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COURT OF APPEALS, STATE OF NEW YORK

NORSE ENERGY CORP. USA,

Petitioner-Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents,

-and-

DRYDEN RESOURCES AWARENESS COALITION,

Proposed Intervenor-Respondent-Cross-Appellant.

Docket No. 515227

Tompkins County Sup. Ct.
Index No. 2011-0902

NOTICE OF 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 FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Lowell J. Schiller, sworn to the 13th day of June, 2013 and the proposed brief attached as an exhibit thereto, the undersigned will move this Court at

the New York State Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York 11207, 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 appear as *amici curiae* in the above-captioned action for the purpose of supporting the application of Norse Energy Corp. USA for leave to appeal and for such other and further relief as the Court may deem just and proper. Attached hereto as **Exhibit A** is a copy of the brief that Proposed *Amici* wish to submit to the Court. This motion will be on submission.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, must be served and filed in the Clerk's Office of the Court of Appeals, with proof of service, on or before the return date of this motion pursuant to this Court's Rules of Practice 500.21(c).

Respectfully submitted,

Dated: June 13, 2013

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COURT OF APPEALS, STATE OF NEW YORK

NORSE ENERGY CORP. USA, *Petitioner-Appellant,* *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, *Proposed Intervenor-Respondent-Cross-Appellant.*	Docket No. 515227 Tompkins County Sup. Ct. Index No. 2011-0902

AFFIRMATION OF LOWELL J. SCHILLER IN SUPPORT OF THE MOTION BY THE AMERICAN PETROLEUM INSTITUTE TO APPEAR AS *AMICUS CURIAE*

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.

2. I am familiar with the facts and circumstances herein set forth and submit this affidavit in support of the motion of API to appear, together

with the Chamber of Commerce of the United States of America (the "Chamber") and the Independent Oil and Gas Association of New York ("IOGA of NY"), as *amicus curiae* in the above-captioned matter for the limited purpose of supporting the motion made by Norse Energy Corp. USA ("Norse") for leave to appeal this case to this Court based upon the novelty and statewide importance of the issues presented. In the event that leave to appeal is granted by this court, API will seek *amicus curiae* status in connection with the appeal and file a proposed brief on the merits of the appeal at that time.

3. API is a national trade association representing more than 500 companies involved in all aspects of the oil and natural gas industry. API's members include natural gas producers, processors, suppliers, and pipeline operators. API's members have made substantial financial investments in New York with the aim of developing the State's natural gas resources.

4. API works to advocate for public policies in favor of a strong oil and natural gas industry that can meet the energy needs of U.S. consumers in an efficient, environmentally responsible manner. Toward this end, API engages in federal and state advocacy based on scientific research and technical expertise.

5. API seeks leave to file the proposed *amici curiae* brief because the questions of law presented by the Opinion and Order of the Appellate Division (the "Decision") are of great importance to API and its members, and the existing parties cannot fully and adequately present API's interests to the Court. The proposed *amici curiae* brief attached to API's joint motion explains how the Decision affects the broader oil and gas industry, as well as the economic benefits that the industry can provide to the State and its communities, and elaborates on the errors underlying the Decision.

6. As explained in the proposed *amici curiae* brief, API and its members have an interest in ensuring that New York State's Oil, Gas and Solution Mining Law (the "Oil and Gas Law") is properly interpreted to prohibit local zoning authorities from enacting laws that ban oil and gas development within their borders and, in particular, that the outright ban enacted by the Town of Dryden is held invalid.

7. The proposed brief further explains that the Dryden ban and similar laws, if left in place, will impede access to critical subterranean resources, impair the correlative rights of surface and mineral owners, result in the waste of vital natural resources, and leave important, highly technical regulatory matters to the judgment of local zoning authorities. It also explains how such local laws will create untenable uncertainty for New

York's oil and gas industry, which will chill investment and inhibit further development of the State's natural resources.

8. Given API's substantial interest and expertise as described above and in the attached brief, API respectfully requests the opportunity to provide, together with the Chamber and IOGA of NY, its brief outlining the impacts of the Decision on its members and the reasons why leave should be granted by this Court to review these important issues on the merits. Those issues are addressed in the brief, which is attached as **Exhibit A** to the Notice of Motion.

WHEREFORE, your deponent respectfully requests that the instant motion be granted in all respects and that the American Petroleum Institute be given leave to appear as *amicus curiae* in Norse's motion for leave to appeal to this Court.

