SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

NORSE ENERGY CORP. USA, *Petitioner-Plaintiff-Appellant,* For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Laws and Rules, *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents-Defendants-Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae, *Proposed Intervenor-Cross-Appellant.*	Case No. 2012-1015 Tompkins County Index No. 2011-0902

NOTICE OF MOTION OF
THE AMERICAN PETROLEUM INSTITUTE, ET AL.
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER-PLAINTIFF-APPELLANT

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Lowell J. Schiller, sworn to the 16th day of October, 2012 ("Schiller Affirmation") and the proposed amicus curiae brief attached as an exhibit thereto, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 29th day of October, 2012, for an order granting the American Petroleum Institute, the Chamber Of Commerce Of The United States Of America, and the Independent Oil and Gas Association of New York leave to file the brief attached as Exhibit A to the Schiller

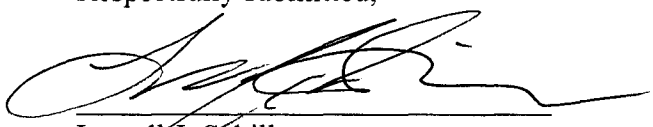
Affirmation as *amici curiae* in support of the Petitioner-Plaintiff-Appellant in the above-captioned action, and for such other and further relief as the court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2(a) answering papers, if any, must be filed before 11 :00 a.m. on Friday, October 26, 2012.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2(a) this motion will be submitted on the papers and that personal appearance in opposition to the motion is neither required nor permitted.

Dated: Washington, D.C.
October 16, 2012

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

NORSE ENERGY CORP. USA, *Petitioner-Plaintiff-Appellant,* For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Laws and Rules, *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents-Defendants-Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae, *Proposed Intervenor-Cross-Appellant.*	Case No. 2012-1015 Tompkins County Index No. 2011-0902

AFFIRMATION OF LOWELL J. SCHILLER IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-PLAINTIFF-APPELLANT

LOWELL J. SCHILLER, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an associate at the law firm of Sidley Austin LLP, and I submit this affirmation in support of the Motion of the American Petroleum Institute, the Chamber Of Commerce Of The United States Of America, and the Independent Oil and Gas

Association of New York (collectively, "Proposed *Amici*") for Leave to File Brief as *Amici Curiae* in Support of Petitioner-Plaintiff-Appellant in the above-captioned action.

2. Attached hereto as Exhibit A is a copy of the brief that Proposed *Amici* wish to submit to the Court (the "brief"). Proposed *Amici* have duly authorized me to submit this brief on their behalf.

3. Proposed *Amici* seek leave to file the brief because this appeal presents questions of law that are of great importance to Proposed *Amici* and their members. Specifically, Proposed *Amici* and their members have an interest in ensuring that New York's Oil, Gas and Solution Mining Law, ECL § 23-0101 *et seq.* (the "Oil and Gas Law"), is properly interpreted to prohibit local zoning authorities from enacting laws and ordinances that ban oil and gas drilling within their borders and, in particular, that the complete ban enacted in the Town of Dryden is held invalid. The interests of individual Proposed *Amici* are set forth in greater detail in the attached brief.

4. Each Proposed *Amicus* is a trade association or business federation that engages in advocacy on behalf of the oil and gas industry. Collectively, Proposed *Amici* have significant expertise in both technical and regulatory issues related to oil and gas development.

5. Given Proposed *Amici*'s substantial interest and expertise as described above and in the attached brief, I respectfully submit that the brief will be of special assistance to the Court in determining the proper interpretation of the Oil and Gas Law. The brief presents law or arguments that might otherwise escape the Court's consideration by expanding upon and elaborating the arguments in support of reversing the decision below in the above-captioned action. Accordingly, I respectfully request that

the instant motion be granted in all respects and that Proposed *Amici* be given leave to file the attached brief in this appeal.

AFFIRMED: Washington, D.C.
October 16, 2012

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

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PROPOSED BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE INDEPENDENT OIL AND GAS ASSOCIATION OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

No. 2012-1012

Supreme Court

State of New York
Appellate Division – Third Department

NORSE ENERGY CORP. USA,

Petitioner-Plaintiff-Appellant,

For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Laws and Rules,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents-Defendants-Respondents,

-and-

DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae,

Proposed Intervenor-Cross-Appellant.

Tompkins County Index No.: 2011-0902

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE INDEPENDENT OIL AND GAS ASSOCIATION OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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October 16, 2012

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INTEREST OF *AMICI*

The American Petroleum Institute ("API") is a national trade association representing more than 500 companies involved in all aspects of the oil and natural gas industry. America's oil and natural gas industry comprises more than 7.7% of the U.S. economy, supports 9.2 million domestic jobs, delivers more than $86 million a day in revenue to the U.S. government, and since 2000 has invested more than $2 trillion in U.S. capital projects to advance all forms of energy, including alternative energy. API's member companies include natural gas producers, processors, suppliers, pipeline operators, and service and supply companies. API's members have made substantial financial investments in New York in order to develop the State's natural gas resources.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, from every region of the country, and in every industry, including the oil and gas industry. An important function of the Chamber is to represent the interests of its members in matters before the political branches and the courts. To that end, the Chamber regularly files amicus curiae briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

The Independent Oil and Gas Association of New York ("IOGA of NY") represents oil and gas professionals to the citizens and lawmakers of New York State. Membership includes producers, operators, engineers, consultants, landowners and allied businesses and individuals. Headquartered in suburban Buffalo, IOGA of NY advocates for industry and educates the public through community outreach.

Amici's members have a significant interest in developing natural gas across the State. Unless impediments such as Dryden's ordinance are held invalid, as they were long understood by industry to be, then further investments, hiring, and other economic activity cannot be pursued by oil and gas developers in the state. The natural gas industry can play a key role in New York's recovery from the economic downturn by creating jobs.

