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Fracking Preemption Litigation

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Fracking Preemption Litigation

James K. Pickle*

Abstract

Fracking is not a new technology, but it only recently came to the forefront of energy industry news. Fracking's recent fame has been both positive and negative. Fracking proponents have lauded the economic and environmental benefits of the process. They cite the process' ability to extract formerly inaccessible oil and natural gas, which reduces the U.S.'s demand for foreign oil and natural gas and reduces the use of coal. In contrast, fracking opponents state fracking damages the environment by diluting drinking water with harmful chemicals, generating emissions, and creating general nuisances for communities. They believe fracking's harmful impacts clearly outweigh any benefits that arise from the process. Instead of having a uniform regulatory scheme for this controversial topic, the federal government, state governments, and municipal governments have created a mishmash of regulations, and much consternation and litigation have arisen from conflicts between state and municipal laws. This Note will explore the litigation currently in state courts, specifically West Virginia, Pennsylvania, New York, Ohio, and Colorado, which will decide the future of fracking. This Note will also explain how the arguments in each case are essentially the same. After reviewing the pertinent litigation surrounding this issue, this Note proposes that a more centralized, comprehensive federal regime is the best regulatory option for fracking.

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I. Introduction

The oil and natural gas industry’s recent use of hydraulic fracturing, commonly known as “fracking,”¹ has generated both

1. See Emily C. Powers, *Fracking and Federalism: Support for an Adaptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. & POL’Y 913, 919–21 (2011) (describing the process of fracking).

vast benefits and numerous headaches for the United States.² Fracking is not a new technology, but it only recently came to the forefront of energy industry news.³ Fracking's recent fame has been both positive and negative.⁴ For example, proponents of fracking have lauded the economic and environmental benefits of the process.⁵ They cite its ability to extract formerly inaccessible oil and natural gas that could reduce the United States' demand for foreign oil and natural gas and reduce its use of coal.⁶ Opponents have alleged that fracking damages the environment by diluting drinking water with harmful chemicals, generating emissions, and creating nuisances for communities.⁷ They believe that fracking's possible harmful impacts outweigh any of the benefits that arise from the process.⁸ Instead of a uniform regulatory scheme governing this controversial topic, the federal government, state governments, and municipal governments

2. See *id.* at 23–29 (explaining the impact fracking has had on the United States).

3. See *id.* at 918–19 (describing the recent media attention given to fracking).

4. See Jody Freeman & David Spence, *Should the Federal Government Regulate Fracking?*, WALL ST. J. (Apr. 14, 2013), <http://online.wsj.com/news/articles/SB10001424127887323495104578314302738867078?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887323495104578314302738867078.html> (outlining both the negative and positive effects of fracking) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

5. See *id.* (noting that “[f]racking has the potential to help the U.S. achieve energy independence, boost the economy and reduce greenhouse-gas pollution.”).

6. See *id.* (stating that “[f]racking—short for hydraulic fracturing—involves injecting fluids into the ground to access hard-to-reach reserves of oil and natural gas, including shale gas, which the U.S. has in vast abundance but hasn’t been able to reach easily up to now.”).

7. See *id.* (specifying that fracking “produces significant amounts of air pollution and methane, a potent greenhouse gas. It also generates wastewater, often containing toxic chemicals. At scale, fracking requires vast amounts of water, which can reduce regional supplies. And industrializing the countryside not only disturbs locals, it can harm habitat and wildlife.”).

