal requirements as well as certain market considerations. With respect to the additional legal requirements, the location of the well within the spacing unit must comply with setback requirements in the OGSML (see ECL 23-0501 [1] [b] [1]) and promulgated in DEC regulations (see 6 NYCRR part 553). These setback requirements dictate the distance between a well and another well (see 6 NYCRR 553.1 [a]), as well as between a well and homes, public buildings, public areas, roads, streets, streams, rivers, and other bodies of water (see 6 NYCRR 553.2). Well locations are also constrained near the boundaries of every leasehold within the spacing unit (see 6 NYCRR 553.1 [a]) as well as near the boundaries of the spacing unit itself (see ECL 23-0501 [1] [b] [1]). Further, in effect, additional setback requirements will exist once the

Revised Draft Supplemental Generic Environmental Impact Statement is finalized (see SGEIS 2011 at pp. 7-55 – 7-56, 7-69 – 7-76, supra).

With respect to market considerations, well operators employ “[g]eologists and geophysicists [to] use seismic data to interpret the formations of rock layers undergrounds. If seismic data suggests a reasonable possibility of efficient gas access, a well [could] be drilled in [that] location” (Cornell Univ. Coop. Extension, Gas Exploration and Leasing on Private Land: Tips and Guidance for New York Landowners at 3,

<http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/PDFs/Gas%20Leasing%20on%20Private%20Land%20Tips.pdf> [last updated July 2008]). In this regard, the geological and seismic data that must be analyzed includes, among other things, the organic composite, temperature, pressure, depth and thickness of the shale formation (see SGEIS 2011 at pp. 4-2 – 4-23, supra). Other market considerations include the potential well site’s location to freshwater supplies – which are required in the drilling process – and the location to pipeline infrastructure – which is required to deliver the extracted gas directly from the well to markets for consumption (see generally SGEIS 2011 at ch 5).

It has been “reported [that] the average cost to drill a well in the Marcellus Shale [is] between \$3 and \$4 million dollars [with t]he highest reported cost . . . between \$4.5 and \$4.7 million dollars” (U.S. Energy Info. Admin., Review of Emerging Resources: U.S. Shale Gas and Shale Oil Plays, <http://www.eia.gov/analysis/studies/usshalegas/pdf/usshaleplays.pdf> [July 2011]). The fact of the matter is that significant amounts of time and money go into obtaining a permit, selecting a well location and completing the construction of the well.

Thus, this raises the next issue of whether an operator will put forward the substantial investment, if the regulatory scheme does not provide some certainty. In this regard, total townwide zoning bans can be enacted with relatively little effort. In general, to enact such a ban by town ordinance or local law:

- the ordinance or law must be introduced by a member of the town board (see e.g. Municipal Home Rule Law § 20 [4]);
- notice of the proposed ordinance or law must be provided, often times by publication in the official newspaper of record (see Town Law § 133; Municipal Home Rule Law § 20 [2], [5]);
- a public hearing on the ordinance or law must occur (see e.g. Town Law § 130; Municipal Home Rule Law § 20 [2], [5]); and

- the ordinance or law must be adopted by a majority of the town board (see Town Law § 133; Municipal Home Rule Law § 20 [1]; see generally Assn. of Towns of the State of New York, Town Manual §§ 6-6; 6-15 – 6-16, at 118-121, 131-139 [2006]).

Similar procedures apply if the adopting municipality is a village, city or county (see generally Municipal Home Rule Law §§ 2 [8], 10; Village Law art 21; Dept. of State, Local Government Handbook [6th ed 2009], available at

http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf).

Moreover, problematic situations exist already in which the views towards natural gas production drastically change from one municipal administration to the next. City of Binghamton's former Mayor was vocally opposed to natural gas development and enacted a moratorium on drilling. The moratorium was struck down by Supreme Court in a decision that was appealed by the City. However, the recently-elected Mayor then swiftly moved to withdraw the City's appeal (see e.g. David Robinson, [Binghamton withdraws fracking-ban appeal](#), Press & Sun Bulletin, Jan. 14, 2014, available at <http://www.pressconnects.com/article/20140114/NEWS01/301140034/Binghamton-withdraws-fracking-ban-appeal>). Binghamton illustrates that

divergent views on energy development can exist within the same municipality, which, if allowed to, will create an impossible climate for investment and completely frustrate the State's energy plans and policies.

