

HIGH VOLUME HYDRAULIC FRACTURING AND HOME RULE: THE STRUGGLE FOR CONTROL

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I. INTRODUCTION

At the core of American jurisprudence is its system of checks and balances. Each of the three branches of government—executive, legislative, and judicial—is specifically designed to provide oversight and review of each other; the goal to reign in and prevent abuses of power or instances where one branch exerts powers it does not have. Moreover, there is no hierarchy of power between the branches; their powers, functions, and limitations being derived by the Constitution itself.

In addition to this system of checks and balances within government, there is also a system of checks and balances among the different layers of government—federal, state, and local. The difference here is that there is a hierarchical structure of power between these layers. Unquestionably, the federal government sits atop the power structure, and provides a unifying force of law and policy throughout the country. The federal government also provides powers to the states, colloquially referred to as the “police powers.”¹ Likewise, state governments have control and authority

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¹ U.S. CONST. amend X; see, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199

over local municipalities, and local governments get their powers from the states, such powers being referred to as “home rule” powers.² In other words, the powers, functions, and limitations of each layer of government are derived from the preceding layer.

Just because a layer of government has exerted power in a particular area, does not automatically preclude another layer from regulating. There are many instances where the different layers of government are able to concurrently regulate a particular area. However, there are instances where the federal or state government has either (i) reserved complete and exclusive control, or (ii) specifically limited the powers of a lower layer of government. This is done through the doctrine of preemption³ and supersession.⁴

Notwithstanding this system, which has been in place for over two hundred years,⁵ there is still a struggle for control among the branches of government, as well as among the layers of government. Where the system tends to break down is with an emerging area of law. In these instances, a struggle for control occurs. There can be an executive order, proposed legislation, and judicial review occurring simultaneously. Plus, there can be attempts by multiple layers of government to exert control.

There is no better current example than with high volume hydraulic fracturing (“HVHF”), an emerging technology and area of law in the Northeast. For the most part, the struggle for control over HVHF is taking place between state and local governments,⁶

(2006) (noting that, when consistent with their own constitutions and laws, the states may take action to protect the general welfare of the people).

² See, e.g., N.Y. CONST. art. IX, § 2(c); Amy Lavine, *From Slum Clearance to Economic Development: A Retrospective of Redevelopment Policies in New York State*, 4 ALB. GOV'T L. REV. 212, 220 (2011) (citing N.Y. CONST. art. IX, § 2(b)(2)); 25 N.Y. JUR. 2D *Counties, Towns, and Municipal Corporations* § 86 (2001) (noting that the “home rule powers” of the state constitution prohibit interference by the Legislature with respect to certain powers of local governments).

³ See U.S. CONST. amend X; see also Adam L. Lounsbury, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 427 (2008).

⁴ See S. Hugh High, *The State of Law Regarding Advertising of Tobacco Products in the European Community: The Demise of Federalism in the Community?*, 5 J. INT'L LEGAL STUD. 177, 203 (1999).

⁵ The U.S. Constitution was adopted in 1787. Steven T. Voigt, *The General Welfare Clause: An Exploration Of Original Intent And Constitutional Limits Pertaining To The Rapidly Expanding Federal Budget*, 43 CREIGHTON L. REV. 543, 545 n.9 (2010).

⁶ There have been attempts for intervention and review by the federal government. See EPA Announces Final Study Plan to Assess Hydraulic Fracturing/Congressionally Directed Study Will Evaluate Potential Impacts on Drinking Water, EPA NEWSROOM (Nov. 3, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/48f0fa7dd51f9e9885257359003f5342/197771b608adfddb8525793d005379c9!OpenDocument> (discussing requests made by Congress to conduct research regarding hydraulic fracturing and the results of such research created by the EPA).

and this article primarily focuses on the struggle between New York State and its local governments. As municipalities are enacting local laws and moratoria banning HVHF within their borders, the question remains: do municipalities have this power?

As explained in more detail below, two recent court cases, *Anschutz Exploration Corporation v. Town of Dryden* (“*Dryden*”),⁷ and *Cooperstown Holstein Corporation v. Town of Middlefield* (“*Middlefield*”),⁸ have upheld local laws prohibiting HVHF.⁹ These laws were upheld, despite the fact that New York State law has very broad preemption powers over the oil and gas industry, and prior attempts by municipalities to regulate the oil and gas industry have been struck down as preempted by state law.¹⁰

Even more recently, on October 2, 2012, another case dealing with home rule powers and HVHF was decided. In *Jeffrey v. Ryan* (“*Binghamton*”),¹¹ the court overturned a local law prohibiting HVHF, determining that the local law was an improper moratorium.¹² In so doing, the court casted doubt upon and questioned the legality of all moratoria prohibiting HVHF.¹³

Both *Dryden* and *Middlefield* have been appealed to the Appellate Division, Third Department,¹⁴ and a decision to appeal has not been made yet regarding *Binghamton*.¹⁵ To date, oral argument has not been heard by the Third Department, and it is likely that a decision will not be issued by the Third Department until sometime in 2013.¹⁶ Until then, municipalities, perhaps embolden by the two

⁷ *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Sup. Ct. Tompkins County 2012) [hereinafter *Dryden*].

⁸ *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. Otsego County 2012) [hereinafter *Middlefield*].

⁹ *Dryden*, 940 N.Y.S.2d at 470–71; *Middlefield*, 943 N.Y.S.2d at 722, 730.

¹⁰ See *Dryden*, 940 N.Y.S.2d at 470–71; see also *Middlefield*, 943 N.Y.S.2d at 722, 729 (citing *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 71 N.Y.2d 126, 131 (1987)); *Envirogas, Inc. v. Town of Kiantone*, 447 N.Y.S.2d 221, 222 (Sup. Ct. Erie County), *aff'd*, 454 N.Y.S.2d 694 (Div. 4th Dep’t 1982).

¹¹ *Jeffrey v. Ryan*, CA2012-001254, 2012 N.Y. Misc. LEXIS 4684 (Sup. Ct. Broome County Oct. 2, 2012) [hereinafter *Binghamton*].

¹² *Id.* at *19.

¹³ See *id.*

¹⁴ Notices of Appeal were filed for the aforementioned two cases with the Appellate Division, Third Department. See *Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. Otsego County 2012) *appeal docketed*, No. 2011-0400 (App. Div. 3d Dep’t Mar. 30, 2012), *available at* <http://drydensc.org/sites/default/files/MiddlefieldNoticeofAppeal.pdf>; *Town of Dryden*, Town Board Meeting of Resolution #79 (2012): Retain Earth Justice as Appellate Counsel 5 (April 12, 2012), *available at* http://dryden.ny.us/Board_Meeting_Minutes/TB/2012/TB2012-04-12.pdf.

¹⁵ See *Binghamton*, 2012 N.Y. Misc. LEXIS 4684. As of the date of this publication, notice to appeal has not been filed.

¹⁶ See Brief for Plaintiff-Appellant, *Norse Energy Corp. v. Town of Dryden*, 940 N.Y.S.2d

trial court decisions, are continuing to use their home rule powers to enact local laws and moratoria prohibiting HVHF.¹⁷ Notwithstanding, based upon the well-established principles of preemption and supersession, New York State law—in particular the Environmental Conservation Law (“ECL”)—is clear that municipalities do not have the power to ban HVHF.¹⁸ Accordingly, *Dryden* and *Middlefield* should be overturned as an impermissible use of home rule power.

This article seeks to provide an overview of the current landscape of HVHF in New York State and the extent to which municipalities may regulate HVHF through the enactment of local law. Part II of this article provides an overview of oil and gas development in New York State through a discussion of technology and associated regulation of HVHF.¹⁹ Part III of this article provides a perspective on the administrative and judicial review of HVHF in New York State.²⁰ Parts IV and V of this article provide an overview of home rule and the associated impact preemption has upon a municipality’s police power to regulate HVHF by local law.²¹ Part VI concludes by making a prediction as to the landscape of the law surrounding HVHF in the future.²²

II. OIL AND GAS DEVELOPMENT IN NEW YORK

While this article provides an in depth discussion and examination of the home rule powers of municipalities over HVHF and the interplay between New York State law and local laws, it is important to have a basic understanding of oil and gas development in New York, hydraulic fracturing, high volume hydraulic fracturing, and the regulatory framework governing the oil and gas industry in New York.