AFFIRMED: Washington, D.C.
June 13, 2013

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COURT OF APPEALS, STATE OF NEW YORK

NORSE ENERGY CORP. USA, *Petitioner-Appellant,* *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, *Proposed Intervenor-Respondent-Cross-Appellant.*	Docket No. 515227 Tompkins County Sup. Ct. Index No. 2011-0902

AFFIRMATION OF LOWELL J. SCHILLER IN SUPPORT OF THE MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO APPEAR AS *AMICUS CURIAE*

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.

2. I am familiar with the facts and circumstances herein set forth and submit this affidavit in support of the motion of the Chamber of

Commerce of the United States of America (the "Chamber") to appear, together with the American Petroleum Institute ("API") and the Independent Oil and Gas Association of New York ("IGOA of NY"), as *amicus curiae* in the above-entitled matter for the limited purpose of supporting the motion made by Norse Energy Corp. USA ("Norse") for leave to appeal this case to this Court based upon the novelty and statewide importance of the issues presented. In the event that leave to appeal is granted by this court, the Chamber will seek *amicus curiae* status in connection with the appeal and file a proposed brief on the merits of the appeal at that time.

3. The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

4. The Chamber seeks leave to file the proposed *amici curiae* brief because the questions of law presented by the Opinion and Order of the

Appellate Division (the "Decision") are of great importance to the Chamber and its members. The proposed *amici curiae* brief attached to the Chamber's joint motion explains how the Decision affects the oil and gas industry, as well as the economic benefits that the industry can provide to the State, and elaborates on the errors underlying the Decision.

5. As explained in the proposed *amici curiae* brief, the Chamber and its members have an interest in ensuring that New York State's Oil, Gas and Solution Mining Law (the "Oil and Gas Law") is properly interpreted to prohibit local zoning authorities from enacting laws that ban drilling within their borders and, in particular, that the outright ban enacted by the Town of Dryden is held invalid.

9. The proposed brief further explains that the Dryden ban and similar laws, if left in place, will impede access to critical subterranean resources, impair the correlative rights of mineral owners, and leave important, highly technical regulatory matters to the majority vote of local zoning authorities. It also explains how such local laws will also create untenable uncertainty for New York's oil and gas industry, which will chill investment and inhibit further development of the State's natural resources.

6. As explained in the proposed brief, a strong oil and gas industry supports job growth and increases the competitiveness of U.S. businesses.

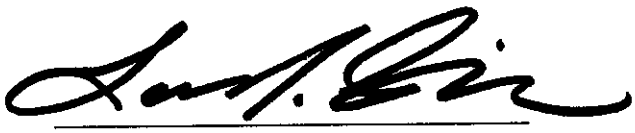
Accordingly, the Chamber regularly advocates for the expansion of American energy resources.

7. The proposed brief also explains how the development of New York's natural gas resources will produce considerable economic benefits for the State and the Chamber's members.

8. The Chamber respectfully requests the opportunity to provide, in conjunction with API and IOGA of NY, its brief outlining the impacts of the Decision on its members and the reasons why leave should be granted by this Court to review these important issues on the merits. Those issues are addressed in the brief attached hereto as **Exhibit A** to the Notice of Motion.

WHEREFORE, your deponent respectfully requests that the instant motion be granted in all respects and that the Chamber be given leave to appear as *amicus curiae* in Norse's motion for leave to appeal to this Court.

AFFIRMED: Washington, D.C.
June 13, 2013



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NEW YORK STATE COURT OF APPEALS

In the Matter of NORSE ENERGY CORP. USA,

Petitioner-Appellant,

- against -

Docket No.: 515227
Tompkins Co. Sup. Ct.
Index No.: 2011-0902

TOWN OF DRYDEN et al.,

Respondents-Respondents.

DRYDEN RESOURCES AWARENESS COALITION,

Proposed Intervenor-Respondent-Cross-Appellant.

AFFIDAVIT OF BRADLEY R. GILL IN SUPPORT OF THE MOTION BY THE INDEPENDENT OIL AND GAS ASSOCIATION OF NEW YORK TO APPEAR AS AMICUS CURIAE

STATE OF NEW YORK)
: ss.
COUNTY OF ERIE)

BRADLEY R. GILL being duly sworn deposes and says that:

1. I am the Executive Director of The Independent Oil and Gas Association of New York ("IOGA-NY").

2. The first commercial gas well in the United States, arguably in the world, was drilled in the Village of Fredonia, Chautauqua County, New York in 1821 and produced until 1858. The Drake Well, which is credited with starting the domestic oil industry, was drilled less than thirty miles from the New York border in Titusville, Pennsylvania in August, 1859. Today

the very existence of the oil and gas industry in New York is threatened by the decisions of the Tompkins County Supreme Court and Appellate Division, Third Department in the above captioned matter.