Accordingly, insomuch as an operator could invest in complying with the spacing requirements and invest in determining a satisfactory well location, and then in a matter of weeks have that investment upended by a townwide ban, it logically follows that no operator will attempt to produce oil and gas in New York under such an uncertain environment. Thus, if the lower court decisions are not reversed, then oil and gas production will be forever barred in New York in clear contradiction to State law and legislative intent.

II. DEFENDANTS' TOWNWIDE BANS CONSTITUTE UNCONSTITUTIONAL TAKINGS OF LAND INTERESTS.

Understanding that plaintiff Cooperstown Holstein and other landowners throughout New York – including those represented by amici curiae – will be deprived of certain rights in their land if the lower courts' decisions are not reversed, it is apparent that a result will be that such landowners will assert viable claims against towns, like defendants, on the ground that their bans constitute unconstitutional takings of private property without just compensation. Landowners' rights to subsurface oil and gas

reserves constitute private property within the meaning of the New York Constitution, article I, § 7 (a) and the United States 5th and 14th Amendments (cf. S. Berzal & Co. v State of New York, 8 AD2d 886 [3d Dept 1959]). Indeed, Colorado Governor John Hickenlooper, with respect to municipal oil and gas zoning, has stated, “That’s a taking from their own citizens Essentially what they’re saying is, ‘We ban anyone from getting those minerals out from what they bought, from what they paid for.’ It’s not fair” (CBS4 Denver, Hickenlooper Threatens To Sue Any Town, City That Bans Fracking, available at <http://denver.cbslocal.com/2013/02/26/hickenlooper-threatens-to-sue-any-town-city-that-bans-fracking/> [Feb. 26, 2013]).

Takings jurisprudence recognizes that, “even if the government does not seize or occupy a property, a governmental regulation can work a taking if it ‘goes too far’” (Matter of Smith v Town of Mendon, 4 NY3d 1, 9 [2004], quoting Pennsylvania Coal Co. v Mahon, 260 US 393, 415 [1922]; see Palazzolo v Rhode Island, 533 US 606, 617 [2001]; Lucas v. South Carolina Coastal Council, 505 US 1003, 1014 [1992]). A particular government action “goes too far” and, thus, constitutes a taking and requires compensation where “the regulation deprive[s] landowners of all ‘economically viable use’ of their property” (Matter of Smith v Town of

Mendon, 4 NY3d at 9; see Matter of Gazza v New York State Dept. of Env'tl. Conservation, 89 NY2d 603, 616-617 [1997], cert denied 118 S Ct 58 [1997]; Palazzolo v Rhode Island, 533 US at 617; Lucas v. South Carolina Coastal Council, 505 US at 1015-1016).

Even “[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including [(1)] the regulation’s economic effect on the landowner, [(2)] the extent to which the regulation interferes with reasonable investment-backed expectations, and [(3)] the character of the government action” (Palazzolo v Rhode Island, 533 US at 617; accord Matter of Smith v Town of Mendon, 4 NY3d at 9; see Matter of Gazza v New York State Dept. of Env'tl. Conservation, 89 NY2d at 617; Penn Cent. Transp. Co. v City of New York, 438 US 104, 124 [1978]).

With respect to the first factor, townwide bans create a clear economic effect on landowners because the bans totally deny landowners’ ability to obtain revenues from their properties through the leasing and drilling of oil and gas resources.

With respect to the second factor, the townwide bans interfere with investment-backed expectations. New York has many landowners whose property interests are limited to subsurface mineral rights. Many of these

landowners purchased subsurface mineral rights for the express purpose of developing these rights. Townwide bans render these investments worthless and wholly obliterate the specific property interest.

With respect to the third factor, the character of the townwide bans is equal to a municipality appropriating or destroying the natural gas under landowners' properties. Indeed, for landowners whose property interests are limited to subsurface mineral rights, their property interest will be taken in its entirety (see Pennsylvania Coal Co. v Mahon, 260 US at 414 [stating that “[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it”]).

Accordingly, amici curiae identify takings jurisprudence for the Court's consideration, and respectfully urge this Court to reverse the lower courts' decisions and, thus, protect the constitutionally guaranteed rights of New Yorks' landowners.

III. NEW YORK WILL LOSE DOCUMENTED ECONOMIC OPPORTUNITIES IF MUNICIPALITIES ARE ALLOWED TO CONTROL DEVELOPMENT OF THE STATE'S NATURAL RESOURCES.