Amici and their members have a direct interest in the validity of both Dryden's complete prohibition on oil and gas drilling within its borders and the reasoning of the decision on review, which upheld the prohibition under a rationale that, if left in place, would impede access to resources in a critical area and leave important, highly technical regulatory matters to the judgment of local zoning authorities. This result would significantly impact New York's ability to ensure the effective recovery of underground resources located in geological formations that obviously do not correspond to municipal borders. Indeed, the ability of local zoning authorities to interfere with a state government's management of these cross-jurisdictional resources is a question of national importance that has arisen in numerous states. *See, e.g.*, *Northeast Natural Energy v. City of Morgantown*, No. 11-C-411 (Cir. Ct., Monongalia County W. Va. Aug. 12 2011) (order granting summary judgment), at 8 ("*Morgantown* S.J. Order") (holding that although "the City [of Morgantown, West Virginia] has an interest in the control of its land within its municipal borders," it lacks the power to prohibit extraction through the technique of hydraulic fracturing); Complaint for Declaratory Relief, *Colo. Oil & Gas Conservation Commn. v. City of Longmont* (Boulder County Colo. Dist. Ct. July 30, 2012), *available at* http://extras.mnginteractive.com/live/media/site46/2012/0730/20120730_051916_Longmont%20Oil%20&%20Gas%20Complaint%207-30-12.pdf. *Amici* and their members have a vital interest in ensuring that the development of natural resources across the State of New

York and the myriad economic benefits that flow from it is not held hostage by a patchwork of unjustified and unnecessary local bans and regulations.

INTRODUCTION AND SUMMARY

The State of New York's vast gas reserves can be recovered safely and cost-effectively through the use of hydraulic fracturing and directional drilling. These technologies, which have been used successfully and safely in New York for decades,[1] involve drilling a deep vertical well, then extending the well bore directionally into the shale where the gas is located. After a protective casing is cemented into the well, fluids and a "proppant" (usually sand) are pumped into the well bore at high pressure to create small fractures in the shale from which trapped gas can flow once the water is removed. Once a well is completed, rigs and other equipment are removed, leaving a structure about the size of a two-car garage to support production over the life of the well.[2] Through proper design of elements such as the depth, location, and casing of the well, these techniques have been utilized in a manner that minimizes surface impacts and, as recently confirmed by federal and state regulators, does not pose a threat to drinking water.[3]

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[1] *See* N.Y. State Dep't of Envtl. Conservation, *Marcellus Shale*, http://www.dec.ny.gov/energy/46288.html.

[2] *See id. See also* EnergyFromShale.org, *How Fracking Works*, (http://www.energyfromshale.org/what-is-fracking; API, *The Facts about Hydraulic Fracturing and Seismic Activity*, http://www.api.org/~/media/Files/Policy/Hydraulic_Fracturing/Facts-HF-and-Seismic-Activity.ashx.

[3] *See Challenges Facing Domestic Oil and Gas Development: Review of Bureau of Land Management/U.S. Forest Service Ban on Horizontal Drilling on Federal Lands: Hearing before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources and the Subcomm. on Conservation, Energy and Forestry of the H. Comm. on Agriculture*, 112th Cong. 27 (July 8, 2011) (BLM Director Bob Abbey testimony that BLM "has never seen any evidence of impacts to groundwater ... from the use of fracking technology on wells that have been approved by" BLM and "that based upon the track record so far, [hydraulic fracturing] is safe."); *Pain at the Pump: Policies that Suppress Domestic Production of Oil and Gas: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 87 (May 24, 2011) (EPA Administrator Lisa Jackson testimony that there is no "proven case where the fracking process itself has affected water"); Energy in Depth, *EPA's Lisa Jackson on Safe Hydraulic Fracturing* (Apr. 30, 2012), http://www.youtube.com/watch?v=_tBUTHB_7Cs&feature=youtu.be (EPA Administrator Jackson confirming more recently in an interview that "in no case have we made a definitive determination that the fracking process has caused chemical contamination of groundwater"). *See also Energy Policy Act of 2005: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. 115-16 (2005) (statement of Hon. Victor Carrillo, Chairman, Railroad Commission of Texas) (citing survey by the Interstate Oil and Gas Compact Commission showing that no instance of harm to drinking water had been found in over one million hydraulic fracturing operations nationwide).

The decision below threatens the effectiveness of oil and gas drilling in New York by disturbing the Legislature's allocation of regulatory authority over this activity. Consistent with the principles just described, the Oil, Gas and Solution Mining Law, ECL § 23-0101 *et seq.* (the "Oil and Gas Law"), vests that authority exclusively in the New York State Department of Environmental Conservation ("NYSDEC" or "the Department"), *e.g.*, ECL § 23-0501, and expressly preempts "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries," except those relating to "local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2). Despite this clear language, the Supreme Court upheld a zoning regulation that imposed a town-wide ban on oil and gas drilling. In so ruling, the court reasoned that, under the Oil and Gas Law, "laws governing 'how' [operations are conducted] are preempted, but not those governing 'where.'" *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 462 (Sup. Ct., Tompkins County 2012). If upheld, this decision would reassign this regulatory authority to hundreds—if not thousands—of municipal, county, and other local bodies, in contravention of long-standing, duly-enacted state law.

In concluding that municipalities may regulate where exploration occurs, the Supreme Court badly misconstrued—and, indeed, defeated a central purpose of—the Oil and Gas Law. By its plain terms, the Oil and Gas Law draws no distinction between local laws that regulate *where* hydraulic fracturing occurs and local laws that regulate *how* it occurs. Instead, the statute broadly preempts "*all* local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." ECL § 23-0303(2) (emphasis added). The Legislature confirmed the breadth of this provision by excepting from its scope only two kinds of local laws, those that concern either roads or local property taxes. These discrete, specific exceptions only reinforce

that the otherwise broad language of the preemption provision must extend to local land-use ordinances, and preempt any that, like the ordinance at issue here, "relat[e] to the regulation of the . . . gas . . . industr[y]." The NYSDEC has confirmed this plain meaning, by issuing regulations governing the location of natural gas wells, *e.g.*, 6 NYCRR part 553, and proposing new draft regulations that make the scope of its regulatory oversight regarding the location of wells even clearer.