Generally, there are two types of drilling methods: vertical and

458 (Sup. Ct. Tompkins County 2012) (No. 2011-0902); Amici Curiae Brief in Support of Plaintiff-Appellant, *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. Otsego County 2012) (No. 2011-0930). These briefs were submitted on October 15, 2012 and October 16, 2012, respectively.

¹⁷ Municipalities like the Towns of Dryden and Middlefield have enacted HVHF bans. See *Dryden*, 940 N.Y.S.2d 458, 461 (Sup. Ct. Tompkins County 2012); *Middlefield*, 943 N.Y.S.2d 722, 722 (Sup. Ct. Otsego County 2012).

¹⁸ N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).

¹⁹ See discussion *infra* Part II.

²⁰ See discussion *infra* Part III.

²¹ See discussion *infra* Parts IV and V.

²² See discussion *infra* Part VI.

horizontal drilling.²³ With vertical drilling, there is just one well, going straight down.²⁴ Vertical drilling is used to extract “conventional” natural gas, which is a pocket of natural gas trapped beneath a rock layer.²⁵ With horizontal drilling, there is an initial vertical well, but then multiple horizontal wellbores can be drilled in different directions and at various heights,²⁶ the goal being to improve the potential efficiency of the well to reach of pockets of natural gas.²⁷ Horizontal drilling is used primarily to access “unconventional” natural gas,²⁸ which is natural gas that is trapped within a rock formation.²⁹ When compared to a vertical well, turning a wellbore horizontally allows the operator to access more natural gas.³⁰

New York has a rich history with oil and gas development. The first commercial well was drilled in Fredonia in 1821.³¹ There have been over 75,000 oil and gas wells drilled in New York,³² and there are currently more than 14,000 active wells in New York.³³ Hydraulic fracturing is a technique using a pressurized fluid to create and maintain fractures to release petroleum or natural gas in rock formations.³⁴ Hydraulic fracturing has been done in New York since the 1950’s, and horizontal drilling has been used in New York since the 1980’s.³⁵

A. High Volume Hydraulic Fracturing

High volume hydraulic fracturing (“HVHF”) is a type of horizontal

²³ J. Daniel Arthur, Brian Bohm & Mark Layne, *Annual Forum of the Ground Water Protection Council, Hydraulic Fracturing Considerations for Natural Gas Wells of the Marcellus Shale*, N.Y. ST. DEPT OF ENVTL. CONSERVATION 8 (Sept. 2008), http://www.dec.ny.gov/docs/materials_minerals_pdf/GWPCMarcellus.pdf.

²⁴ *See id.* at 7 fig.4, 14 fig.8.

²⁵ *See* Heather Cooley & Kristina Donnelly, *Hydraulic Fracturing and Water Resources: Separating the Frack from the Fiction*, PACIFIC INST., 8, 9 (2012), http://www.pacinst.org/reports/fracking/full_report.pdf.

²⁶ *Id.* at 9.

²⁷ *See id.*

²⁸ *See id.*

²⁹ *Id.* at 8.

³⁰ Arthur, Bohm & Layne, *supra* note 23, at 8.

³¹ Robert M. Lillpopp & Sonia A. Lindell, Report, *Drilling for Jobs: What the Marcellus Shale Could Mean for New York*, PUB. POLY INST. OF N.Y. ST., 9 (July 2011), <http://www.ppinys.org/reports/2011/Drilling-for-jobs-what-marcellus-shale-could-mean-for-NY.pdf>.

³² *Id.*

³³ *Id.*

³⁴ *See* *Marcellus Shale*, N.Y. ST. DEPT OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/46288.html> (last visited Jan. 11, 2013).

³⁵ *Id.*

drilling method using large volumes of fluid,³⁶ which is composed primarily—approximately 99%—of water and sand.³⁷ HVHF is not new to the United States; it has been used for over sixty years,³⁸ mainly in the west, and only recently has made its way to the east coast.³⁹ To make a horizontal well more productive, drilling companies increase the tiny fractures in the shale, called fissures, which allows more gas to flow into the well.⁴⁰ This is done by pumping large volumes of hydraulic fracturing fluid into the wellbore.⁴¹ This fluid creates the fissures and keeps them open so that the gas can enter into the well.⁴²

In New York, under the proposed regulations, HVHF in the Marcellus Shale would consist of a vertical well, then turning horizontal within the shale formation.⁴³ The New York State Department of Environmental Conservation (“DEC”) has proposed several siting requirements regarding the location of HVHF wells, including that the Marcellus Shale must be at least 2000 feet below the ground surface level.⁴⁴ This is an oversimplification of the

³⁶ See Larry Swanson & Maureen Krause, *An Assessment of Some of the Environmental and Public Health Issues Surrounding Hydraulic Fracturing in New York State*, N.Y. MARINE SCI. CONSORTIUM (Dec. 20, 2011), <http://www.somas.stonybrook.edu/~awp/downloads/NYMSC-FrackingWhitePaper.pdf>.

³⁷ *Marcellus Shale Hydraulic Fracturing: Fact Sheet*, CHESAPEAKE ENERGY, 1, 2 (May 2012), http://www.chk.com/media/educational-library/fact-sheets/marcellus/marcellus_hydraulic_fracturing_fact_sheet.pdf.

³⁸ Lawrence Roberts, *Guest Viewpoint: How Long Has Fracking Really Been Going On?*, PRESSCONNECT.COM (Sep. 26, 2012, 11:35 AM), <http://www.pressconnects.com/article/20120926/VIEWPOINTS03/309260029/Guest-Viewpoint-How-long-has-fracking-really-been-going>.

³⁹ See Swanson & Krause, *supra* note 36 (noting that approximately 20,000 hydrofracking leases have been issued in New York State).

⁴⁰ *Gas Drilling Boom Brings Little Interest for Other Professions in Small Towns*, SYRACUSE.COM (Aug. 13, 2012, 6:12 PM), http://www.syracuse.com/news/index.ssf/2012/08/gas_drilling_boom_brings_littl.html; see also Timothy Considine et al., Report, *Environmental Impacts During Marcellus Shale Gas Drilling: Causes, Impacts, and Remedies*, SHALE RES. & SOC’Y INST. 7 (2012) [hereinafter *Considine Report*], available at <http://www.srsi.buffalo.edu/wp-content/uploads/2012/05/UBSRSI-Environmental-Impacts-Single-Page.pdf>.

⁴¹ *Considine Report*, *supra* note 40, at 7.

⁴² See *id.*

⁴³ *Revised Proposed Express Terms 6 NYCRR Parts 550 through 556 and 560*, N.Y. ST. DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/87420.html> (last visited Jan. 11, 2013) (noting the addition of Part 560.1 to the Official Compilation of Codes, Rules & Regulations of the State of New York would “appl[y] to all vertical and directionally drilled wells, including horizontal wells, where high volume hydraulic fracturing is planned”).