The economic benefits of high-volume hydraulic fracturing and horizontal drilling can, in general, be distilled to job creation, increased economic activity and additional tax revenues. Indeed, several recent

studies outline that increased oil and gas production results in significant economic benefits. It follows that State leaders must be able to pursue these opportunities if they so decide.

Researchers at Pennsylvania State University, with respect to Pennsylvania, forecasted that:

“[d]uring 2015, the Marcellus gas industry could be generating more than \$17 billion in [economic] value added, \$1.6 billion in state and local tax revenues, and supporting more than 215,000 jobs. In 2020, the projected impacts grow even larger with more than \$20 billion in [economic] value added, \$2 billion in state and local tax revenue, and a Marcellus-supported workforce of 250,000”

(Timothy J. Conside et al., Pennsylvania State Univ., Coll. of Earth and Min. Sciences, Dept. of Energy and Min. Eng’g, The Pennsylvania Marcellus Natural Gas Industry: Status, Economic Impacts and Future Potential at 30-31, <http://marcelluscoalition.org/wp-content/uploads/2011/07/Final-2011-PA-Marcellus-Economic-Impacts.pdf> [July 20, 2011]).

Another study published by the Manhattan Institute analyzed several states and, with respect to past economic benefits, made the following determinations:

State	Shale Play	Year	Job Gains
Arkansas	Fayetteville	2008	9,683
Louisiana	Haynesville	2009	57,637
Texas	Barnett	2008	132,497
Pennsylvania and West Virginia	Marcellus	2009	57,357

Thousands of 2010 Dollars per well				
	Direct	Indirect	Induced	Total
Value Added	2,792	1,166	1,502	5,460
Taxes				2,036
Number of Jobs per well				
Employment	31	12	19	62

Source: Calculations based upon Considine, Watson, and Blumsack (2010)

(see Timothy J. Considine et al., Ctr. for Energy Policy & Envt. at Manhattan Inst., The Economic Opportunities of Shale Energy Development at 6, http://www.manhattan-institute.org/pdf/eper_09.pdf [June 2011]).

Moreover, with respect to New York, this same study published by the Manhattan Institute noted that the Southern Tier and Western New York hemorrhaged 48,000 payroll jobs between 2000 and 2010, but forecasted that ending New York’s moratorium would spur over \$11.4 billion in economic output and create 15,000 to 18,000 jobs in these regions (see id. at Executive Summary, 21). The study also forecasted that expanding exploration and drilling to the Utica Shale and southeastern New York would create an additional 75,000 to 90,000 jobs (see id. at Executive Summary). Further, “[l]ocalities and the [S]tate stand to reap \$1.4 billion in

tax revenues if the moratorium is allowed to expire” (see id. at Executive Summary, 21).

Also specifically with respect to New York, a report prepared for Broome County in September 2009, forecasted the following:

**Economic and Fiscal Impacts of Gas Production Activities
In Broome County, New York
Average Annual Impact Over a 10-Year Period**

Description	Impact 2,000 Wells	Impact 4,000 Wells
Total Spending	\$ 1,853,785,000	\$ 3,707,570,000
Total Economic Activity	\$ 2,060,198,000	\$ 4,120,397,000
Total Wages, Salaries, Benefits (labor income)	\$ 156,758,000	\$ 313,516,000
Total Employment (person years)	2,190	4,380
Total Property Income*	\$ 119,622,000	\$ 238,640,000
State Taxes ⁺	\$ 13,622,000	\$ 27,244,000
Local Taxes ⁺	\$ 12,574,000	\$ 25,149,000

** Includes royalties, rents, dividends, and corporate profits. + Includes sales, excise, property taxes, fees, and licenses.*

(see Bernard L. Weinstein & Terry L. Clower, Potential Economic and Fiscal Impacts from Natural Gas Production in Broome County, New York, http://www.gobroomecounty.com/files/countyexec/Natural%20Marcellus-Broome_County_7_10_09%5B1%5D.pdf [Sept. 2009]).

Other recent reports support the overall correlation between increased oil and gas development, and job creation, income growth and increased economic activity (see IHS, America’s New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, <http://www.ihs.com/info/ecc/a/americas-new-energy-future-report-vol-3.aspx> [Sept. 2013]; Diana Furchtgott-Roth & Andrew Gray, Empire Ctr. for New York State Policy, Manhattan Inst. for Policy Research, The Economic

Effects of Hydrofracturing on Local Economies: A Comparison of New York and Pennsylvania,
<http://www.empirecenter.org/Documents/PDF/economicgrowth.pdf> [May 2013]).