8. See Powers, *supra* note 1, at 924–25 (listing the documented risks of fracking, including groundwater pollution, toxic air emissions, chemical spills, roadway deterioration, and “destruction of ecologically sensitive habitat and the landscape”).

have created a mishmash of regulations that have led to litigation over conflicts between state and municipal laws.⁹

Generally, individual states have widely endorsed fracking, and those states want to retain regulatory control of the industry.¹⁰ State legislatures feel that they are best suited to regulate fracking because they, unlike municipal governments, are intimately familiar with their respective state's geology, economic development priorities, and legal regimes associated with property and leases.¹¹ On the other hand, some municipalities disfavor fracking and have now begun banning it.¹² Most municipalities are granted authority to protect their citizens from nuisances and to regulate the use of land through the enactment of zoning laws by way of their state constitutions, and municipalities analogize fracking to the nuisances from which they are allowed to protect their citizens.¹³

Conflicts between state and local regulations have generated a considerable amount of litigation.¹⁴ State courts in West Virginia, Pennsylvania, New York, Ohio, and Colorado have been called upon to decide whether their state statutes regulating fracking preempt local legislative bans on the process.¹⁵ While the

9. See Jason Schumacher & Jennifer Morrissey, *The Legal Landscape of "Fracking": The Oil and Gas Industry's Game-Changing Technique is its Biggest Hurdle*, 17 TEX. REV. L. & POL. 239, 260–261 (2013) (describing fracking's existing regulatory regime).

10. See *id.* at 260–61 (stating that “[b]ecause of the many variables in local geology, economics, and so forth, there is a general consensus that regulation is best left to the states, where hydraulic fracturing is already a highly regulated activity.”).

11. See *id.* at 260 (describing the critical components of fracking that are commonly regulated by states).

12. See Timothy O'Connor & Joseph De Avila, *Fracking Cases to Top*, WALL ST. J. (Aug. 30, 2013) <http://online.wsj.com/news/articles/SB10001424127887324009304579043250553113252?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324009304579043250553113252.html> (noting that “some cities, counties, and municipalities have begun to enact bans on hydraulic fracturing”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

13. See *id.* (specifying the reasons for supporting municipal regulatory power).

14. See *id.* (identifying conflicts between New York state and municipal governments).

15. See *e.g.*, *Colo. Oil & Gas Ass'n v. City of Longmont*, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014) (“Article XVI of

laws in each state and municipality differ, the arguments in each case are essentially the same.¹⁶ For proponents of state regulation, the argument boils down to state law creating a comprehensive regulatory system or granting the state sole regulatory authority.¹⁷ Thus, any municipal law restricting or

the Longmont Municipal Charter, which bans hydraulic fracturing and the storage and disposal of hydraulic fracturing waste in the City of Longmont, is invalid as preempted by the Colorado Oil and Gas Conservation Act.”); *Norse Energy Corp. v. Town of Dryden*, 964 N.Y.S.2d 714, 724 (N.Y. App. Div. 2013) (stating that the Oil, Gas and Solution Mining Law “does not preempt, either expressly or impliedly, a municipality’s power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.”); *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 99 (Ohio Ct. App. 2013) (holding that certain drilling ordinances were in direct conflict with and preempted by a state law); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013) (finding that a statute restricting municipalities right to restrict fracking unconstitutional under the Environmental Rights Amendment); *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *9 (W. Va. Cir. Ct. Aug. 12, 2011) (concluding that the State’s interest in oil and gas development and production justifies the West Virginia Department of Environmental Protection exclusively controlling this area of the law.).

16. *See Colo. Oil and Gas Ass’n*, 2014 WL 3690665, at *2 (describing how “owners of oil and gas interests [have] challenged regulations enacted by La Plata County, a statutory entity. The regulations stated purpose was to promote the health, safety, morals, convenience, order, prosperity or general welfare of the present and future residents of La Plata County.”); *see also State ex rel. Morrison*, 989 N.E.2d at 88 (noting that “the question to be answered is whether the City of Munroe Falls can enforce its ordinances governing oil and gas drilling and related zoning and rights-of-way issues despite the state’s comprehensive statutory scheme for drilling set forth in R.C. Chapter 1509.”).