3. I am familiar with the facts and circumstances set forth herein and submit this affidavit in support of IOGA-NY's application to appear, with the American Petroleum Institute (the "API") and the Chamber of Commerce of the United States of America (the "Chamber"), as *amici curiae* in the above entitled matter for the purpose of supporting the motion made by Norse Energy Corp., USA ("Norse") for leave to appeal to this Court. If leave to appeal is granted, IOGA-NY will ask this Court to grant it *amicus curiae* status in connection with the appeal so that IOGA-NY may file a brief on the merits.

4. IOGA-NY is a trade association which was formed to protect, foster, and advance the common interests of oil and gas producers, professionals, and related industries in the State of New York. IOGA-NY was formed in 1980 at a time when the oil and gas industry in New York was at the cusp of a period of substantial growth. Today, IOGA-NY has 335 members who represent approximately two hundred entities with literally thousands of employees who depend upon the oil and gas industry in New York for their livelihoods.

5. In the same timeframe that they were forming IOGA-NY, the leaders of the oil and gas industry in New York were working with members of the New York legislature on revisions to the Environmental Conservation Law. At that time, many local municipalities were attempting to regulate the oil and gas industry, including through the use of zoning. The industry leaders realized that the potential growth that the industry, and as a result that the economy of New York, could experience would not be achieved in an environment of patchwork, inconsistent regulation, often adopted and/or enforced by individuals without any requisite training or expertise.

6. The New York State legislature responded in 1981 by amending Article 23 of the Environmental Conservation Law to preempt regulation of the oil, gas and solution mining industries and vest regulation of those industries in the Department of Environmental Conservation. The legislature only excepted two areas from pre-emption by the State, control by

a local municipality over its roads and the rights of a local municipality under the Real Property Tax Law. Contrary to what has been suggested by others, not only "how" but "where" the oil and gas industry would operate was placed in the control of the Department of Environmental Conservation.

7. For decades preemption over municipal regulation, including through zoning, was assumed and the oil and gas industry in New York prospered. Thousands of wells were drilled, huge sums were invested in those wells and in the infrastructure necessary to operate them and the economy of New York State benefitted. In fact, the Department of Environmental Conservation, on several occasions, counseled local municipalities against attempting to enact local laws to regulate the oil and gas industry because the State had pre-empted regulation of that industry and vested regulatory authority over it in the Department.

8. The vast majority of wells that have previously been drilled in New York are wells that had been drilled vertically and hydraulically fractured ("hydro-fracing" or "fracing") so that they may produce economically. This process has been regulated by the Department of Environmental Conservation and the regulations enforced by that Department have addressed issues such as: how far apart wells must be; what properties must be under lease or compulsorily unitized for each well; set-back distances from roads, water ways, dwellings, and public buildings; as well as technical requirements for the construction and operation of the wells.

9. While Marcellus Shale wells have existed in New York since the 1880's, and while the first commercial gas well in the United States, referenced above, was drilled to a shale formation, for the most part shale formations in New York have not been able to be commercially developed utilizing vertical wells, even with fracing. However, technological advances in the industry have resulted in similar formations being successfully developed in other jurisdictions through the use of horizontal drilling and high volume hydraulic fracturing (the process is the same as fracing in vertical wells but a greater volume of liquids is involved). There are two shale formations which underlie large portions of New York State, the Marcellus and the Utica, that are capable of being economically developed through the use of horizontal drilling and high volume hydro-fracing. Such formations are being successfully developed in other jurisdictions, most notably Pennsylvania.

10. Unfortunately, the use of the technological advances involving horizontal drilling and high volume fracing has been accompanied by concerns over the safety of the use of such technologies. Sadly, those concerns have largely arisen in response to unsupported allegations and misstatements concerning the potential consequences of the use of these technologies. While actual experience has shown that the technologies can be safely used, New York has adopted a very cautious approach and has effectively imposed a moratorium on the use of high volume hydro-fracturing since 2008. All indications are that such moratorium will be done away with in the very near future. When that occurs, the oil and gas industry in New York will again be poised for a period of growth with potential significant positive impact on the New York economy.