Many of the above findings are incorporated into the Revised Draft Supplemental Generic Environmental Impact Statement, which itself offers specific examples detailing the potential economic benefits (see SGEIS 2011 at pp. 2-6 – 2-7, supra). The specific examples include the lease bonuses and royalties paid to landowners, the increase in construction activities, and the tax revenue, thereby, generated to the State (see SGEIS 2011 at pp. 2-6 – 2-7, supra).

As alluded to above, municipalities in New York will also derive certain specific tax revenues, as unlike Pennsylvania, New York has a real property ad valorem tax to the exclusive benefit of the municipalities and special districts where the oil and gas is actually extracted (see RPTL 590-597; see generally Matter of Nornew, Inc. v Marsh, 301 AD2d 206, 211-212 [4th Dept 2002]; Dept. of Taxation and Fin., Overview Manual for Valuation and Assessment of Oil and Gas Producing Property in New York State [Jan. 2013], available at <http://www.tax.ny.gov/pdf/publications/orpts/oilgasoverviewmanual.pdf>).

The documented economic benefits of increased oil and gas production include more jobs, increased economic activity and additional tax revenue, all important interests that our State leaders must be permitted to pursue if they so decide. These opportunities will be entirely foreclosed if decisions about the development of our State's natural resources can be made by just a few of New York's 932 towns and 62 cities.

IV. DEFENDANTS' TOWNWIDE BANS ARE UNCONSTITUTIONAL PURSUANT TO THE DORMANT COMMERCE CLAUSE DOCTRINE.

Given the enormous economic impacts at issue, it follows that the townwide bans on all oil and gas activities are an excessive burden on interstate commerce and, thus, violate the dormant Commerce Clause doctrine. Since "Congress shall have Power to [t]o regulate Commerce . . . among the several States" (US Const, art VIII, § 3), it "has long been understood [that the Commerce Clause provides] a 'negative' or 'dormant' power that prevents individual States [and municipalities] from interfering with, or discriminating against, interstate trade" (City of New York v State of New York, 94 NY2d 577, 596 [2000]; see e.g. United Haulers Assn., Inc. v Oneida-Herkimer Solid Waste Mgt. Auth., 550 US 330, 334-347 [2007]). "The central rationale for the rule . . . is to prohibit state or municipal laws whose object is local economic protectionism, [and] laws that would excite

those jealousies and retaliatory measures [that] the Constitution was designed to prevent” (C&A Carbone, Inc. v Town of Clarkstown, N.Y., 511 US 383, 390 [1994]).

The townwide bans – while not necessarily discriminatory per se – nonetheless violate the dormant Commerce Clause doctrine if they impose a burden on commerce which is clearly excessive in relation to the purported local benefits (see generally Pike v Bruce Church, Inc., 397 US 137, 142 [1970]; Homier Distrib. Co. v City of Albany, 90 NY2d 153, 158-159 [1997]). As outlined previously, the burden imposed on commerce will be enormous because these bans will in effect bar the oil and gas industry from New York, even though this industry provides significant, documented economic benefits to businesses, the labor force, municipalities and landowners, throughout the Northeast (see Meredith Wegener, Drilling Down: New York, Hydraulic Fracturing, and the Dormant Commerce Clause, 28 BYU J Pub L ___ [forthcoming Apr. 2014]). Moreover, given the broad application of defendants’ bans, which curtail transportation and pipeline activities, there will be direct burdens on interstate commerce (see U.S. Energy Info. Admin., Natural Gas Pipelines in the Northeast Region, http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipelin e/northeast.html [accessed Apr. 16, 2014]). When these economic losses are

coupled with New York's consumption of natural gas – in effect the fourth most in the United States – the burden on interstate commerce cannot be understated (see U.S. Energy Info. Admin., Natural Gas Consumption by End Use, http://www.eia.gov/dnav/ng/ng_cons_sum_a_EPG0_VC0_mmcfc_a.htm [last updated Mar. 31, 2014]).

Lastly, critical to this constitutional concern is that less restrictive means are available to defendants to advance their purported local goals. Accordingly, amici curiae identify the dormant Commerce Clause doctrine for the Court's consideration because, when balancing the enormous burden on interstate commerce with the purported local benefits, the townwide bans are clearly excessive and, thus, unconstitutional.