The Supreme Court nevertheless suggested that it was appropriate to construe the Oil and Gas Law's preemption clause narrowly because the statute "does not contain a clear expression of legislative intent to preempt local zoning authority." 35 Misc. 3d at 466. The assumption that such an expression is required, however, is based on a fundamental misunderstanding of New York's constitutional structure. Under the Constitution, local governments may only enact zoning laws that are "not inconsistent" with "the provisions of this constitution or any general law." NY Const. art. IX, § 2(c). *See Wambat Realty Corp. v. State*, 41 N.Y.2d 490 (1977). Because the Oil and Gas Law expressly and unambiguously prohibits *all* local laws regulating where drilling occurs, Dryden's zoning law is inconsistent with "general law" and thus invalid. That conclusion cannot be avoided on the basis of decisions of the Court of Appeals interpreting different preemption language under different statutory schemes, and it certainly cannot be avoided on the basis of decisions from other states.

In addition, Dryden's regulation is invalid under well-settled principles of implied preemption. A local law or ordinance is preempted if it (1) regulates in a field of exclusive state authority or (2) conflicts with a state statute because it undermines its purpose, prohibits permissible conduct, or interferes with its operation. *See, e.g., Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983). Dryden's blanket prohibition on a wide swath of oil, gas,

and related activities does all these things. If allowed to stand, the Supreme Court's decision below will have far-reaching adverse consequences that extend well beyond Dryden's own borders.

ARGUMENT

I. THE SUPREME COURT ERRED IN CONCLUDING THAT NEW YORK'S OIL AND GAS LAW DOES NOT EXPRESSLY PREEMPT DRYDEN'S ZONING REGULATION

A. The Oil and Gas Law Expressly Preempts Dryden's Zoning Regulation.

Dryden's zoning regulation is invalid because it is expressly preempted by the Oil and Gas Law. This understanding is compelled by the statute's unambiguous text and structure and by its clear delegation of exclusive regulatory authority on the matter to NYSDEC.

The Oil and Gas Law was first enacted in 1963 to serve several related purposes: (1) to "regulate the development, production and utilization of natural resources of oil and gas"; (2) to "provide for the operation and development of oil and gas properties" so as to promote "a greater ultimate recovery" of those resources; and (3) to protect "the correlative rights of all owners." ECL § 23-0301. It sets forth a detailed and comprehensive statutory scheme that, *inter alia*, requires permits for oil and gas wells, *id.* § 23-0501, specifies precise depth and spacing limits for different types of wells, *id.* § 23-0503, and provides for integration of properties to protect owners' correlative rights, *id.* §§ 23-0701, 23-0901. It also empowers NYSDEC to issue regulations and orders as necessary to promote the efficient recovery of oil and gas resources, and to prevent or remedy any pollution or other damage relating to the recovery of those resources. *Id.* § 23-0305.

The statute imposes express restrictions on local laws concerning the gas industry. In 1981, due to problems with intrusive and inconsistent local regulations of the oil and gas industry, the Legislature amended the Oil and Gas Law to include a broad provision preempting

local laws and ordinances. As noted, that clause declares that the law "shall supersede *all* local laws or ordinances *relating to* the regulation of the oil, gas and solution mining industries," except that the law "shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2) (emphases added).

The scope of this supersession clause is extraordinarily broad. The term "all" is, by definition, sweeping in scope. So, too, is the phrase "relating to." Indeed, the Court of Appeals has given the phrase an "expansive" meaning synonymous with having a "connection with." *State v. Philip Morris Inc.*, 8 N.Y.3d 574, 580 (2007) (interpreting language in arbitration agreement). Similarly, the Supreme Court of the United States has concluded that use of the phrase "relating to" in a preemption clause reflects a "broad pre-emptive purpose." *Morales v Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *see State ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278, 283-84 & n.5 (2012). As used in the Oil and Gas Law, therefore, this "expansive" language unambiguously preempts local laws that prohibit oil and gas drilling as well as laws that prescribe the manner of drilling operations. In either case, such laws "relat[e] to," or have a "connection with," regulation of the oil and gas industry, and thus are preempted.

The conclusion that this language preempts local zoning regulations is both confirmed and compelled by the fact that the supersession clause includes an express exception for certain local laws and ordinances—those governing local roads and property taxes—but fails to include an express exception for local land-use ordinances. The Legislature's decision to state only certain exceptions must be interpreted using the traditional canon of *expressio unius est exclusio alterius*, which recognizes that "'where a statute creates provisos or exceptions as to certain

matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned.'" *Jewish Home & Infirmary v. Comm'r. of N.Y. State Dept. of Health*, 84 N.Y.2d 252, 262 (1994) (quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 240, at 412-13). By not including zoning laws within the stated exceptions, the Legislature made clear its intent not to create an exception for such laws.

Thus, as one court explained in a decision affirmed by the Appellate Division for the Fourth Judicial Department, the language and structure of the Oil and Gas Law make clear that it "pre-empts not only inconsistent local legislation, but also *any municipal law* which purports to regulate gas and oil well drilling operations, unless the law relates to local roads or real property taxes." *Application of Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432, 434 (Sup. Ct., Erie County 1982) (emphasis added), *aff'd*, 89 A.D.2d 1056 (4th Dept. 1982). Dryden's law, of course, is not an exercise of its "jurisdiction over local roads" or its rights "under the real property tax law." ECL § 23-0303(2). Thus, it is plainly preempted.

The preemption of local zoning regulations is confirmed by other provisions of the Oil and Gas Law that explicitly grant NYSDEC the authority to regulate *where* drilling for gas occurs. *See* ECL § 23-0501 (requiring analysis of well locations as part of permit application). Indeed, the statute specifically provides that local governments are entitled only to prior notice of "the location of the drilling site" *after* a state-level permitting decision has been made. *Id.* § 23-0305(13). This provision would make no sense if municipalities retained authority to prohibit drilling. Under the Supreme Court's interpretation, companies could apply for well permits, and the NYSDEC could exercise its regulatory authority and approve such applications, only to have a town subsequently enact an ordinance barring the location of any wells within its borders. The Legislature could not have intended to allow such a clear waste of private and agency resources.