11. The unfounded fear over the potential consequences of high volume hydraulic fracturing has resulted in some municipalities enacting local laws to ban such activities, and often to ban any oil and gas activities within the municipality. The above captioned matter involves a challenge to such a local law that was passed by the Town of Dryden.

12. Local laws prohibiting drilling will obviously adversely impact companies involved in the oil and gas industry and their employees, including the members of IOGA-NY. Unfortunately, such local laws, if upheld, also have the potential of adversely impacting development of the oil and gas resource in adjoining municipalities because oil and gas deposits do not follow municipal boundaries. A piecemeal pattern of local regulation and prohibition of oil and gas activities will prohibit the oil and gas industry in New York from properly developing the Marcellus and Utica formations and thus deny the areas of New York State where those formations are located the significant economic growth and benefit that would occur absent such local regulation.

Conflict with Recent Court of Appeals Decisions

13. IOGA-NY believes that the appeal of the above entitled matter is necessary to address important legal questions of statewide significance. We believe that the interpretation by the Tompkins County Supreme Court and the Appellate Division Third Department of the pre-emption language in the Oil, Gas and Solution Mining Law ("OGSML") conflicts with the guidelines for statutory interpretation outlined by this Court, most recently in *Commonwealth of*

Northern Mariana Islands v. Canadian Imperial Bank of Commerce, _____ N.Y. 3d_____, _____ N.Y.S. 2d _____ 2013 WL 1798585 (April 30, 2013).

14. Additionally, IOGA-NY believes the Third Department decision misunderstands the nature of municipal power as outlined recently by this Court in *Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead*, 20 N.Y.3d 481, 964 N.Y.S.2d 64 (2013). The Appellate Division found that while the savings clause of the OGSML only listed municipal road powers and taxing powers, municipal zoning powers did not have to be listed to be excluded from preemption. But as this Court noted in *Hempstead*, zoning power derives from a legislative enactment just as municipal road and real property tax powers do; yet the Third Department treated the zoning power almost as a sovereign power, calling it a "traditional power". The Third Department's disparate treatment of the zoning power turns legislative interpretation on its head by elevating zoning to a super power, a role not supported by New York law. Further the Third Department's conclusion that local power over roads and taxes would harm mining but zoning would not, substitutes the Judiciary's opinion for that of the Legislature, again in violation of the rules of statutory construction.

15. Further, IOGA-NY believes the lower courts erred in relying upon prior decisions relating to the Mined Land Reclamation Law, which specifically allows local zoning, in interpreting a statute that makes no such provision. These issues will be more fully discussed by IOGA-NY in its brief if this Court allows the instant appeal and grants IOGA-NY *amicus* status in the appeal.

16. IOGA-NY respectfully requests the opportunity to provide, with API and the Chamber, its brief outlining the impacts of the lower court decisions in the above captioned matter on its members and the reasons why this Court should grant leave to Norse to appeal such decisions.

WHEREFORE, your Deponent respectfully requests that the instant application be granted in all respects and that the Independent Oil and Gas Association of New York be granted leave to appear as *amicus curiae* in Norse's application for leave to appeal to this Court.

Bradley R. Gill

STATE OF NEW YORK)
:ss
COUNTY OF ERIE)

On the 13th day of June, in the year 2013, before me, the undersigned, personally appeared BRADLEY R. GILL, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individuals acted, executed the instrument.

Notary Public

JENNIFER BANKS
No. 01BA6098758
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 09/22/2015

EXHIBIT A

COURT OF APPEALS, STATE OF NEW YORK

NORSE ENERGY CORP. USA, *Petitioner-Appellant,* *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, *Proposed Intervenor-Respondent-Cross-Appellant.*	Docket No. 515227 Tompkins County Sup. Ct. Index No. 2011-0902

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 THE PETITIONER-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

COURT OF APPEALS, STATE OF NEW YORK

NORSE ENERGY CORP. USA,	Docket No. 515227
Petitioner-Appellant,	Tompkins County Sup. Ct. Index No. 2011-0902
-against-	
TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,	
Respondents,	
-and-	
DRYDEN RESOURCES AWARENESS COALITION,	
Proposed Intervenor-Respondent-Cross-Appellant:	

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 AMICI CURIAE IN SUPPORT OF THE PETITIONER-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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June 13, 2013