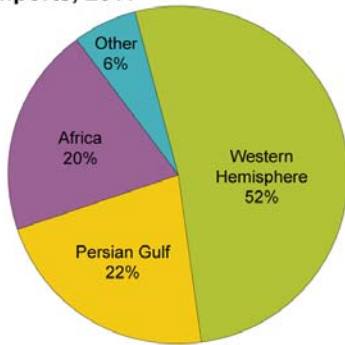
V. OIL AND GAS PRODUCTION USING HIGH-VOLUME HYDRAULIC FRACTURING AND HORIZONTAL DRILLING BENEFITS NATIONAL SECURITY AND THE ENVIRONMENT.

High-volume hydraulic fracturing and horizontal drilling are simply technological advancements that allow for greater access, recovery, and production of oil and gas resources, here, in the United States (see SGEIS 2011 at Executive Summary, pp. 1-4, supra; see also Am. Petroleum Inst., Hydraulic Fracturing Well Construction, <http://www.api.org/policy-and-issues/policy-items/exploration/hydraulic-fracturing-well-construction.aspx>

[accessed Apr. 17, 2014]). This Court should reverse the lower courts' decisions because State leaders should be able to decide whether to use these advancements to help address serious national security and environmental concerns.

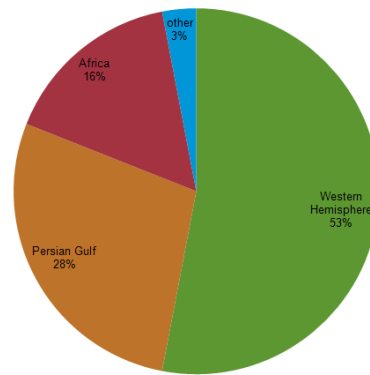
With respect to national security, it is noted that in 2012 the United States was the “world’s largest petroleum consumer” as it consumed 18.6 million barrels per day of crude oil and other petroleum products (U.S. Energy Info. Admin., How dependent are we on foreign oil?, http://www.eia.gov/energy_in_brief/article/foreign_oil_dependence.cfm [last updated May 10, 2013]). In order to meet this demand, in 2012 the United States imported 11.0 million barrels per day of crude oil and other petroleum products (*id.*). As demonstrated in the graphics below, only about half of these imports came from the Western Hemisphere; whereas, over 40% was imported from the Persian Gulf and Africa. It is well known and well documented that dependence on imports from foreign governments represents a major threat to our national security.

Sources of U.S. Net Petroleum Imports, 2011



Source: U.S. Energy Information Administration, *Petroleum Supply Monthly* (February 2012), preliminary data.

Sources of U.S. net petroleum imports, 2012



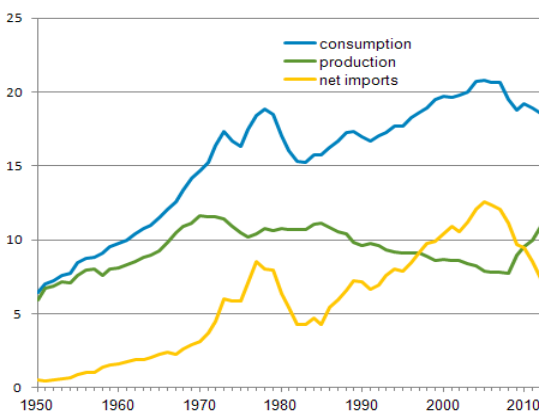
Source: U.S. Energy Information Administration, *Petroleum Supply Monthly* (February 2013).



(see [id.](#); see also U.S. Energy Info. Admin., U.S. Net Imports by Country, http://www.eia.gov/dnav/pet/pet_move_net_i_a_EP00_IMN_mbb1pd_m.htm [accessed Apr. 2, 2014]).

However, as demonstrated in the graphics below, the United States’ dependence on foreign petroleum products has been declining – since peaking in 2005 – in part, because of the recent increase in domestic production of crude oil and natural gas:

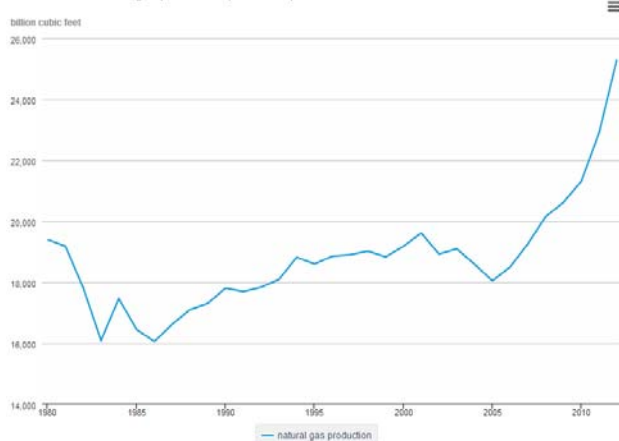
U.S. petroleum and other liquids consumption, production, and net imports (1950-2012)
million barrels per day



Source: U.S. Energy Information Administration, *Monthly Energy Review*, Table 3.1 (April 2013), preliminary 2012 data, and *Annual Energy Review*, Table 5.1b (August 2012).