⁴⁴ *Revised Proposed Express Terms 6 NYCRR Parts 750.1 and 750.3*, N.Y. ST. DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/87445.html> (last visited Jan. 11, 2013). The proposed regulations also contain the following setback requirements: 2000 feet within public drinking water intakes, 1000 feet below the base of fresh groundwater, 500 feet from a private well or domestic supply spring, 500 feet from primary aquifers, a ban on HVHF

process and the technology,⁴⁵ as well as the proposed regulations governing the siting of HVHF wells.⁴⁶

B. Natural Gas Regulation in New York

The DEC regulates natural gas development in New York.⁴⁷ In order to drill a well in New York, an operator must obtain a DEC permit.⁴⁸ In 1992, in accordance with the New York State Environmental Quality Review Act (“SEQRA”), the DEC completed a Final Generic Environmental Impact Statement (“FGEIS”) for oil and gas wells,⁴⁹ and determined that oil and gas wells do not have a significant adverse impact on the environment.⁵⁰ Accordingly, subsequent wells that satisfy the terms of the FGEIS require no additional environmental review.⁵¹

The oil and gas industry is regulated by the ECL, specifically Article 23, otherwise known as the Oil, Gas and Solution Mining Law.⁵² This law vests the power and jurisdiction over oil and gas development in the DEC, and provides for specific regulations, including regulations regarding well spacing,⁵³ voluntary integration,⁵⁴ and compulsory integration.⁵⁵ The regulations also contain a preemption provision that prohibits local municipalities from regulating the oil and gas industry, with the exception of two

within 100 year floodplains, a ban on well pads within state parks, and 4000 feet from the New York City and Syracuse watersheds. *Id.* (outlining the addition of Part 750–3.3 and Part 750–3.4 to the Official Compilation of Codes, Rules & Regulations of the State of New York, which prohibits certain activities and addresses discharges and requirements in obtaining a permit); *Considine Report*, *supra* note 40, at 27.

⁴⁵ See *Considine Report*, *supra* note 40, at 6–9 (outlining a more detailed discussion of the technology and science of HVHF).

⁴⁶ See *High Volume Hydraulic Fracturing Proposed Regulations*, N.Y. ST. DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/77353.html> (last visited Jan. 11, 2013) (displaying the full text of the proposed regulations).

⁴⁷ See *Marcellus Shale*, *supra* note 34.

⁴⁸ *Id.*

⁴⁹ *Findings Statement*, N.Y. ST. DEP’T ENVTL. CONSERVATION (Sept. 1, 1992), http://www.dec.ny.gov/docs/materials_minerals_pdf/geisfindorig.pdf (noting the purpose of the report in the finding statement); see also N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (2012).

⁵⁰ *Final Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program*, N.Y. ST. DEP’T ENVTL. CONSERVATION, 16 tbl.1 (Sept. 1992), http://www.dec.ny.gov/docs/materials_minerals_pdf/fgeisseqrcon.pdf.

⁵¹ *Id.* at FGEIS 13 (noting that no additional review is required if there is compliance with Table 1).

⁵² N.Y. ENVTL. CONSERV. LAW § 23-0102 (McKinney 2012).

⁵³ See *generally id.* § 23-0501 (noting the requirements for well spacing in obtaining a well permit).

⁵⁴ See *id.* § 23-0701(1).

⁵⁵ See *id.* § 23-0901(1).

narrow instances.⁵⁶

III. HVHF REVIEW IN NEW YORK

HVHF has generated significant discussion and debate throughout New York, not only in the public domain,⁵⁷ but also within, and among, the layers and branches of government.⁵⁸ In 2009, the DEC issued a draft supplement to the FGEIS, to consider HVHF, as it was determined that HVHF and HVHF-related technologies were outside the scope of the FGEIS.⁵⁹ In 2009, then-Governor Patterson vetoed a legislative moratorium on HVHF and issued an executive order requiring the DEC to revise its draft.⁶⁰

In 2011, the DEC issued a Draft Supplemental Generic Environmental Impact Statement (“DSGEIS”) and proposed HVHF regulations, as well as proposed amendments to the ECL for HVHF.⁶¹ There is no timetable for when the DEC will finalize its review of HVHF.⁶² Given the fact that the DEC received more than 80,000 comments on the DSGEIS, it is likely that the SEQRA process will take all of 2012 to complete, and possibly a good portion of 2013.⁶³ That puts off any potential HVHF drilling until at least 2013, and that’s assuming the DEC ultimately permits HVHF. There is also the real possibility that, even if the DEC approves HVHF, a lawsuit will be filed challenging any HVHF regulations.⁶⁴

⁵⁶ See *id.* § 23-0303(2); see also *infra* Part V (preemption in the oil and gas industry).

⁵⁷ A recent Quinnipiac poll showed that New Yorkers are in favor of HVHF. David Bertola, *Poll: NYers See Drilling Natural Gas as Positive*, BUFFALO L. J. (Sept. 24, 2012, 12:00 AM), <http://www.lawjournalbuffalo.com/news/article/current/2012/09/24/104271/poll-nyers-see-drilling-natural-gas-as-positive>.

⁵⁸ See Danny Hakim & Nicholas Confessore, *Cuomo Moving to End a Freeze on Gas Drilling*, N.Y. TIMES, July 1, 2011, at A1.

⁵⁹ *Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Reg. Program*, N.Y. ST. DEP’T OF ENVTL. CONSERVATION, 2-1 to 2-2 (Sept. 30, 2009), <http://www.dec.ny.gov/energy/58440.html>.

⁶⁰ See Hakim & Confessore, *supra* note 58, at A1.

⁶¹ See *Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program: Executive Summary* N.Y. ST. DEP’T OF ENVTL. CONSERVATION, 2 (Sept. 7, 2011), http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisexecsum0911.pdf.

⁶² See Jon Campbell, *Fracking Delay Leads to Uncertainty*, ROCHESTER DEMOCRAT & CHRON., Oct. 2, 2012, available at 2012 WLNR 20923037.

⁶³ See Adam Chick, *Hydraulic Fracturing in New York Faces Delay*, WBNG NEWS (Oct. 1, 2012), <http://www.wbng.com/news/local/Hydraulic-Fracking-In-New-York-Faces-Delay-172176441.html>; see generally Campbell, *supra* note 62 (noting that a determination by the DEC is on hold until a finalization is complete of their review on high-volume hydrofracking).

⁶⁴ It is also possible that the DEC would be sued by both opponents and supporters of HVHF, the former arguing the regulations are not strict enough and the latter arguing that the regulations go too far in certain areas.

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However, by no means does that derail the ongoing discussion of HVHF in New York.

IV. THE HVHF HOME RULE DEBATE

As the New York review of HVHF makes its way through the SEQRA process and the DEC, communities across New York are holding meetings and discussions on HVHF, in an attempt to learn more about HVHF and the issues, impacts, and benefits associated therewith.⁶⁵ Chief among those issues is a municipality's right to regulate HVHF through its home rule powers. What right does a municipality have to regulate HVHF? Can a municipality enact a law that provides for specific regulations for HVHF? What about a law of general applicability (e.g., a special use permit)? Can a municipality ban, or "zone-out," HVHF in all or part of its borders? These questions go to the heart of the home rule issue.

On one hand, you have the ECL, which has a preemption provision for the oil and gas industry that limits the amount of home rule power.⁶⁶ On the other hand, you have HVHF, an emerging technology in New York.⁶⁷ Some municipalities have answered these questions affirmatively, and enacted local laws prohibiting or restricting HVHF, or adopted moratoria on HVHF.⁶⁸ However, by no means should those measures be viewed as an indication that they are legal or otherwise enforceable. Regardless of the actions taken by some municipalities, home rule of HVHF will ultimately be determined by the courts or the state legislature. Indeed, as we have seen thus far, as HVHF becomes an emerging area of law and policy in New York, a clear struggle for control is also developing.

A. Case Law on Home Rule and HVHF

There have been three decisions in 2012 dealing with challenges to local laws prohibiting HVHF. Two cases upheld such laws, and

⁶⁵ See, e.g., *Hydrofracking Hearing at Penfield Town Hall*, WHEC.COM (Sept. 5, 2012), <http://www.whec.com/news/stories/s2753395.shtml?cat=565> ("The town board is proposing a one year moratorium on hydrofracking."); *Informational Meetings on Hydrofracking Scheduled*, MADISON COUNTY COURIER (Aug. 2012), <http://madisoncountycourier.com/?p=33898> ("The Town of North Norwich will be hosting two informational meetings on hydrofracking.").

⁶⁶ See discussion *infra* Part V.