17. *See Colo. Oil and Gas Ass’n*, 2014 WL 3690665, at *2 (stating that “[t]he *Bowen/Edwards* plaintiffs claimed the Colorado Oil and Gas Conservation Act conferred exclusive authority on the Colorado Oil and Gas Conservation Commission to regulate oil and gas activity throughout the state, thereby preempting the county regulations.”); *see also Norse Energy*, 964 N.Y.S.2d at 719 (noting that “[t]he supersession clause in the OGSML provides that “[t]he provisions of [ECL article 23] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries”); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (describing that the statute at issue states “this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.”); *Robinson Twp.*, 83 A.3d at 913 (stating that the dispositive issue is the controlling source of legal

banning fracking would be in conflict with state law and preempted.¹⁸ For proponents of municipal regulation, the basic argument is that state constitutions grant municipalities power to adopt ordinances over local issues, and fracking is an issue of local concern because of its potential negative effects on local communities.¹⁹ As a result, municipal ordinances restricting or banning fracking are not preempted and should remain valid.²⁰

Although state and municipal legislatures should weigh fracking's positive and negative consequences when enacting fracking laws, courts are not required to consider those policy concerns.²¹ The courts involved in this preemption litigation should focus on the constitutional preemption issues in each case, and the courts should conclude that each state's fracking regulation preempts the municipal fracking bans.²² In addition, after reviewing the complexity of the existing fracking regulatory regime, it is evident that a comprehensive federal regulatory

authority); *Ne. Natural Energy*, 2011 WL 3584376, at *5–6 (outlining the pro-state regulation argument).

18. See *Colo. Oil and Gas Ass'n*, 2014 WL 3690665, at *8–9 (concluding that the state agency regulates hydraulic fracturing); see also *State ex rel. Morrison*, 989 N.E.2d at 97–100 (holding that “[t]he city, however, is permitted to enforce pertinent right-of-way ordinances in the face of the drilling activities, provided these ordinances are not enforced in a discriminatory manner against oil and gas well drilling.”); *Robinson Twp.*, 83 A.3d, at 913 (finding that certain “provisions of Act 13 violate the Commonwealth’s duties as trustee of Pennsylvania’s public natural resources under the Environmental Rights Amendment”); *Ne. Natural Energy*, 2011 WL 3584376 (holding that the state “regulations do not provide any exception or latitude to permit the City of Morgantown to impose a complete ban on fracking or to regulate oil and gas development and production.”).

19. See Shaun A. Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, HARVARD LAW BLOG (July 2012), <http://blogs.law.harvard.edu/environmentallawprogram/files/2013/03/Municipalities-and-Hydraulic-Fracturing-Trends-in-State-Preemption.pdf> (explaining the pro-municipal regulation argument) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

20. See *id.* (stating the pro-municipal regulation conclusion).

21. See *id.* (describing the legal conflicts at issue in preemption litigation).

22. See *Colo. Oil and Gas Ass'n*, 2014 WL 3690665, at *2 (detailing pro-state regulation arguments).

regime involving minimal state regulation and no municipal regulation is much needed in the future.²³

This Note will explore the complexity of the existing fracking regulatory regime, as well as the preemption litigation that has arisen between states and municipalities because of the convoluted regulatory system.²⁴ Part II of this Note provides background information on how fracking works, the costs and benefits of fracking, and the structure of the existing regulatory regime.²⁵ Part III analyzes the arguments in the completed and current cases dealing with preemption litigation arising from disputes between state fracking laws and municipal fracking bans.²⁶ Part III ends with explanations of how the courts involved in current preemption litigation should rule in each case. This Note concludes with a discussion on the complexity and costliness of fracking's existing regulatory system and provides potential alternative regulatory regimes that would minimize costs and completely eliminate preemption litigation.

