

FOREWORD

FRACTURED COMMUNITIES: HYDRAULIC FRACTURING AND THE LAW IN NEW YORK STATE

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The regulation of hydraulic fracturing has been debated on many fronts and that debate will now be heard before New York's highest court in the *Dryden*¹ and *Middlefield*² cases. The New York Court of Appeals will have to decide whether or not municipalities have the authority to ban hydraulic fracturing within their borders. The answer to this question will undoubtedly affect a multitude of stakeholders. Municipal legislators, homeowners, environmental advocates, and industry representatives will all be eagerly awaiting the answer to a question that has been looming in New York: Will hydraulic fracturing, specifically high-volume horizontal hydraulic fracturing, be permitted in the state? All aspects of hydraulic fracturing, from the process to the environmental impacts, have been fruitfully discussed and vigorously debated. Now the focus is on the small communities in New York's southern tier that sit above shale gas, and their power to regulate an activity of statewide importance. Some communities welcome hydraulic fracturing while others have passed local laws banning the activity completely. In an effort to discuss the potential impacts of permitting or banning hydraulic fracturing on New York's towns and landowners, the *Albany Law Review* sponsored a symposium entitled "Fractured Communities: Hydraulic Fracturing and the Law in New York State" in September 2013. This issue contains articles on topics that were presented, discussed, and debated at the symposium.

The first article is written by Roderick M. Hills, Jr., the William T. Comfort, III Professor of Law at New York University School of

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¹ *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714, 724 (App. Div. 3d Dep't 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013).

² *Cooperstown Holstein Corp. v. Town of Middlefield*, 964 N.Y.S.2d 431, 432 (App. Div. 3d Dep't 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013).

Law and author of the *amicus* brief filed in the Appellate Division, Third Department on behalf of ten law professors in the *Dryden* and *Middlefield* cases.³ Professor Hills examines whether a presumption against state preemption is the law in New York by analyzing the home rule powers granted to municipalities in the New York Constitution. He suggests that the language in Article IX, section (3)(c) of the New York Constitution, requiring that home rule powers of municipalities be “liberally construed,” creates a qualified presumption against state law preemption of local laws. Professor Hills also contends that the ambiguity of the preemption clause of the Oil, Gas, and Solution Mining Law should be read in favor of preserving local power. Lastly, Professor Hills suggests that although the presumption against preemption can be rebutted as where local laws impose external costs on non-residents or disrupt settled and investment-backed expectations of local residents, in the case of hydraulic fracturing, the presumption against preemption actually preserves the expectations of local property owners.

In the next article, Elisabeth N. Radow examines the interaction between gas leases, residential mortgages, and the secondary mortgage market.⁴ Radow suggests that the mere signing of a gas lease can affect the value of a person’s home and the multiple rights associated with homeownership. Furthermore, the cumulative effect of high-volume hydraulic fracturing on residences, Radow contends, will pose a potential threat to the nation’s \$6.7 trillion secondary mortgage market. This article provides a novel analysis to the potential negative effects that gas leases can have on homeowners sitting above the Marcellus Shale. Specifically, Radow delves into possible water contamination, structural damage to homes, and the ability of gas companies to sell and assign the gas lease without homeowner consent. In an attempt to temper some of these negative consequences associated with gas leases, Radow proposes a few solutions. These solutions include: requiring the Federal Housing Finance Agency, as a condition to transitioning the secondary mortgage market to private companies, to create underwriting guidelines which fully address the risks of high-volume hydraulic fracturing; requiring property appraisers that

³ Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647 (2014).

⁴ Elisabeth N. Radow, *At the Intersection of Wall Street and Main: Impacts of Hydraulic Fracturing on Residential Property Interests, Risk Allocation, and Implications for the Secondary Mortgage Market*, 77 ALB. L. REV. 673 (2014).

value properties in shale regions to understand the lifecycle of natural gas extraction; creating a national registry of all gas leases that encumber residential property; and reallocating risk to industry.

In contrast to Professor Hills, who emphasizes the ambiguity of the preemption clause in the Oil, Gas, and Solution Mining Law, the next article focuses on the clear local law preemption language found in the Public Service Law. Konstantin Podolny examines limits on home rule power as pertaining to bans on natural gas gathering lines and compressor stations.⁵ He suggests that to the extent municipalities attempt to ban gas gathering lines and compressor stations, like the Dryden and Middlefield zoning laws did, they will be ineffective in preventing such activities under Article VII of the Public Service Law. It is here, Podolny emphasizes, that the state legislature has clearly expressed a desire for and implemented a centralized review process for major gas transmission facility siting decisions. Moreover, Podolny examines the breadth of the Middlefield and Dryden ordinances, and he compiles a listing of municipalities that on the one hand ban outright gathering lines within their borders, and others that exempt gathering lines subject to Article VII from the general ban on high-volume hydraulic fracturing. In sum, Podolny suggests that the Public Service Commission (the regulatory body charged with overseeing the gas transmission facility siting process) has the authority to and should refuse to apply local bans on natural gas gathering lines and compressor stations.

The final article examines another potential risk associated with high-volume hydraulic fracturing—water supply and use issues. Sorell E. Negro explores how different states, and by extension local communities, have regulated the use of water in high-volume hydraulic fracturing.⁶ Negro explains how the massive amount of water used to extract horizontal shale gas could impact water supplies, competing uses, water quantity, and water quality. She provides illustrative examples of how different communities from Mora County, New Mexico to Dimmit County, Texas have studied and regulated the use of water in the hydraulic fracturing process. Additionally, Negro examines various state approaches to regulating the disclosure of chemicals used in hydraulic fracturing,

⁵ Konstantin Podolny, *Gas Transmission Facilities: The Limits on Home Rule*, 77 ALB. L. REV. 705 (2014).

⁶ Sorell E. Negro, *The Thirst of Fracking: Regulating to Protect the Linchpin of the Natural Gas Boom*, 77 ALB. L. REV. 725 (2014).

the siting of natural gas activities including setback requirements, and the disposal or re-use of fracking wastewater. She also looks at the balance of regulation, and more specifically, the role of the Environmental Protection Agency versus that of a state level approach in regulating industry operations—or even a regional attempt to regulate the impacts of water resources. Also highlighted by Negro is the regulatory challenge of keeping pace with the quickly evolving industrial technologies involved with natural gas extraction. Negro stresses that innovative and adaptable approaches to managing water resources are critical to an effective regulatory structure.

I wish to thank all of the aforementioned authors for contributing their work to the *Albany Law Review*. I'd also like to thank all of the participants from the symposium. The participants included: Karen Moreau, Executive Director of the New York State Petroleum Council; Sorell E. Negro, Associate, Robinson & Cole; Elisabeth N. Radow, Chair, Committee on Energy, Agriculture and the Environment of the League of Women Voters of New York; Tom Wilber, author of *Under the Surface: Fracking, Fortunes, and the Fate of the Marcellus Shale*. In addition to the above named participants, a special thank you to Tom West, Managing Partner of The West Firm and counsel for Nose Energy Corp. USA, and to Deborah Goldberg, Managing Attorney for Earthjustice and counsel for the Town of Dryden, for engaging in an oral argument on the upcoming Court of Appeals case of *Norse Energy Corp. USA v. Town of Dryden*. And, of course, I want to thank Susan Arbetter, the host of the Capitol Pressroom, for moderating the debate.