⁶⁷ John R. Nolon & Victoria Polidoro, *Hydrofracking: Disturbances Both Geological and Political: Who Decides?*, 44 URB. LAW. 507, 507 (forthcoming 2012).

⁶⁸ See *supra* note 17 and accompanying text.

the third overturned a local law as an improper regulation of HVHF. This has resulted in a murky legal landscape for home rule of HVHF.

1. *Dryden* and *Middlefield*

Two recent decisions, *Dryden* and *Middlefield*, are the first cases in New York to deal with the issue of home rule of HVHF.⁶⁹ In both cases, the Towns of Dryden and Middlefield enacted local laws regulating HVHF, specifically prohibiting oil and gas drilling as a permitted use.⁷⁰ These laws were challenged as impermissible, as preempted by the ECL, and as an invalid attempt to exercise home rule authority.⁷¹

The trial courts in both cases ruled in favor of the municipalities, concluding that municipalities have home rule authority to prohibit oil and gas drilling.⁷² The courts found that the preemption provision in the ECL regarding oil and gas development did not preclude municipalities from banning HVHF.⁷³ The court in *Dryden* did, however, invalidate a portion of the town law that attempted to invalidate drilling permits issued by the state.⁷⁴ Central to both courts' reasoning was that the preemption provision regarding the mining industry—namely, the right to determine if mining is a permissible use—is inherently similar to the oil and gas preemption provision.⁷⁵ Thus, the home rule powers that a municipality enjoys over the mining industry should be implied to control the oil and gas industry.⁷⁶

These decisions represent a change in how courts have interpreted preemption provisions in the past.⁷⁷ The decisions have also likely emboldened municipalities that want to regulate and prohibit HVHF. Similar to the holdings in *Dryden* and *Middlefield*, supporters of home rule over the oil and gas industry rely

⁶⁹ *Dryden*, 940 N.Y.S.2d 458, 461, 465–66 (Sup. Ct. Tompkins County 2012); *Middlefield*, 943 N.Y.S.2d 722, 722, 723–24 (Sup. Ct. Otsego County 2012).

⁷⁰ *Dryden*, 940 N.Y.S.2d at 461; *Middlefield*, 943 N.Y.S.2d at 722.

⁷¹ *Dryden*, 940 N.Y.S.2d at 465–66; *Middlefield*, 943 N.Y.S.2d at 723–24.

⁷² *Dryden*, 940 N.Y.S.2d at 474; *Middlefield*, 943 N.Y.S.2d at 730.

⁷³ *Dryden*, 940 N.Y.S.2d at 474; *Middlefield*, 943 N.Y.S.2d at 730.

⁷⁴ *Dryden*, 940 N.Y.S.2d at 473 (holding that a municipality has “no authority to invalidate a permit lawfully issued by another governmental entity”).

⁷⁵ *Dryden*, 940 N.Y.S.2d at 474; *Middlefield*, 943 N.Y.S.2d at 730.

⁷⁶ *Dryden*, 940 N.Y.S.2d at 474; *Middlefield*, 943 N.Y.S.2d at 730.

⁷⁷ See Mireya Navarro, *Judge's Ruling Complicates Gas Drilling Issue in New York*, N.Y. TIMES, Feb. 23, 2012, at A23 (noting that the *Dryden* and *Middlefield* cases are “among the first in the nation to uphold . . . local drilling ban[s]”).

principally on the similarities between the oil and gas industry and the mining industry.⁷⁸ They argue that the provisions of the ECL regarding oil and gas do not provide a clear and express preemption of all local laws, and therefore leave the door open for home rule powers.⁷⁹ Additionally, they argue that the preemption provisions in the ECL regarding mining and oil and gas are similar, such that the same rights conferred to municipalities to regulate mining should apply to the oil and gas industry.⁸⁰ Moreover, they argue that case law regarding the rights of a municipality to regulate mining should apply to the oil and gas industry.⁸¹

These arguments resonated with the courts in *Dryden* and *Middlefield*:

[T]he court is unable to discern any meaningful difference between the language of the supersedure clauses of the [Mined Land Reclamation Law] . . . and the [Oil, Gas and Solution Mining Law] or in the respective legislative histories, purposes or regulatory schemes of the two statutes, [thus] it is constrained to apply . . . [mining case law] in determining that the Zoning Amendment is not preempted⁸²

Both of these cases have been appealed to the Third Department, Appellate Division.⁸³ It is likely that oral argument will not be heard until sometime in early 2013, with a decision coming perhaps midway through the year.⁸⁴ As we wait for the final judicial review, which, given the importance of HVHF, will likely be determined by the New York Court of Appeals, the struggle over home rule continues.

While it is unclear how the courts will ultimately decide this issue, a review of the existing statutory law and case law provide

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*; Michael E. Kenneally & Todd M. Mathes, *Natural Gas Production and Municipal Home Rule in New York*, 10 N.Y. ZONING L. & PRAC. REP. 4 (Jan. 2010); Charles Gottlieb, *Regulating Natural Gas Development Through Local Planning and Land Use Controls*, 10 N.Y. ZONING L. & PRAC. REP. 6 (June 2012).

⁸¹ See Navarro, *supra* note 77, at A23; Kenneally & Mathes, *supra* note 80, at 4; Gottlieb, *supra* note 80, at 6.

⁸² *Dryden*, 940 N.Y.S.2d 458, 474 (Sup. Ct. Tompkins County 2012); see also *Middlefield*, 943 N.Y.S.2d 722, 729 (Sup. Ct. Otsego County 2012) (noting that the preemption provisions for mining, and oil and gas are “strikingly similar”).

⁸³ Chris Dolmetsch & Jim Efstathiou Jr., *New York Drilling Ban Rulings Being Appealed, Lawyers Say*, BLOOMBERG NEWS (Mar. 30, 2012, 6:46 PM), <http://www.bloomberg.com/news/2012-03-30/anschutz-files-appeal-notice-in-fracking-case-lawyer-says.html>.

⁸⁴ See *supra* note 16 and accompanying text.

some guidance as to the right of municipalities to regulate HVHF. As set forth below, this guidance does not allow for the type of home rule authority that was recognized by the courts in *Dryden* and *Middlefield*. New York case law and statutory law provide for limited home rule power over the oil and gas industry,⁸⁵ and thus any attempts to analogize and create parallels between a municipality's home rule power over the mining industry and the oil and gas industry are unfounded and unwarranted under present law.

2. *Binghamton*

The most recent decision regarding home rule over HVHF, *Binghamton*, dealt with the challenge to a local law enacted by the City of Binghamton, which prohibited HVHF.⁸⁶ The difference with the City of Binghamton's law, as compared to the local laws in *Dryden* and *Middlefield*, is that the City of Binghamton placed a two-year ban on HVHF.⁸⁷

The court overturned the local law as an illegal and improper moratorium.⁸⁸ Although counsel for the City of Binghamton, David Slottje, argued to the court that the local law was not a moratorium, the court quickly dismissed this, noting that the City Council viewed the law as a two-year moratorium.⁸⁹ Additionally, the court quoted from comments made by Mr. Slottje during a meeting of the City Council, where he stated that the City Council "can absolutely think of it in terms of being a moratorium."⁹⁰

In determining whether the local law was a moratorium, the court noted that "the hallmark of a moratorium" is a temporary ban on development or land use.⁹¹ Thus, the local law, which imposed a two-year ban on HVHF, was clearly a moratorium, and the City's attempt to claim otherwise was "illusory."⁹²

In overturning the moratorium, the court stated that in order for a moratorium to be upheld, a municipality is required to show (1) that the moratorium is "in response to a dire necessity," (2) that the

⁸⁵ See discussion *infra* Part V(A) & Part V(B).

⁸⁶ See *Binghamton*, CA2012-001254, 2012 N.Y. Misc. LEXIS 4684, at *1-2 (Sup. Ct. Broome County Oct. 2, 2012).