INTRODUCTION

In 1963, the New York Legislature enacted the Oil, Gas and Solution Mining Law, ECL § 23-0101 *et seq.* (the "Oil and Gas Law") with the aim of regulating the development of the State's oil and gas industry in a consistent manner that conserves resources and protects the rights of the parties throughout the State who hold interests in them. Nearly two decades later, in 1981, in response to growing interference from local governments, the Legislature further sought to avoid patchwork local regulation from interfering with the State's regulation of an entire industry by amending the law to add a preemption clause prohibiting (with exceptions not relevant here) "all local laws or ordinances relating to the regulation of [the oil and gas industry]." ECL § 23-0303(2). On the strength of this provision, state regulators have long exercised plenary authority in the field of oil and gas regulation, and the State has realized a uniform, statewide approach to the development of its oil and gas resources.

Now, in the midst of a broader debate over the practice of hydraulic fracturing, the State's ability to uniformly regulate the industry and the development of its natural resources is again under attack, and this time local jurisdictions effectively are exercising vetoes that are creating a patchwork approach to natural resource development that places municipal boundaries

paramount over state policies. In the past few years, more than 50 municipalities have banned oil and gas drilling within their jurisdictions, and nearly 100 more have enacted moratoriums on the same. One such ban, enacted by the Town of Dryden, was challenged by Petitioner-Appellant Norse Energy Corp. USA ("Norse") as preempted by the Oil and Gas Law. Norse (through its corporate predecessors) had acquired valuable oil and gas leases in Dryden with plans to drill for natural gas. In an opinion and order dated May 2, 2013 (the "Decision"), the Appellate Division, Third Department affirming a decision of the Supreme Court, Tomkins County dismissed Norse's preemption claim and upheld the Dryden ordinance as consistent with the Oil and Gas Law. *Norse Energy Corp. USA v. Town of Dryden*, No. 515227, slip op. at 15 (N.Y. App. Div. May 2, 2013). Norse's oil and gas leases, which cover some 22,000 acres and cost its predecessors more than $5 million to acquire, were rendered worthless as a result of the local ordinance and the decision below.

The Decision is wrong, and its effects could spell disaster for New York's oil and gas industry at a critical moment during the state's ongoing economic recovery, which could only be accelerated and magnified by the development of New York's vast shale reserves. The Appellate Division upheld Dryden's drilling ban under a rationale that guts key provisions of

the Oil and Gas Law, delegates important and exceedingly technical regulatory matters to inexpert local bodies, and effectively grants local zoning board majorities a regulatory veto over gas and oil projects. If left in place, the Dryden ordinance, together with similar bans across the State, will block access to valuable underground resources and imperil the interests of mineral and surface owners. Beyond any one municipality, the resulting climate of uncertainty and corresponding patchwork of regulation will raise the costs of, and inhibit development in, New York's oil and gas resources. In time investment will dry up, and with it the possibility that New York's vast shale reserves could one day revitalize many of the State's communities and help pave a path toward energy independence.

STATEMENT OF INTEREST

The American Petroleum Institute ("API"), the Chamber of Commerce of the United States of America (the "Chamber"), and the Independent Oil and Gas Association of New York ("IOGA of NY") (together "*Amici*") respectfully submit this *amici curiae* brief in support of Norse's motion for permission to appeal the Decision.

API is a national trade association representing more than 500 companies in the oil and natural gas industry. The industry comprises more than 7.7 percent of the U.S. economy, supports some 9.2 million domestic

jobs, and delivers to the U.S. government more than $86 million per day in revenue. Since 2000, the industry has invested more than $2 trillion in U.S. capital projects with the aim of advancing all forms of energy, including alternative energy. API's member companies include natural gas producers, processors, suppliers, pipeline operators, as well as service and supply companies. API's members have poured a substantial amount of capital into New York in order to develop the State's natural gas resources.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

IOGA of NY represents oil and gas professionals to the citizens and lawmakers of New York State. IOGA of NY's members include producers, operators, engineers, consultants, landowners, and allied businesses and

individuals. Headquartered near Buffalo, IOGA of NY advocates for the industry through public education and community outreach.

Amici and their members have a strong interest in the outcome of this challenge. The Decision has statewide implications for New York businesses and residents alike, and this Court has never addressed the preemptive scope of the Oil and Gas Law. *Amici* respectfully urge this Court to grant the Petitioner-Appellant's Motion for Leave to Appeal so that this Court may rule on these novel matters of statewide importance. *See* N.Y. Comp. Codes R. & Regs. ("NYCRR") tit. 22, § 500.22(b)(4).