United States natural gas production (1980-2012)



(see U.S. Energy Info. Admin., How dependent are we on foreign oil?, http://www.eia.gov/energy_in_brief/article/foreign_oil_dependence.cfm [last updated May 10, 2013]; U.S. Energy Info. Admin., Overview Data for the United States, <http://www.eia.gov/countries/country-data.cfm?fips=US&trk=p1#cde> [last updated May 30, 2013]).

The advantages and efficiencies resulting from high-volume hydraulic fracturing and horizontal drilling are largely responsible for the increasing access and recovery of these domestic energy sources (see e.g. The Economist, The economics of shale oil: Saudi America, <http://www.economist.com/news/united-states/21596553-benefits-shale-oil-are-bigger-many-americans-realise-policy-has-yet-catch> [Feb. 15, 2014]).

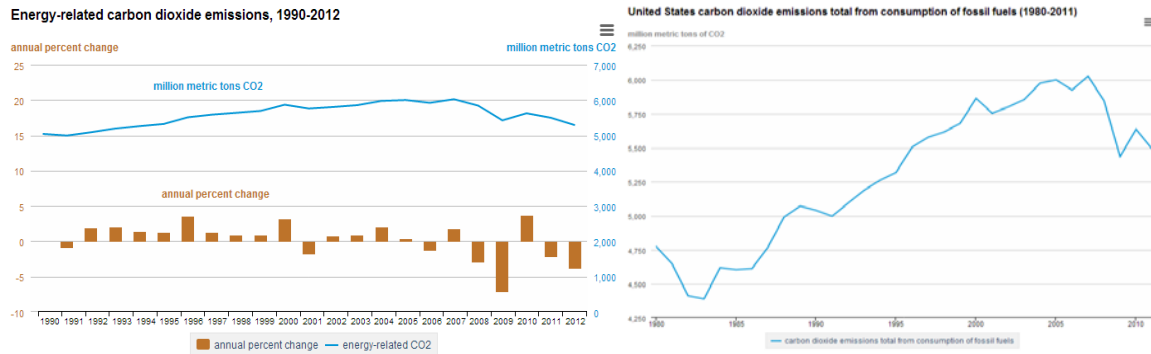
Accordingly, our national leaders have expressed overwhelming support for high-volume hydraulic fracturing and horizontal drilling. In the 2013 State of the Union Address, President Obama stated that “the natural gas boom has led to cleaner power and greater energy independence” (Remarks by the President in the State of the Union Address, <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> [Feb. 12, 2013]).

Tom Donilon, National Security Advisor to the President, has opined that “[i]ncreasing U.S. energy supplies act as a cushion that helps reduce our vulnerability to global supply disruptions and price shocks. It also affords us a stronger hand in pursuing and implementing our international security

goals” (Remarks by Tom Donilon, National Security Advisor to the President at the Launch of Columbia University’s Center on Global Energy Policy, <http://www.whitehouse.gov/the-press-office/2013/04/24/remarks-tom-donilon-national-security-advisor-president-launch-columbia-> [Apr. 24, 2013]).

Former Secretary of State Hillary Clinton, with respect to the United States being on track to surpass Russia in domestic oil and gas production, has stated, “That’s good news. . . . What that means for viable manufacturing and industrialization in this country is enormous” (Jon Campbell, [In Oneida County, Hillary Clinton touts U.S. oil-and-gas production](http://www.democratandchronicle.com/story/vote-up/2013/10/07/in-oneida-county-hillary-clinton-touts-u-s-oil-and-gas-production/2936949/), Democrat and Chronicle, Oct. 8, 2013, available at <http://www.democratandchronicle.com/story/vote-up/2013/10/07/in-oneida-county-hillary-clinton-touts-u-s-oil-and-gas-production/2936949/>).