Instead, the provisions that authorize the Department to consider location as part of the permitting process, and that entitle municipalities to notice only after a permit is granted, confirm that the statute preempts local land use ordinances governing the location of drilling activities.

In fact, NYSDEC has issued numerous regulations pursuant to this authority. For example, it has issued regulations that prohibit wells from being located within certain distances of private dwellings, certain public buildings, traveled roads, bodies of water, lease boundary lines, oil and gas wells in the same pool, or the Pennsylvania border. 6 NYCRR part 553. It has also issued regulations that authorize it to permit exceptions to any of these prohibitions "[w]here in its opinion there exists good and sufficient reason," *id.* § 553.4, or to issue orders further regulating the location of wells within a lease, taking into account all relevant information, *id.* § 553.3. In addition, NYSDEC is proposing new regulations that relate specifically to operations associated with high-volume hydraulic fracturing. *See* N.Y. State Dep't of Envtl. Conservation, *Proposed Express Terms 6 NYCRR Parts 550 through 556 and 560*, http://www.dec.ny.gov/regulations/77401.html (proposing new requirements with respect to, *inter alia*, permit applications, *id.* § 560.3; the construction and operation of wells, *id.* § 560.6; and the location of wells with respect to various water supplies, *id.* § 560.4). If the regulation of where gas recovery may occur were left to local authorities, NYSDEC's current and proposed actions would be *ultra vires*.

Regulating the location of wells, moreover, is not merely ancillary or incidental to NYSDEC's function, but is part of its core responsibility. The Oil and Gas Law was enacted 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," ECL § 23-0301, and "waste" is defined to include "locating" or "spacing" any gas well "in a manner which causes or tends to cause reduction in

the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations," *id.* § 23-0101(20)(c). This definition reflects the reality that gas does not exist in formations that follow jurisdictional boundaries, and efficient and economical development that minimizes waste should prioritize full development of a particular shale formation and gas field. If authority over location had been left to the municipalities, rather than the State, NYSDEC would have been powerless to prevent this sort of waste.[4]

B. The Decision Below Is Inconsistent With The Oil and Gas Law.

The decision below is fundamentally at odds with the text, structure, and purpose of the Oil and Gas Law, as well as the authoritative interpretation of the agency charged with implementing the law. The Supreme Court's contrary conclusion rests on a series of critical errors that must now be corrected.

The Supreme Court's first error was to sidestep textual analysis altogether based on the mistaken belief that the result it reached was compelled by two decisions of the Court of Appeals that interpreted *different* language in a *different* statute, New York's Mined Land Reclamation Law, ECL § 23-2701, *et seq.* ("Mined Land Law"). 35 Misc. 3d at 459-62. In *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987), and *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996), the Court of Appeals upheld two local zoning ordinances as

[4] The importance of location to effective regulation of the oil and gas industry is reflected in industry guidance and technical standards, which provide a framework based on proven engineering practices for safe and reliable natural gas production. These documents make clear that proper site selection and layout are essential to the success of hydraulic fracturing operations, and contain detailed recommendations to ensure that the relevant considerations are taken into account. *See, e.g.*, API, *Practices for Mitigating Surface Impacts Associated With Hydraulic Fracturing* (1st ed. Jan. 2011), http://www.api.org/~/media/Files/Policy/Exploration/HF3_e7.ashx. (explaining the importance of site selection and layout and discussing relevant considerations); API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Lease* (1st ed. July 2009), http://www.api.org/~/media/Files/Policy/Exploration/API_RP_51R.ashx; § 1 (Scope), § 6 (explaining detailed considerations for the planning and placement of wells), § 7 (explaining detailed considerations for the planning and placement of lease gathering and system lines).

consistent with the Mined Land Law. The preemption provision in that law, however, differs markedly from the Oil and Gas Law's supersession clause both in language and in purpose.

The Supreme Court erred in relying on these decisions because the text of the supersession clauses at issue compelled a result that would be contrary to the text of the Oil and Gas Law. In the version of the Mined Land Law at issue in *Frew Run*, the preemption clause stated that "'nothing in this title shall be construed to prevent any local government *from enacting local zoning ordinances* or other local laws which impose stricter mined land reclamation standards or requirements.'" 71 N.Y.2d at 129 (emphasis added). The version of the law at issue in *Gernatt* was even more explicit in preserving local zoning authority, stating that "nothing in this title shall be construed to prevent any local government from . . . *enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.*" 87 N.Y.2d at 682 (quoting ECL § 23-2703) (emphasis added). Thus, even though the supersession language contained the same phrase—"relating to"—that appears in the Oil and Gas Law,[5] the Legislature *expressly* provided that this language was to be "construed" as permitting local zoning laws. *See id.* at 683 ("the Legislature expressly excluded that authority from its preemptive reach"). In contrast, the Oil and Gas Law expressly exempts only local road and real property tax ordinances from preemption, but does *not* exempt local zoning ordinances.

The Supreme Court reached a contrary conclusion only by ignoring these textual differences. In a footnote, the Supreme Court stated that it was justified in doing so because the fact that the statutes "contain different exceptions to preemption is not a basis for ascribing different meanings to the nearly identical language of their respective primary clauses." 35 Misc. 3d at 463 n.11. This is incorrect. As just explained, the exception in the Mined Land Law

[5] *See* ECL § 23-2703(2) ("this title shall supersede all other state and local laws relating to the extractive mining industry.").

expressly provides that the *primary* language of the supersession clause—*i.e.*, the language that the Supreme Court compared to the Oil and Gas Law's supersession clause—must be "construed" as permitting local zoning laws.[6] That the Court of Appeals followed this command by "construing" the Mined Land Law not to preempt local zoning laws says nothing about how language in a different statute should be interpreted absent this command.