I. THE NOVEL AND IMPORTANT QUESTIONS RAISED BY THE DECISION BELOW MERIT CONSIDERATION BY THIS COURT.

A. The Questions Raised By The Decision Are Novel.

This case presents several novel questions of law that have not been addressed by this Court. Resolution of these issues would bring much-needed clarity and certainty to the law governing the development of New York's vitally important oil and natural gas resources. Indeed, at present, the rules governing hydraulic fracturing within the State seem to change with the mile marker, as numerous jurisdictions add to a sprawling patchwork of local bans and moratoria superimposed on a temporary statewide drilling moratorium that could end at any time.

The preemption issue comprises two questions, each worthy of granting leave in its own right: (1) whether the Oil and Gas Law, which supersedes "all local laws and ordinances relating to the regulation of the oil[] [and] gas . . . industries," ECL § 23-0303(2), expressly preempts a municipal zoning ordinance that bans oil and gas development; and (2) whether the same municipal zoning ordinance is in conflict with, and therefore impliedly preempted by, the comprehensive regulatory scheme created by the Oil and Gas Law. These questions, in turn, raise additional issues of statewide importance concerning the conflict between local land-use concerns and the State's explicit authority over matters relating to the oil and gas industry.

1. The express preemption question raises novel issues of first impression.

This Court has never construed the preemption clause in the Oil and Gas Law, and the case law below has suffered in the absence of its guidance. Thus, in addition to presenting a matter of first impression, this case presents an opportunity to address the questionable treatment the lower courts have applied to the express preemption issue. Specifically, granting leave will shed needed light on whether the lower courts have erred (1) by placing undue reliance on this Court's decisions interpreting different preemption provisions in different statutes; and (2) by imposing heightened "clear

statement" burdens on the Legislature in order to preempt local land use decisions.

With respect to the first issue, lower courts interpreting the preemptive scope of the Oil and Gas Law have deviated from the ordinary rules of statutory interpretation by inappropriately relying on precedent from this Court that interprets distinct and differently worded preemption clauses in statutes with different purposes. *See, e.g.*, *Norse Energy Corp.*, slip op. at 15; *Cooperstown Holstein Corp. v. Town of Middlefield*, No. 515498, slip op. at 3 (N.Y. App. Div. May 2, 2013). The Appellate Division sought to shoehorn the preemption language in ECL § 23-0303(2) into the reasoning of this Court's decision in *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987), which upheld a local zoning ordinance as consistent with the Mined Land Reclamation Law (the "Mined Land Law"). The preemption clause in the Mined Land Law, however, accommodates local land-use concerns in a way that the Oil and Gas Law does not—a distinction that is not reflected in the decision below. Whereas the preemption clause in the Oil and Gas Law exempts from its sweep only ordinances concerning local roads and property tax (the law "shall supersede all local laws or ordinances relating to the regulation of the [oil and gas industry]," but "shall not supersede local government jurisdiction over local roads or the rights of

local government under the real property tax law," ECL § 23-0303(2)), the version of the Mined Land Law at issue in *Frew Run* stated that the preemption provision was to be construed to *permit* local zoning laws. *See* 71 N.Y.2d at 129 (interpreting clause which expressly provided 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.'"). Moreover, the Mined Land Law was enacted for a distinctly different purpose at a different time and with respect to an entirely different industry. *See Frew Run Gravel Prods.*, 71 N.Y.2d at 129. Given the explicit and fundamental differences between these laws, the authoritative determination of the Oil and Gas Law's preemption clause should not rest with an intermediate court applying this Court's interpretation of a fundamentally different statute.

Second, the Decision raises an independently important question about what presumptions and standards apply when New York courts interpret preemption clauses. The Appellate Division concluded that the Oil and Gas Law does not preclude local drilling bans because it lacks a "clear expression of legislative intent to preempt local control over land use." *Norse Energy Corp.*, slip op. at 11. Requiring the Legislature to satisfy a "clear expression" standard in order to preempt local zoning laws, however,

is plainly inconsistent with the Constitution's division of governmental authority in New York and reverses the burdens between the Legislature and the local government. In light of this division of governmental authority, the Oil and Gas Law is a general law that should be presumed to override all local laws relating to the regulation of the oil and gas industry. It is thus the local government, not the State, that needs a "clear expression of legislative intent" to act. *See Robin v. Inc. Vil. Of Hempstead*, 30 N.Y.2d 347, 350-51 (1972). By resolving its doubts in favor of local rather than state law, the Appellate Division turned New York's constitutional design on its head.