Next, the increasing use of domestic natural gas has significant environmental benefits. As the graphics below demonstrate, the United States has recently begun achieving reductions in its carbon dioxide emissions:



(see U.S. Energy Info. Admin., U.S. Energy-Related Carbon Dioxide Emissions, 2012, <http://www.eia.gov/environment/emissions/carbon/> [last updated Oct. 21, 2013]; U.S. Energy Info. Admin., Overview Data for the United States, <http://www.eia.gov/countries/country-data.cfm?fips=US&trk=p1#cde> [last updated May 30, 2013]).

This progress is significant as reports indicate that emissions levels are now similar to that of several decades ago (see U.S. Energy Info. Admin., U.S. energy-related CO₂ emissions in early 2012 lowest since 1992, http://www.eia.gov/todayinenergy/detail.cfm?id=7350#tabs_co2emissions-3 [Aug. 1, 2012]).

This achievement in the reduction of carbon dioxide emissions is attributed largely to increased natural gas production. “[T]he generation of electricity . . . is an important source of emissions[, and] the carbon intensity of power generation . . . fell by 3.5 percent [in 2012] due largely to the increase in the share of natural gas generation relative to coal generation”

(U.S. Energy Info. Admin., U.S. Energy-Related Carbon Dioxide Emissions, 2012, <http://www.eia.gov/environment/emissions/carbon/> [last updated Oct. 21, 2013]; see Intl. Energy Agency, Global carbon-dioxide emissions increase by 1.0 Gt in 2011 to record high, <http://www.iea.org/newsroomandevents/news/2012/may/name,27216,en.html> [May 24, 2012]).

Indeed, it is without much dispute that increasing domestic natural gas production will lower carbon dioxide emissions in the United States because natural gas emits significantly less carbon dioxide relative to other fuel sources, particularly coal and petroleum (see U.S. Energy Info. Admin., Frequently Asked Questions: How much carbon dioxide (CO₂) is produced per kilowatthour when generating electricity with fossil fuels, <http://www.eia.gov/tools/faqs/faq.cfm?id=74&t=11> [accessed Apr. 7, 2014]; see also U.S. Energy Info. Admin., U.S. energy-related CO₂ emissions in early 2012 lowest since 1992, http://www.eia.gov/todayinenergy/detail.cfm?id=7350#tabs_co2emissions-3 [Aug. 1, 2012] [providing graphs comparing emissions from coal, natural gas and petroleum]).

With respect to renewable energy, it has become apparent that these energy sources are not achieving significant reductions in carbon dioxide

emissions because the overall costs are simply not competitive (see Stephen Castle, Europe, Facing Economic Pain, May Ease Climate Rules, NY Times, Jan. 22, 2014, available at http://www.nytimes.com/2014/01/23/business/international/european-union-lowers-ambitions-on-renewable-energy.html?_r=0; see also U.S. Energy Info. Admin., Levelized Cost of New Generation Resources in the Annual Energy Outlook 2013, http://www.eia.gov/forecasts/aeo/pdf/electricity_generation.pdf [Jan. 2013]). Accordingly, “since 2006 [the United States has achieved] the largest reduction [in carbon dioxide emissions] of all countries or regions [because of, among other things,] a substantial shift from coal to [natural] gas in the power sector” (Intl. Energy Agency, Global carbon-dioxide emissions increase by 1.0 Gt in 2011 to record high, <http://www.iea.org/newsroomandevents/news/2012/may/name,27216,en.html> [May 24, 2012]).

Accordingly, our national leaders have embraced the environmental benefits of high-volume hydraulic fracturing and horizontal drilling. In the 2014 State of the Union Address, President Obama said natural gas is “the bridge fuel that can power our economy with less of the carbon pollution that causes climate change” (President Barack Obama’s State of the Union

Address, <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> [Jan. 28, 2014]).

United States Energy Secretary Ernest Moniz has affirmed that “[n]atural gas produced by [hydraulic fracturing] has boosted American industry by more than \$100 billion and lowered [carbon dioxide] emissions” (Scott Waldman, Capital, U.S. energy secretary says fracking brings prosperity,

<http://www.capitalnewyork.com/article/albany/2014/02/8540411/us-energy-secretary-says-fracking-brings-prosperity> [Feb. 18, 2014]).

United States Interior Secretary Sally Jewell has said that “[hydraulic fracturing] absolutely can be done and has been done safely and responsibly” (Mark Stricherz, Colorado Observer, Jewell’s Remarks on Fracking Buoy Backers, <http://thecoloradoobserver.com/2014/04/jewells-remarks-on-fracking-buoy-backers/> [Apr. 4, 2014]).