Indeed, if anything, these cases affirmatively undermine the Supreme Court's conclusion in this case. First, *Frew Run* and *Gernatt* demonstrate that the phrase "relating to" is so broad that, when read in accordance with its plain meaning, it encompasses local land-use zoning laws. It is precisely because the language is ordinarily understood to have such breadth and meaning that the Legislature deemed it necessary to expressly enact a rule of construction to avoid that result. *See* ECL § 23-2703(2) (providing that supersession clause must be "construed" to permit local zoning laws). Second, the preemption provisions at issue in *Frew Run* and *Gernatt* confirm that the Legislature knows how to exempt local land-use zoning laws from the reach of an otherwise broad preemption provision, and does so expressly when that is its intent. The fact that Legislature chose, in the Oil and Gas Law, to preserve local authority only with respect to roads and property taxes confirms that it intended to preempt all other local authority relating to regulation of the natural gas industry, including the authority to enact local land-use zoning laws that prohibit drilling operations within municipal borders. *See Jewish Home*, 84 N.Y.2d at 262 (applying canon of *expressio unius est exclusio alterius*).

Moreover, the Supreme Court's effort to shoehorn the Oil and Gas Law into the Court of Appeals's analysis of a different statute produces a result that is at odds with the statutory language. If the supersession clause were interpreted to apply only to laws that govern how—

[6] Indeed, contrary to the Supreme Court's understanding of *Frew Run*, the Court of Appeals in that decision acknowledged that its interpretation was guided by the statute's "proviso" allowing municipalities to enact zoning laws and stricter mining standards than those imposed by the State. 71 N.Y.2d at 133.

rather than where—wells are operated, then there would have been no need for the drafters to include the exception for laws governing local roads and property taxes, because neither type of law falls within the narrow scope of that exception. Thus, the Supreme Court's interpretation runs afoul of the fundamental interpretive rule that "meaning and effect should be given to every word of a statute" such that each word has "'a distinct and separate meaning.'" *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001).

The Supreme Court's only answer was to suggest that if a municipality were to regulate roads, such regulations "would plainly relate to operation of gas wells by directly affecting access to well sites or other areas of operation and by imposing additional burdens or costs." 35 Misc. 3d at 462. But a regulation governing the location and characteristics of access roads, or the weight of trucks that can traverse town roads, is not a regulation relating to the operation of gas wells. It is a law relating to the regulation of something else that can have incidental effects on the costs of well operations, just as minimum wage laws can impose "additional burdens or costs" on well operators, but are not reasonably understood as regulations relating to the operation of natural gas wells. Moreover, the Supreme Court offered no explanation as to how a municipal property tax could be understood to regulate natural gas operations. By definition, local property tax laws are location-based—they regulate (by taxing) specific pieces of property, not particular business operations.

The Supreme Court also erred in concluding that there is no "meaningful difference in the purposes of the two laws." 35 Misc. 3d at 463. Unlike the Oil and Gas Law, the Mined Land Law clearly contemplated that there *would* be local restrictions on the location of mining activities. As the court in *Frew Run* emphasized, upon an "examination of the entire statute," there was "nothing" to suggest that the Mined Land Law was intended to preempt zoning

ordinances that restrict the location of mining activities. 71 N.Y.2d at 132-33. In contrast, the Oil and Gas Law expressly regulates the location as well as the operation of wells, *see supra* pp. 8-10, demonstrating an intent to preempt conflicting local ordinances that prohibit oil and gas drilling in certain locations.[7]

The Legislature's decision to create two different schemes—one that provides for the regulation of well location at the statewide level, and another that expressly permits local regulation of where mining may occur—reflects the reality that these statutes regulate two industries and, unsurprisingly, take two different approaches to waste. In dismissing the Oil and Gas law's provisions governing location as addressing "technical operational concerns" rather than "traditional land use concerns," 35 Misc. 3d at 465, the Supreme Court missed the point entirely: By restricting *where* drilling may occur, a municipality affects the recovery of gas from a formation that stretches across jurisdictional lines and, as a result, reduces the amount that can be recovered from a single gas field. It is precisely this species of "waste" that the Oil and Gas law was designed to avoid.

The legislative history of the Oil and Gas law supports this understanding. For example, a Memorandum in Support of the original 1963 legislation stated that NYSDEC "'is empowered to make an early determination as to all the lands believed underlaid by a pool and shall fix ... *well locations* [to ensure the] uniform distribution of wells.'" R.588 (emphasis added). Leaving the regulation of "where" drilling occurs to local governments would have made this determination impossible to achieve. Likewise, when the Legislature added the express

[7] In addition, in neither *Frew Run* nor *Gernatt* did the ordinances completely prohibit mining everywhere in the municipality. Specifically, in *Frew Run*, the ordinance prohibited mining only in particular non-industrial districts, 71 N.Y.2d at 130; in *Gernatt*, even with statutory language that expressly saved zoning ordinances from preemption, the court found it "important" that the zoning ordinance allowed existing mines to continue as nonconforming uses, 87 N.Y.2d at 675-76. Here, by contrast, the Town is "singl[ing] out oil and gas drillers," *Envirogas*, 112 Misc. 2d at 434, and attempting to ban drilling entirely, in all districts.

preemption clause in 1981, the Memorandum in Support explained that this amendment was intended to preclude "[l]ocal government's diverse attempts to regulate the oil, gas and solution mining activities," which "threaten[ed] the efficient development of these resources." A.6928, Mem. in Support (1981), *available at* R.995, *Cooperstown Holstein Corp. v Town of Middlefield*, No. 2012-1010 (3d Dept.). *See also id.* ("The comprehensive scheme envisioned by the law and the technical expertise required to administer and enforce it necessitates that this authority be reserved to the State."). Given that well location is chief among the technical issues that must be addressed to ensure efficiency and reduce waste, it is implausible that a legislature concerned with ensuring comprehensive control by the State would have intended, without saying so, to exclude regulations governing location from the statute's preemptive scope.