II. Background

A. What It Is and How It Works

Hydraulic-fracturing, also known as “fracking,” is a gas drilling and extraction technique involving “the injection of fluid into a well to cause subsurface formations to fracture and release natural gas.”²⁷ Fracking is not a recently developed process.²⁸ The process originated in the U.S. in the 1940s and has been continuously used for the last seven decades.²⁹ It only recently

23. See Freeman, *supra* note 4 (listing arguments in support of federal regulation).

24. See *Colorado Oil and Gas Ass'n*, 2014 WL 3690665, at *1 (listing current litigation concerning conflicting regulatory regimes).

25. See Powers, *supra* note 1, at 919–21 (describing the process of fracking).

26. See *supra* note 15 (listing current litigation concerning conflicting regulatory regimes).

27. See Powers, *supra* note 1, at 919 (detailing the mechanics of the fracking process).

28. See *id.* (stating that fracking was “[f]irst developed in the 1940s”).

29. See *id.* (“Hydraulic fracturing has been used throughout the country for about sixty years and in New York State since the 1950s.”).

became well known because of the discovery of the Marcellus Shale natural gas formation.³⁰

To implement the fracking process, a well is drilled into bedrock creating what industry experts call a “wellbore,” after which acid is injected in the wellbore to eliminate any bacteria in the wellbore.³¹ A metal and concrete casing is then fitted into the wellbore and a mix of chemicals, commonly called “fracturing fluids,” is shot through the wellbore at high pressure to open or enlarge fractures in the geological formation.³² This process “allow[s] oil or natural gas to move more freely from the rock pores to production wells that bring the oil or gas to the surface.”³³

The fracking fluid injected into the geological formations is typically composed of many different chemicals, but water and sand are the primary components.³⁴ Typically, water and sand compose 99.5% of the fluid, and chemical additives compose the remaining 0.5%.³⁵ Those additives include “chemical agents with anti-corrosive and anti-bacterial functions, many of which are highly toxic.”³⁶

After cracking the target geological formation, the fracturing fluids, or “flowback,” returns to the surface where it

30. See *id.* (describing that “[t]he first horizontal well in the East was drilled in Pennsylvania in 2003 to reach the gas-rich Marcellus shale formation, which underlies much of the Appalachian region.”).

31. See *id.* at 920 (outlining the process of drilling a well, fitting the wellbore with steel and concrete casing, and pumping chemicals into the wellbore).

32. See *Hydraulic Fracturing Background Information*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (May 9, 2012), [hereinafter EPA Fracturing Background], http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (explaining the second step in the fracking process) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

33. *Id.*

34. See AMERICAN PETROLEUM INSTITUTE, HYDRAULIC FRACTURING: UNLOCKING AMERICA’S NATURAL GAS RESOURCES 7 (July 2014), available at <http://www.api.org/~media/files/oil-and-natural-gas/hydraulic-fracturing-primer/hydraulic-fracturing-primer-2014-highres.pdf> (“[f]racturing fluid is made up from 90% water, 9% sand and .5% chemicals”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

35. See *id.* (listing the chemical composition of fracturing fluids).

36. See Powers, *supra* note 1, at 920.

can be stored.³⁷ The flowback returns to the surface because the internal pressure of the formation forces the flowback up through the wellbore.³⁸ Not all of the flowback rises back to the surface causing concerns over the potential “contaminat[ion] of groundwater sources for waterways and drinking supplies.”³⁹

B. Consequences

1. Negative

There are several alleged harms associated with fracking.⁴⁰ The harms “range from quality of life issues, such as persistent noise and vibrations from drilling and underground injection, to health impacts from exposure to air and water pollutants, to property value destruction, to social disruption.”⁴¹

Specifically alleged quality of life issues include: erosion from construction and pipeline siting; noise and light pollution; increased truck traffic and roadway deterioration; and destruction of ecological habitats and the landscapes.⁴² Specific alleged health impact issues include: gas or fracking fluid contaminating groundwater; toxic air emissions from gas leaks; chemical spills; chemical fires and gas explosions; and improper disposal of toxic chemicals.⁴³