⁸⁷ *Id.* at *5-6.

⁸⁸ *Id.* at *19-20.

⁸⁹ *Id.* at *5-6.

⁹⁰ *Id.* at *5.

⁹¹ *Id.* at *16.

⁹² *Id.* at *17-18.

moratorium is “reasonably calculated to alleviate or prevent a crisis condition,” and (3) that “the municipality is presently taking steps to rectify the problem.”⁹³ The court held that the City failed in all three areas.⁹⁴

While the court did note in dicta that the local law would not be superseded by state law and adopted the reasoning set forth in *Dryden* and *Middlefield*,⁹⁵ it nevertheless overturned the City of Binghamton’s local law as an illegal and improper moratorium, and, in so doing, called into question the legality of all moratoria on HVHF.⁹⁶

Generally, a moratorium is a temporary stop-gap measure designed to preserve the status quo to afford a municipality time to analyze an issue.⁹⁷ It is for this reason that a moratorium on HVHF cannot withstand legal scrutiny. As noted by the court in *Binghamton*, a moratorium on HVHF is not in response to a “dire necessity”—or any necessity.⁹⁸ Importantly, no one can commence HVHF drilling in New York unless and until the DEC finishes its review and determines to issue drilling permits for HVHF.⁹⁹ Thus, a moratorium on HVHF is superfluous, and does not serve to halt any development or activity.

Accordingly, municipalities should be cautioned when considering the enactment of a moratorium on HVHF. Moreover, municipalities that have already adopted moratoria on HVHF run the risk of those laws being challenged as illegal and, as noted by the court in *Binghamton*, the statute of limitations on such a challenge is six years,¹⁰⁰ thus making any HVHF moratoria enacted after 2006 ripe for challenge.

Based on the foregoing, the ability of a municipality to regulate HVHF remains unclear. While the courts have held that local laws

⁹³ *Id.* at *16.

⁹⁴ *Id.* at *19.

⁹⁵ *Id.* at *14.

⁹⁶ *See id.* at *18–19.

⁹⁷ *See Dune Assocs. v. Anderson*, 500 N.Y.S.2d 741, 742–43 (App. Div. 2d Dep’t 1986) (explaining that a moratorium is “a reasonable measure designed to temporarily halt development while the town consider[s] comprehensive zoning charges” (emphasis added) (citing *Charles v. Diamond*, 41 N.Y.2d 318, 325 (1977) (emphasis added))); *see also* N.Y.C. Hous. Auth. v. Comm’r of Env’tl. Conservation Dep’t, 372 N.Y.S.2d 146, 150 (Sup. Ct. Queens County, 1975) (noting that courts have upheld moratoria “so long as they are for a reasonable purpose and of a reasonable duration.” (internal citations omitted)).

⁹⁸ *Binghamton*, CA2012-001254, 2012 N.Y. Misc. LEXIS 4684, at *19 (Sup. Ct. Broome County Oct. 2, 2012).

⁹⁹ *See id.*

¹⁰⁰ *Id.* at *13 (noting that a six year statute of limitations would be applicable for a declaratory judgment).

prohibiting HVHF are not superseded by state law,¹⁰¹ moratoria of HVHF are improper.¹⁰² Notwithstanding, a review of the law of preemption provides support for the proposition that, despite the holdings in *Dryden* and *Middlefield*, local laws banning or regulating HVHF are invalid and preempted by state law.¹⁰³

V. PREEMPTION

An analysis of the ability of a municipality to enact legislation attempting to regulate HVHF must begin with the legislative grant of authority that permits a municipality to adopt laws regulating land uses within its borders.

The preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies “the untrammelled primacy of the Legislature to act * * * with respect to matters of State concern.” Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field.¹⁰⁴

A. Express Preemption

Even though the constitutional home rule provision confers broad police powers upon local governments, this power may not be exercised by a municipality through the adoption of a law “inconsistent with the Constitution or any general law of the State.”¹⁰⁵ Where a state and local law both relate to the same subject it does not automatically lead to the conclusion that the state legislature intended to preempt the entire field.¹⁰⁶ The

¹⁰¹ See, e.g., *Dryden*, 940 N.Y.S.2d 458, 474 (Sup. Ct. Tompkins County 2012); *Middlefield*, 943 N.Y.S.2d 722, 730 (Sup. Ct. Otsego County 2012).

¹⁰² See *Binghamton*, 2012 N.Y. Misc. LEXIS 4684, at *19.

¹⁰³ See N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).

¹⁰⁴ *Albany Area Builders Ass’n v. Town of Guilderland*, 546 N.E.2d 920, 922 (N.Y. 1989) (alteration in original) (internal citations omitted) (quoting *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 586 (N.Y. 1977)).

¹⁰⁵ *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E.2d 903, 905 (N.Y. 1987) (citing N.Y. Const. art. IX, § 2(c); *N.Y. State Club Ass’n v. City of N.Y.*, 505 N.E.2d 915, 917 (N.Y. 1987), *aff’d*, 487 U.S. 1 (1988); *Consolidated Edison Co. v. Town of Red Hook*, 456 N.E.2d 487, 490 (1983); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78, 80 (N.Y. 1980); *People v. Cook*, 312 N.E.2d 452, 455 (N.Y. 1974)).

¹⁰⁶ See *Jancyn Mfg. Corp.*, 518 N.E.2d at 907.

analysis must turn to the particular state law provision to see if, and to what extent, the state has preempted local control.

1. State Preemption Under the Environmental Conservation Law

Generally, where the state has expressed a clear intent to exclusively regulate a particular area, local attempts to regulate are preempted and superseded.¹⁰⁷ Stated differently, the ability of a municipality to regulate a particular area depends upon the powers reserved to the municipality by the state.

Regarding the oil and gas industry, the ECL provides the following:

The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.¹⁰⁸

This language provides a clear, unambiguous intent of the state legislature to preempt and supersede all local laws and ordinances that regulate the oil and gas industry, with the exceptions being local roads and real property taxes.¹⁰⁹ With the exception of the two narrow home rule powers (local roads and real property taxes), it is difficult to argue that this language grants additional home rule authority.

Recognizing this clear and unequivocal preemption of local laws regarding the oil and gas industry, there has not been much case law generated regarding ECL section 23-0303(2).¹¹⁰ Prior to the recent decisions in *Dryden* and *Middlefield*, the only reported decision interpreting ECL section 23-0303(2) was *Envirogas, Inc. v. Town of Kiantone*.¹¹¹

In that case, the Town passed a local law prohibiting the construction of any oil or gas well unless and until a \$2500 compliance bond and \$25 permit fee—per well—was paid to the Town.¹¹² The court struck down the law as invalid, unenforceable,

¹⁰⁷ See *Albany Area Builders Ass'n*, 546 N.E.2d at 922.

¹⁰⁸ N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).

¹⁰⁹ See *id.*

¹¹⁰ See *Envirogas, Inc. v. Town of Kiantone*, 447 N.Y.S.2d 221, 222 (Sup. Ct. Erie County 1982), *aff'd*, 454 N.Y.S.2d 694 (App. Div. 4th Dep't 1982). There are no reported cases on point from this decision, in 1982, until 2012.