The decision below is also flawed for the separate reasons that it rests on the erroneous assumption that municipal zoning laws may only be preempted if the statute contains "a clear expression of legislative intent to preempt local zoning authority." 35 Misc. 3d at 460. But there is no reason to require a "clear statement" to find preemption of local zoning laws because New York's Constitution prohibits municipalities from enacting zoning laws that are inconsistent with any general law.

Dryden's power to enact laws and ordinances, like that of other local governments in New York, is defined by the State's Constitution and Home Rule Law, as interpreted by New York courts. Article IX of the New York Constitution grants local governments the authority to enact laws and ordinances "relating to its property, affairs, or government," but expressly limits that authority to laws and ordinances that are "not inconsistent" with "the provisions of this constitution or any general law." NY Const. art. IX, § 2(c); *see* Municipal Home Rule Law § 10(1)(ii). The Town of Dryden, therefore, "may not exercise its police power when the

Legislature has restricted such an exercise by preempting the area of regulation." *N.Y. State Club Assn. v. City of N.Y.*, 69 N.Y.2d 211, 217 (1987), *aff'd*, 487 U.S. 1 (1988). *See People v. De Jesus*, 54 N.Y.2d 465, 468 (1981) ("[S]ince the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority."). To the extent that a state law expressly provides that it supersedes all local ordinances, a local government may not legislate on that subject matter unless the State has given it "clear and explicit" authority to the contrary. *Robin v. Inc. Vil. of Hempstead*, 30 N.Y.2d 347, 350-51 (1972).

It is well-established that zoning laws, like other local laws and ordinances, are subject to these principles. *Wambat Realty*, 41 N.Y.2d 490. Local governments "have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant," as with their other powers. *Kamhi v. Town of Yorktown*, 59 N.Y.2d 385, 389 (1983). Thus, because the zoning law at issue here is preempted by the express language in a state statute, it is void as outside the scope of the local governmental authority.

The Supreme Court's observation that other statutes that have been construed to preempt local zoning laws contain provisions dealing expressly with land use concerns, 35 Misc. 3d at 465, is simply beside the point. Those statutes, which addressed the siting of hazardous waste facilities and drug treatment facilities, raised obvious land use concerns that the legislature chose to address directly. *See* ECL § 27-1107; Mental Hygiene Law § 41.34. That the Legislature may choose to address these concerns directly in no way indicates that it *must* do so in order to accomplish the preemption of conflicting zoning laws, particularly when, as in the case of oil and gas regulation, land use is only one of many concerns that might arise. In any event, the Oil and Gas law *does* expressly contemplate a scheme in which any land use concerns that might arise

will be addressed by the NYSDEC, not local zoning boards. *See* ECL § 23-0305(13) (providing for the notification of local governments *after* a state-level permitting decision has been made). This scheme may not be as protective of local zoning powers as those provided under other statutes, but that distinction is immaterial; the fact remains that this provision reflects a clear legislative intent to leave siting and permitting decisions to NYSDEC, not local governments.

The Supreme Court erred further to the extent it looked to judicial decisions from Pennsylvania and Colorado as "instructive" authority in support of its interpretation of the Oil and Gas law. 35 Misc. 3d at 468. The courts in both states were interpreting statutory schemes that differ markedly from New York's, and the conclusions that they drew regarding what their respective state legislatures intended have no relevance to an inquiry regarding what *New York's* legislature intended when it enacted the different statutory text at issue here. Indeed, in both states, the decisions on which the Supreme Court relied turned upon the interpretation of statutory terms and provisions that do not appear in New York's Oil and Gas law. *See Huntley & Huntley, Inc. v. Council of Oakmont*, 964 A.2d 855, 864-65 (Pa. 2009) (interpreting the meaning of the terms "features" and "the same purposes as set forth in this act"); *Bd. Of County Commrs. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1057 (Colo. 1992) (explaining that the only express preemption clause withdrew jurisdiction from other *state* officers, and was silent as to county and local authority).

Moreover, the Supreme Court's decision is actually out of step with the law in Colorado and elsewhere. Colorado's oil and gas law has been interpreted to prohibit municipalities from enacting precisely the sort of total ban on drilling that Dryden has enacted. *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1069 (Colo. 1992). And, in West Virginia, the law has been

interpreted to prohibit cities from banning hydraulic fracturing within their borders.

Morgantown S.J. Order at 8.

II. THE SUPREME COURT ERRED BY FAILING TO INVALIDATE DRYDEN'S ZONING REGULATION UNDER PRINCIPLES OF IMPLIED PREEMPTION.

Even if this Court were to conclude that ECL § 23-0303(2) is silent as to whether local zoning ordinances are included in the Oil and Gas Law's preemptive scope, Dryden's zoning regulation still would be invalid under principles of implied preemption. The constitutional requirement that local laws must be "not inconsistent" with "any general law," NY Const. art. IX, § 2(c), applies without regard to whether the statute in question contains language expressly preempting the local law at issue. *See, e.g.*, *Red Hook*, 60 N.Y.2d at 108 ("Inconsistency is not limited to cases of express conflict between State and local laws."); *N.Y. State Club Assn.*, 69 N.Y.2d at 217 (a local government "may not exercise its police power by adopting a local law inconsistent with constitutional or general law"). Thus, even if a statute's supersession clause is not on point, a local enactment will be impliedly preempted if (1) "it imposes an additional layer of regulation in an area where the Legislature has evidenced its intent to pre-empt the field of regulation," or (2) "it is inconsistent with ... a general law." *Red Hook*, 60 N.Y.2d at 104-05. Dryden's regulation is preempted under both doctrines.[8]

A. Dryden's Regulation Is Invalid Under The Doctrine of Field Preemption.

In addition to stating expressly in ECL § 23-0303(2) that *all* local regulation of the oil and gas industries is preempted, the Legislature made clear in other provisions of the Oil and Gas

[8] The Supreme Court declined to address these concerns because it believed that "where, as here, there is an express supersedure clause, there is no need to consider implied preemption." 35 Misc. 3d at 466 n.13. That is incorrect. *Red Hook*, 60 N.Y.2d at 108 ("Inconsistency is not limited to cases of express conflict between State and local laws."). If a local law conflicts with state legislation, then it is invalid under the constitutional requirement that local laws must be "not inconsistent" with "any general law." NY Const. Art. IX, § 2(c). The only case cited by the Supreme Court in support of its contrary proposition was *Frew Run*. That case, however, announced no such rule; the Court of Appeals was dealing with a preemption clause that expressly *permitted* the local laws at issue in that case, which meant that there was no conflict. But if an express supersedure clause simply does not address the type of law at issue, then implied preemption analysis is not only permissible, but constitutionally required.