2. The issues surrounding the question of implied preemption are novel.

This Court never has addressed the question whether the State's authority to regulate the oil and gas industry conflicts with, and thereby preempts, a municipality's authority to regulate the permissible uses of land within its jurisdiction. In upholding the Dryden law as consistent with the Oil and Gas Law, the Decision draws a novel distinction between local laws that regulate *how* drilling occurs (which the Decision holds are preempted) and local laws that regulate *where* it occurs (which the Decision holds are not preempted). *Norse Energy Corp.*, slip op. at 10-11. The distinction is baseless. Not only does it find no support in the text of the Oil and Gas Law, which by its terms preempts *all* local laws regulating the oil and gas

industry, but it is at odds with a comprehensive set of rules and regulations addressing precisely the type of land-use concerns the Appellate Division deemed beyond the authority of state regulators. *See, e.g.*, ECL § 23-0503 (specifying depth and spacing of various well types); *id.* §§ 23-0701, 23-0901 (providing for the integration of properties to protect the correlative rights of their owners); 6 NYCRR § 553.2 (specifying how far a well must be situated from private homes, schools, places of lodging, and other structures); *id.* § 553.4 (authorizing regulators to make exceptions to their own geographic restrictions). These provisions reflect the State's (correct) understanding that it has the authority to regulate the location of drilling operations, and the Decision leaves the validity of these provisions, as well as that of the statutory objectives they support, in doubt.[1]

This uncertainty underscores the need for this Court to weigh in on a novel and unsettled question of statewide importance. If the Appellate Division is wrong about the reach of the Oil and Gas Law, then granting leave will allow the Court to correct the error, clarify the scope of the statute and its relationship with local land-use concerns, and lift the fog of

[1] Indeed, the Appellate Division's conclusion that the Oil and Gas Law does not "address traditional land use considerations, such as proximity to nonindustrial districts [and] compatibility with neighboring land uses" is flatly inconsistent with regulations promulgated under the Oil and Gas Law governing precisely those subjects. *Compare Norse Energy Corp.*, slip op. at 14, *with* 6 NYCRR §§ 553.2, 553.4.

uncertainty hanging over the State's oil and gas industry. If, on the other hand, the Appellate Division is right, and the State must come to terms with a more limited regulatory role, then granting leave will help clarify the contours of that role by resolving unanswered questions about the scope of the Oil and Gas Law and the prerogatives of the regulators charged with implementing it.

The permit process illustrates the debilitating uncertainty that the Decision has spawned. Well location is chief among the technical issues that must be addressed by state regulators during the permit process. *See* 6 NYCRR part 553.2-4. But, under the decision below and the Dryden ordinance, it is unclear what authority the State retains over well location when local zoning boards are now authorized as the paramount decision makers on where drilling occurs. Similarly, the decision leaves in doubt how regulators can account for factors like waste and the protection of property rights when a municipality merely can prohibit drilling within its borders as a political measure without regard to or consideration of the technical information considered by state regulators. By the same token, under the decision below, it is now unclear when in the permit process regulators must notify a municipality that a permit application is pending for a well in its jurisdiction. Under the current rules, regulators are required to

notify the affected municipality only *after* the permit has issued. See ECL § 23-0305(13). If the regulators' decisions are subject to municipal approval or veto, however, it makes little sense to require applicants to spend the time and money seeking a permit at the state level only to later discover that the local zoning board (or boards, as the case may be) will not permit the operation. The decision thus leaves in doubt whether regulators should continue to follow the established permitting process even if it means creating needless bureaucracy. This confused state of affairs confirms the nature of the issues raised by the Appellate Division's Decision as warranting the granting of leave here.

B. The questions before the Court are of statewide importance.

This Court should also grant leave because the Decision raises questions of statewide importance. New York sits atop one of the most important natural gas reserves in the United States. The Marcellus Shale extends across the borders of five states and, according to the most recent U.S. Department of Energy estimate, holds more than 141 trillion cubic feet of recoverable natural gas, enough to meet New York's energy needs for hundreds of years. *See* U.S. Energy Info. Admin., *Assumptions to the Annual Energy Outlook 2013*, U.S. DEP'T OF ENERGY, 123 (May 2013), *available at* http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf. The