¹¹¹ *Id.*

¹¹² *Id.* at 221–22.

and preempted by ECL section 23-0303(2).¹¹³ In its reasoning, the court stated generally that “[t]he mere fact that a state regulates a certain area of business does not automatically pre-empt all local legislation which applies to that enterprise.”¹¹⁴ However, the court went on to note that “where a state law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on the same subject matter unless it has received ‘clear and explicit’ authority to the contrary.”¹¹⁵

Accordingly, the court held that the purpose of ECL section 23-0303(2), based on the plain language of the statute, “is to ‘supersede all local laws or ordinances,’ [and therefore] it pre-empts not only inconsistent local legislation, but also any municipal law which purports to regulate gas and oil well drilling operations.”¹¹⁶ The only areas where the state provided clear and explicit authority to act to the contrary are regarding local roads and real property taxes.¹¹⁷ In striking down the town’s law, the court permanently enjoined the town from enforcing this law, and concluded the following: “[s]ince the State Legislature clearly intended Article 23 of the ECL to supersede and preclude the enforcement of all local ordinances in the area of oil and gas regulation, [the Town’s] actions are arbitrary and capricious and contrary to law.”¹¹⁸

In the thirty years since the *Envirogas* case, there have been no changes or amendments to ECL section 23-0303(2),¹¹⁹ and no other reported decisions or instances of municipal violations thereof.¹²⁰ This is an indication that municipalities understand the limitations placed upon their home rule power regarding the oil and gas industry. It was not until HVHF was being considered in the Northeast that municipalities began attempts to regulate and prohibit oil and gas development.¹²¹ It is difficult, however, to

¹¹³ See *id.* at 223.

¹¹⁴ *Id.* at 222 (citation omitted) (citing *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78, 80 (N.Y. 1980)).

¹¹⁵ *Envirogas, Inc.*, 447 N.Y.S.2d at 222 (quoting *Robin v. Inc. Vill. of Hempstead*, 285 N.E.2d 285, 287 (N.Y. 1972)).

¹¹⁶ *Envirogas, Inc.*, 447 N.Y.S.2d at 222 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012)).

¹¹⁷ See ENVTL. CONSERV. LAW § 23-0303(2); *Envirogas*, 447 N.Y.S.2d at 222.

¹¹⁸ *Envirogas*, 447 N.Y.S.2d at 223.

¹¹⁹ ENVTL. CONSERV. § 23-0303(2) (noting in the statutory history section that there have been no changes or amendments to ECL section 23-0303 since August 26, 1981 when subdivision (2) was added).

¹²⁰ See *supra* notes 110–11 and accompanying text.

¹²¹ See discussion *supra* Parts III & IV (discussing the recent review of HVHF in New York and the tension between the state and local government with respect to a municipality’s right

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understand how, or why, HVHF changed the equation to allow for greater home rule of the oil and gas industry.

B. Implied Preemption

Where “the Legislature has not expressly preempted a municipality’s home rule authority” to regulate HVHF through land use regulations, it can be argued that “the Legislature has impliedly evidenced [an] intent . . . to preempt [such] laws.”¹²² In other words, state policy may preempt local “laws in favor of promoting the development of natural gas to maximize its recovery and protect the correlative rights of the mineral owners across the State.”¹²³

1. State Preemption Under the Environmental Conservation Law

In ECL section 23-0301, the legislature sets forth state policy, declaring that it is “in the public interest 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.”¹²⁴ This statement of policy provides an indication that the state legislature intended to promote natural gas drilling in New York State while, at the same time, prevent waste by discouraging local regulation. Furthermore, the legislature has enacted detailed statutory provisions regulating the natural gas industry—going so far as specify permissible locations and size of drilling units and well pads.¹²⁵

C. Use of Mining Law to Support Home Rule for HVHF

A reason expressed by supporters of home rule over HVHF—and one relied upon heavily by the courts in *Dryden* and *Middlefield*¹²⁶—is the power conferred upon municipalities regarding the regulation

to regulate HVHF through its home rule power).

¹²² David Everett & Robert Rosborough, *The Billion Dollar Question—Are Municipalities Preempted Under New York State Law from Using Their Zoning Powers to Control Hydraulic Fracturing for Natural Gas?*, 32 N.Y. ENVTL. LAW. 39, 43 (2012).

¹²³ *Id.* (citing *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008), *cert. denied*, 129 S. Ct. 999 (2009)).

¹²⁴ N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2012).

¹²⁵ *See id.* § 23-0501 (outlining well spacing requirements and conditions under which well permits are granted).

¹²⁶ *See discussion supra* Part IV(A)(1) (discussing the recent issues and cases that have arisen out of municipalities’ attempts to regulate HVHF through their home rule power).

of mining.¹²⁷ Supporters argue that there are inherent similarities between the mining industry and the oil and gas industry that warrant equal treatment under the law.¹²⁸ Thus, because a municipality has certain home rule authority regarding mining—namely the right to (1) determine if mining is a permissible use, and (2) subject mining to local laws of general applicability (e.g., special use permits)¹²⁹—these powers transfer over to regulate the oil and gas industry. Additionally, they claim that the ECL provisions regarding local authority to regulate mining of and oil and gas are similar, thus bolstering the argument that the powers to regulate are the same.¹³⁰

It is because of these similarities that case law regarding mining should apply to the oil and gas industry. One case in particular is *Frew Run Gravel Products, Inc. v. Town of Carroll* (“*Frew Run*”).¹³¹ In *Frew Run*, the Court of Appeals recognized the right of a municipality to pass local laws prohibiting mining as a permitted use, based upon, *inter alia*, the preemption limitations in the ECL.¹³² Thus, because the two industries are similar (each involving the extraction of natural resources from the ground) and have similar preemption provisions in the ECL, the same home rule powers a municipality enjoys over mining should be recognized over oil and gas development. As held by the court in *Dryden*, “[i]n light of the similarities between the [oil and gas law] and the [mining law] as it existed at the time of *Matter of Frew Run*, the court is constrained to follow that precedent in this case.”¹³³

1. Unfounded Comparisons to the Mining Industry

Despite the arguments set forth above, the regulations regarding mining and oil and gas are not similar, and any comparisons between the two industries, or use of mining case law or statutory

¹²⁷ *Dryden*, 940 N.Y.S.2d 458, 466 (Sup. Ct. Tompkins County 2012); *Middlefield*, 943 N.Y.S.2d 722, 729 (Sup. Ct. Otsego County 2012).

¹²⁸ See, e.g., Everett & Rosborough, *supra* note 122, at 42–43 (noting that, due to the similarities in the language and purpose of MLRL, towns continue to argue that statutory interpretation of mining laws and related case law regarding a municipality’s home rule authority must apply when regulating the oil and gas industry).

¹²⁹ See ENVTL. CONSERV. § 23-2703(2)(a)–(b).

¹³⁰ *Dryden*, 940 N.Y.S.2d at 474 (“[T]he court is unable to discern any meaningful difference between the language of the supersedure clauses of the MLRL . . . and the OGSML.”); *Middlefield*, 943 N.Y.S.2d at 729 (deeming the provisions of MLRL and OGSML “strikingly similar”).

¹³¹ *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987).

¹³² See *id.* at 923.

¹³³ *Dryden*, 940 N.Y.S.2d at 466.

law against the oil and gas industry, is simply unfounded and a stretch of legislative and judicial interpretation.

First, the state legislature drafted separate and distinct preemption provisions, depending upon the subject matter at issue.¹³⁴ Each of these laws provides for varying amounts of state preemption and limitations on home rule.¹³⁵ Simply put, if the state legislature intended the preemption provisions for the oil and gas and mining industries to be the same, it would have provided for the same language in each. It did not, and it is illogical to assume the legislature intended the provisions to be the same.

Specifically, when comparing the regulations regarding the oil and gas and mining industries, not only are the preemption provisions not similar, but they are fundamentally different in origin and operation. Thus, attempts to imply the home rule powers for mining onto the oil and gas industry is simply lacking a sound legal foundation.

Regarding oil and gas, the preemption provision is as set forth above.¹³⁶ That is, all local laws and ordinances regulating the oil and gas industry are superseded, with the exception of local laws pertaining to local roads or real property taxes.¹³⁷ This law has remained in place and unchanged since 1981.¹³⁸ The law has very broad preemption language with a corresponding narrow home rule power, and represents one side of the preemption spectrum.¹³⁹ Only in certain defined, limited instances does the ECL permit a municipality to enact local laws affecting the oil and gas industry.¹⁴⁰ This is in sharp contrast with the preemption provision regarding mining.