Law that it intended to occupy the entire field of regulation over where drilling occurs. A local enactment is invalid under the doctrine of field preemption if the Legislature has demonstrated an intent to "occupy the entire field so as to prohibit additional regulation by local authorities in the same area." *Robin*, 30 N.Y.2d at 350. Such intent can be inferred from either (1) "a declaration of State policy by the Legislature" or from (2) "the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." *Red Hook*, 60 N.Y.2d at 105; *accord Vil. of Nyack v. Daytop Vil., Inc.*, 78 N.Y.2d 500, 505 (1991). Here, intent may be inferred on either basis.

First, the zoning regulation undermines a "declar[ed] ... State policy," *Red Hook*, 60 N.Y.2d at 105, by prohibiting drilling within its borders without regard to the effect this prohibition will have on waste. Preventing waste is one of the statute's primary policy objectives, ECL § 23-0301, and minimizing waste of the Marcellus Shale's resources through proper well positioning is a technical issue entrusted to the expertise of NYSDEC, *id.* §§ 23-0101(20)(c), 23-0501. If Dryden can prohibit drilling within its borders, then so too can municipalities throughout the State. The cumulative impact of such restrictions would predictably increase waste of the Marcellus Shale's resources, in direct contravention of the goals underlying the Oil and Gas Law. *See also infra* pp. 22-23. Because the Legislature "made a studied decision" that these goals "would be more effectively met not at the local community level but by State action alone," *De Jesus*, 54 N.Y.2d at 470, municipalities may not legislate in the field by regulating where drilling occurs.

Second, the Legislature's intent to occupy the field is clear from the "comprehensive and detailed" regulatory scheme that it enacted, under which both the "how" and "where" of drilling are addressed at the statewide level. *Id.* at 469. The Oil and Gas Law expressly regulates the

location of wells and authorizes NYSDEC to promulgate detailed regulations, which it has done. *See supra* § I.A. NYSDEC's regulations are not restricted to technical details but establish detailed and comprehensive rules regarding traditional land use concerns. For example, these regulations specify precisely how far away a well must be situated from private homes, schools, places of lodging, and other structures. 6 NYCRR § 553.2. They also authorize NYSDEC to grant "exceptions" to these specifications upon application and a public hearing. *Id.* § 553.4. Moreover, the legislature has made clear that there is no place in this scheme for the concurrent regulation of well locations by local governments, which are entitled only to *subsequent* notice of "the location of the drilling site," ECL § 23-0305(13)—a division of authority that would make no sense if local governments could make such decisions on their own. *See supra* pp. 8-9.

B. Dryden's Regulation Is Invalid Under The Doctrine of Conflict Preemption.

Dryden's regulation is separately invalid under the doctrine of conflict preemption, under which local governments may not enact laws or ordinances that actually conflict with the State's general laws. For example, where a "municipality seeks to administer a zoning ordinance in a manner that is in conflict with the policy objectives of [a state law] . . . . the zoning ordinance is superceded." *Inter-Lakes Health, Inc. v. Town of Ticonderoga*, 13 A.D.3d 846, 847 (3d Dept. 2004). Likewise, a local law is invalid if it "prohibit[s] what would be permissible under State law," or if it "impose[s] prerequisite additional restrictions on rights under State law" that "inhibit the operation of the State's general laws." *Red Hook*, 60 N.Y.2d at 108 (internal quotation marks omitted). Under these principles, Dryden's zoning regulation is preempted because it conflicts with the Oil and Gas Law in a variety of ways.

First, the zoning regulation conflicts with the Oil and Gas Law's policy objective of preventing waste. This conflict not only demonstrates that the Legislature intended to occupy

the field of regulation, *see supra* § II.A, but is in and of a basis for finding preemption, *see Inter-Lakes Health*, 13 A.D.3d at 847.

Second, Dryden's blanket prohibition on exploration and drilling prohibits conduct that is permissible under State law. *Red Hook*, 60 N.Y.2d at 108. Dryden makes no exception for activities conducted pursuant to a state-issued permit, which means that a party that seeks and obtains express permission from NYSDEC to drill on its property nonetheless will be prohibited under local law from exercising that right. Under Dryden's law, a party could follow all applicable state laws and obtain a permit from NYSDEC, only to be told by local zoning officials that its state-issued permit is a worthless document. Moreover, Dryden's prohibition effectively nullifies NYSDEC's authority to permit exceptions to its own geographic restrictions within the Town's borders, 6 NYCRR § 553.4, because any exception granted by NYSDEC would be useless in the face of a blanket local prohibition.

Third, by imposing land use restrictions over and above those imposed pursuant to the Oil and Gas Law, it "inhibit[s] the operation of the State's general laws," *Red Hook*, 60 N.Y.2d at 108, by impeding comprehensive decisionmaking by NYSDEC regarding the location of wells and by discouraging applicants from seeking permits that might otherwise be granted. Indeed, under the decision below, it would make little commercial sense for *amici*'s members to make requisite financial investments and acquire lawful state permits from the NYSDEC that could be immediately invalidated on a whim by a capricious local body of government anywhere in the State.

III. THE CONTINUED OPERATION OF DRYDEN'S ZONING REGULATION THREATENS THE EFFECTIVENESS OF OIL AND GAS DRILLING AND HYDRAULIC FRACTURING OUTSIDE OF DRYDEN.