development of the Marcellus in neighboring Pennsylvania has brought a host of economic benefits, with per capita income and employment climbing at disproportionate rates in counties where drilling is occurring. *See* Diana Furchtgott-Roth, *The Case for Fracking in New York*, Market Watch, May 9, 2013 available at http://www.marketwatch.com/story/the-case-for-fracking-in-new-york-2013-05-09. And development of the Marcellus in New York promises to produce similar benefits, including more than $11 billion in economic output and 15,000 to 18,000 new jobs in New York's Western and Southern Tiers alone. Timothy J. Considine, Robert W. Watson & Nicholas B. Considine, *The Economic Opportunities of Shale Energy Development*, Manhattan Institute (June 2011), *available at* www.manhattan-institute.org/html/eper_09.htm. Those job figures could reach as high as 75,000 to 90,000 if the State were to extend development to the Utica Shale, which lies below the Marcellus and extends further north.

The outcome of this litigation will determine the extent to which New York can harness this economic potential. If upheld, the Decision will impair New York's ability to effectively recover natural resources located in formations that do not correspond with municipal borders. The patchwork arising out of disparate local regulation across the State will impede access to the shale and result in "uneven and potentially wasteful production" of oil

and gas from formations that underlie multiple jurisdictions, some with bans and some without. *See Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (holding that a Colorado municipal drilling ban was preempted by state energy policy). It will also threaten the correlative rights of owners of gas interests in a common formation by "exaggerating production in one area and depressing it in another," and, in some cases, increasing operation expenses to the point where production becomes cost-prohibitive. *Id.* at 1067-68. These two policy considerations, preventing waste and protecting correlative rights, are the principle reasons for uniform state regulation of oil and gas operations, including the location of such operations; they distinguish the complexity of and need for preemption in this area.

Local regulation will also discourage oil and gas operators eager to invest in the State. Natural-gas exploration is costly. In addition to the expenses associated with securing the drilling rights and completing the permitting process, there is the cost of finding an appropriate drilling site, the cost of clearing and grading it, and the cost of building the requisite access roads and infrastructure. *Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas, and Solution Mining Regulatory Program*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, 5-6 (Sept. 7, 2011), *available at* www. dec. ny. gov/ data/dmn

/rdsgeisfull0911.pdf. Investors will be reluctant to invest the necessary time and money in a climate of regulatory uncertainty, where years of exploration and millions in capital can be rendered valueless by the majority vote of a zoning board.

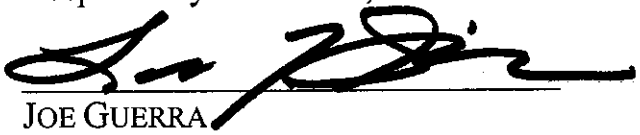
Furthermore, with the State poised to lift its temporary moratorium on high volume hydraulic fracturing, now is the ideal time for this Court to weigh in on the preemption question. State regulators are nearing the end of an extended review of the environmental and health effects of hydraulic fracturing, and a decision from the Governor on whether to lift the moratorium could come at any time. Teri Weaver, *Cuomo will Make Decision on Hydrofracking Before Next Year's Election*, The Post-Standard, May 24, 2013, available at stateimpact.npr.org/ pennsylvania/ 2013/05/24/new-york-governor-says-hell-make-fracking-decision-before-2014-election/. In the event that the moratorium is lifted, the patchwork of local zoning bans and moratoria, unless addressed by this court, will be the most formidable hurdle to further natural gas development in the Southern Tier, and the questions presented in this case will take on a new sense of urgency. Given the desperate need for clarity in this area, this Court should weigh in now to give the Governor the benefit of its guidance.

CONCLUSION

Amici respectfully submit that the issues now before the Court represent questions of statutory interpretation that are novel issues of statewide public importance. For the foregoing reasons, *Amici* contend that this Court should determine whether the ECL § 23-0303(2) preempts local regulation of oil, gas and solution mining.

Accordingly, *Amici* respectfully request that the Court grant Petitioner-Appellant's Motion for Leave to Appeal to the Court of Appeals.

Respectfully submitted,



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NEW YORK STATE COURT OF APPEALS

NORSE ENERGY CORP. USA, *Petitioner-Appellant,* *-against-* TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD, *Respondents,* *-and-* DRYDEN RESOURCES AWARENESS COALITION, *Proposed Intervenor-Respondent-Cross-Appellant.*	Docket No. 515227 Tompkins County Sup. Ct. 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 June 13, 2013, the foregoing NOTICE OF MOTION, AFFIRMATION, and PROPOSED BRIEF were served on the following by overnight mail:

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