The preemption provision regarding mining is codified at ECL

¹³⁴ See, e.g., ENVTL. CONSERV. § 19-0709 (air pollution controls); *id.* § 23-0303(2) (oil, gas and solution mining); *id.* § 23-2703(2) (mining); *id.* § 27-0711 (solid waste and refuse disposal); *id.* § 27-1017 (beverage container laws); *id.* § 27-1107 (siting of industrial hazardous waste treatment, storage and disposal facilities).

¹³⁵ See *Ne. Mines, Inc. v. N.Y. Dep't of Env'tl. Conservation*, 113 A.D.2d 62, 64 (App. Div. 3d Dep't 1985) (noting that the legislature employed a "deliberately selective treatment" of preemption regarding the regulation of various activities).

¹³⁶ See *supra* note 108 and accompanying text.

¹³⁷ ENVTL. CONSERV. § 23-0303(2).

¹³⁸ See *id.* (noting in the statutory history section that ECL section 23-0303 was amended to add subdivision (2), which became effective on August 26, 1981, and no amendments have occurred since such time).

¹³⁹ See *id.*

¹⁴⁰ Section 23-0303(2) of the ECL expressly states that the provisions of the article "shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." *Id.*

section 23-2703(2).¹⁴¹ This provision underwent a significant amendment in 1991.¹⁴² However, in order to fully understand the spectrum of preemption regarding mining, it is necessary to examine both the pre-1991 and post-1991 provisions.

At the time that *Frew Run* was decided in 1987, the preemption provision for mining read as follows:

For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, 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 than those found herein.*¹⁴³

This language is significantly different than the preemption language regarding oil and gas. Before the amendment in 1991, the statute expressly gave municipalities the right to enact stricter mining standards (for example, the right to prohibit mining). Nowhere in the preemption provision for oil and gas mining is a municipality afforded the power to enact stricter standards.¹⁴⁴

In 1991, the preemption statute for mining was amended.¹⁴⁵ Specifically, the language regarding the ability of a municipality to enact stricter standards was removed; however, a municipality's home rule authority was not completely curtailed.¹⁴⁶ In its place, ECL section 23-2703(2) now allows a municipality to regulate mining by "enacting or enforcing local laws or ordinances of general applicability"¹⁴⁷ or "enacting or enforcing local zoning ordinances or laws which determine permissible uses [of mining]."¹⁴⁸ In other words, municipalities can require mining companies to receive a local special use permit or, alternatively, a municipality can determine those zoning districts in which mining is permissible, including the ability to completely zone out and ban mining from its borders.¹⁴⁹

Additionally, there is another distinction between the two

¹⁴¹ *Id.* § 23-2703(2).

¹⁴² *See* 1991 N.Y. Laws 2643–44.

¹⁴³ N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 1984) (expressing the language before the statute was amended in 1991) (emphasis added).

¹⁴⁴ *See* ENVTL. CONSERV. § 23-0303(2).

¹⁴⁵ 1991 N.Y. Laws 2643–44.

¹⁴⁶ *See id.*

¹⁴⁷ ENVTL. CONSERV. § 23-2703(2)(a).

¹⁴⁸ *Id.* § 23-2703(2)(b).

¹⁴⁹ *See id.* § 23-2703(2)(a)–(b).

preemption provisions. Regarding the oil and gas preemption provision, it expressly supersedes “all local laws *or ordinances*,”¹⁵⁰ while the mining preemption provision only supersedes “local laws.”¹⁵¹ The inclusion of “ordinances” into the preemption provision for oil and gas broadens the reach of preemption and can only mean to prohibit attempts to regulate oil and gas through local land use and zoning ordinances.

Accordingly, the preemption language for mining is very narrow, with corresponding broad home rule powers, and thus is at the opposite end of the preemption spectrum when compared to oil and gas. It is worth noting that a municipality has the ability to regulate mining through laws of general applicability (or to zone out mining) because the ECL expressly gives it those home rule powers.¹⁵² This language is noticeably absent from the oil and gas regulations.¹⁵³ It cannot, therefore, be implied, nor may case law regarding mining be used to bridge the gap and allow for greater home rule authority of the oil and gas industry. Simply put, a municipality’s right to regulate the oil and gas industry is limited,¹⁵⁴ and support for greater home rule authority does not exist in the law.

Perhaps underscoring this fact is that there are currently several bills pending in the state legislature that would confer broader home rule rights for municipalities with respect to the oil and gas industry.¹⁵⁵ These proposed bills would amend ECL section 23-0303(2) to expressly give municipalities home rule powers to regulate the oil and gas industry through local laws of general applicability, and give municipalities the right to determine whether natural gas drilling is a permissible use.¹⁵⁶ In effect, the proposed bills would provide for similar home rule powers for the oil and gas industry as that of the mining industry.¹⁵⁷ Clearly, this is an acknowledgment by the state legislature—at least the bill sponsors—that the current state of the law does not provide the same home rule powers for the oil and gas industry as it does for the mining industry.

¹⁵⁰ *Id.* § 23-0303(2) (emphasis added).

¹⁵¹ *Id.* § 23-2703(2).

¹⁵² *Id.* § 23-2703(2)(a).

¹⁵³ *See id.* § 23-0303.

¹⁵⁴ *See id.*

¹⁵⁵ *See* Assemb. B. A3245, 234th Sess., at A120 (N.Y. 2011); Assemb. B. A8557, 235th Sess., at A264 (N.Y. 2011); S.B. S5830, 234th Sess., at S231 (N.Y. 2011).

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

In addition to the differences in the preemption provisions, there is also a difference between the industries that support limited home rule for oil and gas development. While both mining and oil and gas development involve the extraction of natural resources, mining is done within a set, confined geographic area.¹⁵⁸ This allows for mining to be contained to a specific area (i.e. within a municipality).¹⁵⁹ Thus, in accordance with the preemption provision for mining, a municipality has the right to determine if mining is a permissible use, and this determination does not affect another municipality from mining within its borders.¹⁶⁰

In contrast, with oil and gas development, especially HVHF, the recovery of natural gas can take place over a much larger spectrum.¹⁶¹ Recovery from a single HVHF well could come from hundreds of acres involving multiple municipalities.¹⁶² Thus, one municipality's ban on HVHF could affect another municipality that wants HVHF.

To illustrate this problem, assume Municipality A and Municipality B are adjoining municipalities. Assume further that Municipality A wants to ban mining and HVHF, and Municipality B wants mining and HVHF. If Municipality A bans mining, this will not affect Municipality B from permitting mining within its borders. However, if Municipality A bans HVHF, this could affect oil and gas drilling in Municipality B, since wells that could be drilled in Municipality B might recover natural gas that is underneath Municipality A. This problem is known as the "checkerboard effect".¹⁶³

This difference in the scope of recovery between mining and oil and gas extraction supports the position that mining and oil and gas development are two separate and distinct industries. It also helps to explain why the preemption provision for mining expressly allows a municipality to ban mining, and why this language is absent from the oil and gas preemption provision. Additionally, it provides

¹⁵⁸ See *Mineral Resources of New York*, N.Y. ST. DEPT OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/cfm/xtapps/MinedLand/standard/commodities> (last visited Jan. 11, 2013) (listing various mineral commodities in New York State and the locations of such minerals, which are confined to specified counties).

¹⁵⁹ See *id.*

¹⁶⁰ See N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012).

¹⁶¹ See Navarro, *supra* note 77, at A23; see also *New York's Natural Gas and Oil Resource Endowment: Past, Present and Potential*, N.Y. ST. ENERGY RES. & DEV. AUTH. (NYSERDA) 20–21 (2007), <http://www.tiogagaslease.org/images/NYSERDAReport.pdf> (noting that gas resources stretch over a broad geographic area and multiple counties).

¹⁶² See *id.*

¹⁶³ Navarro, *supra* note 77, at A23.

support for statewide control over oil and gas development, to avoid the checkerboard effect where one municipality may effectively disrupt drilling activities in another municipality.