Allowing Dryden's zoning regulation to stand as written would have significant practical consequences that would undermine the effectiveness of oil and gas drilling and hydraulic

fracturing in areas well beyond Dryden's borders. First, interpreting the Oil and Gas Law to grant municipalities—not the NYSDEC—the authority to regulate where drilling occurs would call into question the validity of numerous state-level regulations that it has issued on that topic, including those governing subjects such as well siting, *see* 6 NYCRR part 553. *See supra* p. 9.

Second, and more fundamentally, such an interpretation would effectively write the State's expert agency out of a technical area squarely within its expertise, and would do great damage to the State's effort to develop and implement uniform technical standards for oil and gas drilling and hydraulic fracturing. The location of wells is not an ancillary issue that has only an "'incidental effect'" on the recovery of natural resources. 35 Misc. 3d at 460. Rather, determining where to drill requires significant technical expertise and has important implications for the effectiveness of the well that is constructed. *See supra* n.4 (describing API guidance regarding the need to properly locate leases, wells, and system lines to ensure effective operations). Local governments generally do not have the expertise necessary to undertake the required analysis. The NYSDEC plainly does.

Third, the unilateral decision by one municipality to prohibit recovery within its borders has the potential to affect recovery outside its jurisdiction. Because gas formations do not conform to local jurisdictional borders, one municipality's prohibition will reduce the recovery from a single gas formation or field that is shared by multiple jurisdictions. *See supra* pp. 9-10. Superimposing a patchwork of restrictions on a single formation will result in sub-optimal and wasteful recovery, with the potential to affect the feasibility of development in neighboring municipalities that *do* wish to permit it. The decision below, however, allows for multiple municipalities to control development of a shared resource outside their territorial and jurisdictional boundaries. In contrast, when decisions are made by a single statewide authority,

as the Legislature intended, such conflicts can be addressed by a statewide authority with both the expertise and the jurisdiction to balance competing interests.

Fourth, Dryden is not the only municipality that has endeavored to prohibit hydraulic fracturing or other oil and gas recovery, and the fate of its regulation will have a very real impact on the laws of other local governments in New York. Over two dozen municipalities at least have enacted laws that prohibit or regulate oil and gas drilling and hydraulic fracturing within their borders, *see* Joseph De Avila, *"Fracking" Goes Local*, Wall St. J., Aug. 29, 2012, at A17, with mixed results before the courts. *Compare Cooperstown Holstein Corp. v Town of Middlefield*, 35 Misc. 3d 767 (Sup. Ct., OtsegoCounty 2012), *with Jeffrey v. Ryan*, 2012 N.Y. Misc. LEXIS 4684 (Sup. Ct., Broome County Oct. 2, 2012, No. CA2012-001254) (striking down temporary moratorium as exceeding local police power). This Court's interpretation of the Oil and Gas Law will therefore have consequences that bear on more than just the permissibility of oil and gas recovery within a single municipality.

Finally, if local governments are able to close large portions of New York's lands to hydraulic fracturing or other oil and gas activities, the effects on New York's energy production and economic activity will be significant, especially as new development of the Marcellus Shale formation is expected to continue in New York's Southern Tier under the regulatory authority of the NYSDEC. The use of hydraulic fracturing and directional drilling enables the recovery of oil and natural gas that otherwise could not be commercially developed and thereby spurs both energy production and economic growth. To put the importance of these technologies in perspective, it is estimated that, without them, the nation would lose 45 percent of domestic natural gas production within 5 years.[9] Shale gas development alone supported 600,000 jobs in

[9] *See* API, *Shale Answers* at 3 (June 2012), *available at* http://www.api.org/~/media/Files/Policy/Hydraulic_Fracturing/Hydraulic_Fracturing_Brochure_June2012.ashx.

2010, *supra* n.9, *Shale Answers* at 4, and one study indicates that that a 25 percent increase in the supply of ethane (a liquid derived from shale gas) could add even more jobs, provide billions in federal, state, and local tax revenue, and spur billions in capital investment.[10] Indeed, it has been estimated that developing the Marcellus could generate $1.2 billion in economic activity in New York *every year*.[11] Local prohibitions that place large portions of New York's gas resources out of reach of development would lead to precisely the sort of "waste" that the Oil and Gas Law was designed to prevent through comprehensive statewide regulation.

[10] *See* Am. Chem. Council, *Shale Gas and New Petrochemicals Investment: Benefits for the Economy, Jobs, and U.S. Manufacturing* at 1 (March 2011), *available at* http://www.americanchemistry.com/ACC-Shale-Report.

[11] *See* N.Y. State Dep't of Envtl. Conservation, *Revised Draft Supplemental Generic Environmental Impact Statement On The Oil, Gas and Solution Mining Regulatory Program*, Executive Summary 17 (Sept. 2011), *available at* http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court should be reversed.

Respectfully submitted,

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October 16, 2012

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

NORSE ENERGY CORP. USA, *Petitioner-Plaintiff-Appellant,* For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Laws and Rules, *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents-Defendants-Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, by its President, Marie McRae, *Proposed Intervenor-Cross-Appellant.*	Case No. 2012-1015 Tompkins County Index No. 2011-0902

AFFIRMATION OF SERVICE

I, Lowell J. Schiller, an attorney duly admitted to practice law before the Courts of the State of New York, affirm under penalty of perjury:

That I am not a party to this action and am over 18 years of age, and am employed by Sidley Austin LLP, 1501 K Street NW, Washington, D.C., 20005.

That on October 16, 2012, the foregoing NOTICE OF MOTION, AFFIRMATION, and PROPOSED BRIEF were served on the following by overnight mail:

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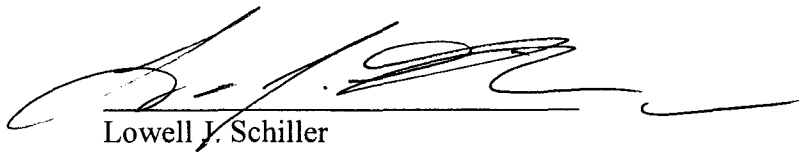
AFFIRMED: Washington, D.C.
October 16, 2012



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