These enormous national security and environmental benefits to our State and our nation will never be achieved through a municipal “not in my back yard approach” to energy. Only a uniform and intentional approach to the production and development of oil and gas, conducted by State leaders, can ensure a balance between the protection of our natural resources and the efficient use of our energy resources.

VI. THE ACTIONS OF THE CITY OF DUNKIRK COMMON COUNCIL DEMONSTRATE THE LEGAL AND POLICY ARGUMENTS IN FAVOR OF PREEMPTION.

The City of Dunkirk is the leading example of the need for State preemption over municipal attempts to ban oil and gas production.

Citing the economic, national security and environmental benefits of natural gas production, an agreement was reached by the State in December 2013 that will convert the aging coal-fired Dunkirk Power Plant in Western New York into a natural gas facility (see Melinda Miller & Susan Chiappone, [NRG Power Plant to stay open, setting off glee in Dunkirk](http://www.buffalonews.com/city-region/chautauqua-county/nrg-power-plant-to-stay-open-setting-off-glee-in-dunkirk-20131215), Buffalo News, Dec. 15, 2013, available at <http://www.buffalonews.com/city-region/chautauqua-county/nrg-power-plant-to-stay-open-setting-off-glee-in-dunkirk-20131215>; David Robinson, [Report backs conversion of Dunkirk power plant to natural gas: NRG wants facility to run on natural gas](http://www.buffalonews.com/20130326/report_backs_conversion_of_dunkirk_power_plant_to_natural_gas), Buffalo News, Mar. 26, 2013, available at http://www.buffalonews.com/20130326/report_backs_conversion_of_dunkirk_power_plant_to_natural_gas.html). Governor Andrew Cuomo stated, “This agreement will result in a larger, cleaner power plant . . . that will meet reliability needs, reduce costs for consumers, create jobs and stabilize the local property tax base” (Governor Andrew M. Cuomo, Governor Cuomo Announces Dunkirk Power Plant to be Repowered and Expanded to Cost

Effectively Meet Reliability Needs, Restoring Payments to Local Governments and Preserving Jobs, <http://www.governor.ny.gov/press/12152013-dunkirk-power-plant> [Dec. 15, 2013]).

However, shortly thereafter, in March 2014, the City of Dunkirk Common Council unanimously passed a resolution “enacting a citywide ban from any activity that involves the process of hydraulic horizontal fracturing drilling” (Dunkirk Resolution #25-2014, available at <http://www.dunkirktoday.com/wp-content/uploads/cc-03-18-14.pdf> [accessed Apr. 3, 2014]; see Tina Zboch, Common Council Enacts Citywide Ban on Fracking, Chautauqua Today, Mar. 19, 2014, available at <http://www.chautauquatoday.com/news/details.cfm?clientid=25&id=118573#.Uz1gJfldVDA>). Mindful that defendants have broadly banned all pipe infrastructure and any processing or treatment of natural gas, the circumstances in Dunkirk illustrate that – if this Court does not reverse – New York municipalities could upend the State’s economic development initiatives, energy policies and environmental directives by prohibiting where oil and gas activities can occur. This result would be illogical and be counterproductive.


Similarly, this Court has held that the Public Service Law preempts municipalities – pursuant to the doctrine of field preemption – from requiring local approvals with respect to the siting of electric generating facilities (see Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 102-107 [1983]). For some of the reasons contained therein, and as demonstrated by the actions of the Dunkirk Common Council, this Court should reverse the lower courts’ decisions.

CONCLUSION

Amici curiae respectfully request that this Court reverse the lower courts’ decisions. In addition to the lower courts’ misapplications of the legal preemption issues, the practical, policy and constitutional consequences outlined herein further support the preemption of townwide bans on all oil and gas activities. New York has an overriding State interest in the development and promotion of its oil and gas reserves, it has a need for Statewide uniformity, and it has comprehensive State law that supersedes restrictive and inconsistent local laws and ordinances. Decisions about how to develop New York’s natural resources must be made by the State and the DEC, and not by municipalities.

Dated: April 18, 2014

LEVENE GOULDIN & THOMPSON, LLP

By: 

Scott R. Kurkoski, Esq.

Office Address:

450 Plaza Drive

Vestal, NY 13850

Mailing Address:

P.O. Box F-1706

Binghamton, NY 13902-0106

Telephone: (607) 763-9200

Fax: (607) 763-9211