D. Dryden and Middlefield Should be Overturned

Despite the holdings in both *Dryden* and *Middlefield* that recognize similarities between the preemption provisions for mining and oil and gas,¹⁶⁴ an analysis of these provisions demonstrates that they are not similar, but rather are at the opposite ends of the preemption spectrum. The courts also failed to recognize the distinction in the provisions with the inclusion of “ordinances” into the oil and gas preemption provision,¹⁶⁵ and in *Dryden* the court expressly stated the differences in the provisions were simply “form over substance.”¹⁶⁶ Notwithstanding, the differences in the preemption provisions for oil and gas and mining are not merely form over substance, but are meaningful differences that evidenced a clear intent on the part of the state legislature to provide for different home rule powers for these industries.

Additionally, the Appellate Division, Third Department, which will be hearing the appeals for both *Dryden* and *Middlefield*, has recognized that the state legislature, in drafting the ECL, drafted separate and distinct preemption provisions for different industries.¹⁶⁷ Moreover, the Third Department has recognized that preemption language should be given a “literal”—and not liberal—interpretation.¹⁶⁸

Implying the home rule powers for mining onto the oil and gas industry, as the courts in *Dryden* and *Middlefield* did, represents a very liberal interpretation of the preemption provisions,¹⁶⁹ contrary to both the intent of the state legislature that enacted the ECL¹⁷⁰

¹⁶⁴ Everett & Rosborough, *supra* note 122, at 44.

¹⁶⁵ See generally *Dryden*, 940 N.Y.S.2d 458, 467 (Sup. Ct. Tompkins County 2012); *Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. Otsego County 2012) (addressing no substantial distinction between the language of ECL section 23-2703(2) and ECL section 23-0303(2)).

¹⁶⁶ *Dryden*, 940 N.Y.S.2d at 467. Neither court really addressed the language of the ECL § 23-0303(2) with respect to the inclusion of “ordinances” but rather punted the issue as “form over substance.” *Id.*

¹⁶⁷ See *Ne. Mines, Inc. v. N.Y. Dep’t of Env’tl. Conservation*, 113 A.D.2d 62, 63–64 (App. Div. 3d Dep’t 1985).

¹⁶⁸ *Id.* (applying the ordinary meaning of the language of ECL section 23-2703(2) in their interpretation).

¹⁶⁹ See *id.*; *Dryden*, 940 N.Y.S.2d at 473–74 (holding that though the town does not have the power to invalidate state-issued mining permits, it does have the right to regulate the use of its land).

¹⁷⁰ See discussion *supra* pp. 180–83 (discussing the intent of the legislature).

and prior Third Department case law.¹⁷¹ It is the judiciary's role to interpret the laws passed by the legislature, not to, *sua sponte*, imply legislation from one industry onto another industry, particularly when each industry has its own set of governing regulations. Thus, the decisions in *Dryden* and *Middlefield* overstepped the powers accorded to the judiciary.

The power to provide for similar home rule control rests in the state legislature. If the state legislature wants to amend the ECL for oil and gas to provide municipalities with the same home rule powers as mining, it can do so, and in fact there is pending legislation that would allow for it.¹⁷² It is not the province of the judiciary to step into the shoes of the legislature and re-write the ECL. Accordingly, *Dryden* and *Middlefield* should be overturned, as our system of checks and balances should intervene to restore the balance of power between the legislature and the judiciary.

E. Preemption in Other Jurisdictions

The issue of preemption in the context of HVHF is not unique to New York. Most notably, a case was recently decided on this very issue in West Virginia.¹⁷³ In *Northeast Natural Energy, L.L.C. v. City of Morgantown*, the plaintiffs claimed "that the [c]ity violated their Constitutional rights by adopting a regulation in derogation of West Virginia[] State law[]." ¹⁷⁴ Further, plaintiffs averred that the regulations promulgated by the West Virginia Department of Environmental Protection preempted any regulation by local municipalities as to HVHF within the limits of their locality.¹⁷⁵ The defendant-City, on the other hand, contended that it had the authority to enact such an ordinance pursuant to the home rule provisions guaranteed to it by West Virginia Code section 8-12-2.¹⁷⁶

In analyzing the extent of the City's home rule power, the court acknowledged that the City did indeed have an interest in the

¹⁷¹ See *Ne. Mines, Inc.*, 113 A.D.2d at 64–65 (noting that the interpretation of the various ECL provisions should be viewed in light of their literal meanings).

¹⁷² See *supra* note 155 and accompanying text.

¹⁷³ See *Ne. Natural Energy, L.L.C. v. City of Morgantown*, No. 11-C-411, slip op. at 9 (Cir. Ct. Mongolia County Aug. 12, 2011).

¹⁷⁴ *Id.* at 1.

¹⁷⁵ See *id.*

¹⁷⁶ See W.VA. CODE § 8-12-2 (1994) (stating that any city shall have the authority to enact local laws so long as they are not at odds with West Virginia's constitution, other laws within Chapter Eight of the West Virginia Code, or other general laws of the state); see also *Ne. Natural Energy, L.L.C.*, No. 11-C-411, slip op. at 2.

control of its lands.¹⁷⁷ Notwithstanding, the court also acknowledged that under West Virginia Code section 22-6, the state legislature explicitly established a comprehensive framework for the regulation of the oil and gas industry.¹⁷⁸ Given the foregoing, the court concluded “that the State’s interest in oil and gas development and production throughout the State . . . provid[ed] for the exclusive control of this area of law to be within the hands of the” rulemaking bodies at the state level.¹⁷⁹

Analogizing the West Virginia statute to its New York counterpart is a productive exercise in understanding the trends, and motivating factors, facing courts in the context of HVHF regulation. Like Article 23 of the New York ECL, West Virginia Code section 22-6¹⁸⁰ explicitly lays out a framework for the regulation of the oil and gas industry.¹⁸¹ In so doing, the West Virginia State Legislature, like the New York State Legislature, makes clear its intention to occupy the entire field of oil and gas regulation.¹⁸² Provisions of this nature are likely to exist in other jurisdictions as well—and are likely to be handled by courts in the same manner—preventing attempts by a locality to impose a ban on HVHF or regulate the oil and gas industry itself.

VI. CONCLUSION

Based on the foregoing, the preemptive powers of the state regarding the regulation of the oil and gas industry—including HVHF—is broad, and the corresponding home rule powers of municipalities are narrow. Attempting to shoehorn the oil and gas industry into compliance with the regulations regarding mining is unfounded and unsupported by the law. Unless and until the state legislature amends the Environmental Conservation Law, there is no basis to apply the home rule powers of municipalities over mining onto the oil and gas industry.

While some municipalities have enacted moratoria or local laws prohibiting HVHF, these laws are ripe for challenges from the industry or landowners, and all interested parties—from municipalities, the industry, HVHF supporters and opponents—

¹⁷⁷ See *Ne. Natural Energy, L.L.C.*, No. 11-C-411, slip op. at 8.

¹⁷⁸ See *id.* at 8 (citing W.VA. CODE § 22-6).

¹⁷⁹ *Ne. Natural Energy, L.L.C.*, No. 11-C-411, slip op. at 9.

¹⁸⁰ See W.VA. CODE § 22-6.

¹⁸¹ See N.Y. ENVTL. CONSERV. LAW § 23-0102; W.VA. CODE § 22-6.

¹⁸² See *id.*

eagerly await the final outcome of the *Dryden* and *Middlefield* cases, and *Binghamton*, should that get appealed. If these trial court decisions stand, it will represent a sharp change from existing law, which has long recognized the separate and distinct preemption provisions applicable to different industries. If, however, the Third Department relies upon the history of oil and gas regulation in New York, as well as its own precedent, then the trial court decisions should be overturned, and the local laws in each case should be declared unenforceable and an improper attempt by municipalities to regulate the oil and gas industry.

Given the importance of this issue and HVHF generally, the interplay between HVHF and home rule may ultimately be decided by the Court of Appeals or the state legislature. Until this uncertainty is resolved, the struggle for control will continue.