Opponents primarily cite issues with water pollution because “[w]astewater treatment facilities are not always equipped to handle drilling waste.”⁴⁴ Water pollution could arise from fracking fluid seeping through the targeted formations into water sources or runoff of flowback into surface or groundwater resources.⁴⁵ Flowback can contaminate groundwater immediately

37. See EPA Fracking Background, *supra* note 32 (noting the effects of geological pressures on the fracking process).

38. See Powers, *supra* note 1, at 920 (explaining the incidental results of fracking).

39. *Id.*

40. See Powers, *supra* note 1, at 924 (describing fracking’s potentially widespread negative consequences).

41. *Id.*

42. See *id.* (listing specific negative effects).

43. See *id.* at 924–25 (outlining negative health effects).

44. Schumacher & Morrissey, *supra* note 9, at 247.

45. See *id.* at 244 (explaining potential negative effects on water supplies).

after expulsion from the wellbore or after leakage from containment pits dug in the ground.⁴⁶

Fracking proponents answer the seeping fracking fluid argument by citing studies that indicate, “migration of contaminants through up to a mile of rock into the water table is unlikely, though theoretically possible.”⁴⁷ Fracking proponents respond to the flowback contamination threat by citing that regulators closely scrutinize management and disposal of fracking fluid.⁴⁸

The other most cited alleged negative consequences concerns emissions, land use, and seismic activity.⁴⁹ Toxic air emissions primarily “stem from methane leaks originating from wells, and emissions from the diesel or natural gas-powered equipment such as compressors, drilling rigs, pumps, and so forth that are used in the process of constructing the well and extracting the gas.”⁵⁰

Land use issues primarily arise when fracking rigs are located near residential areas, and these troublesome situations have become prevalent due to the fracking of the Marcellus Shale formation.⁵¹ Recent seismic activity in areas where earthquakes usually do not occur has been linked to fracking because rigs are located near the seismic activity, but a definitive link has not yet been confirmed.⁵²

2. Positive

Natural gas production from fracking can be “enormously profitable and bring . . . hard-to-resist economic benefits to . . . state[s].”⁵³ Landowners with property rich in gas or oil

46. See *id.* at 246 (listing additional potential negative consequences on water supplies).

47. See *id.* at 245–46 (describing counterarguments to the water dilution effect).

48. See *id.* at 246 (presenting regulations in place to prevent water dilution).

49. See *id.* at 251–53 (noting more, less well known, negative consequences).

50. *Id.* at 251.

51. See *id.* at 252 (describing potential land use issues).

52. See *id.* at 252–53 (identifying the possibility of induced seismic activity).

53. Powers, *supra* note 1, at 927.

typically lease their land to drillers and receive royalties and signing bonuses in return.⁵⁴ Signing bonuses can be thousands of dollars, and royalties from one acre of leased land for one year can be six figures.⁵⁵

Landowners are not the only citizens of states to benefit from fracking.⁵⁶ Fracking can also generate job opportunities because the method is composed of several other processes.⁵⁷ According to estimates, “the natural gas industry is expected to create over 75,000 new jobs by 2020, provide \$600 million in state revenue, as well as \$270 million in local tax revenue” for Pennsylvania under the existing regulatory scheme.⁵⁸ The Marcellus Shale formation under Pennsylvania is “estimated to be worth at least \$500 billion.”⁵⁹

IHS Global Insight, a data mining company focusing on the energy sector, determined that the development of shale gas via fracking could lead to lower household energy bills for consumers, thus creating additional disposable income.⁶⁰ Specifically, IHS Global Insight estimated that the “development of shale gas resources added \$1,200 of disposable household income in 2012, and that amount could increase to more than \$3,500 by 2025.”⁶¹

Natural gas also may be a viable alternative to the United States’ reliance on coal and oil and may significantly reduce the nation’s greenhouse gas emissions.⁶² The United States has

54. *See id.* at 927 (explaining positive effects for landowners).

55. *See id.* (outlining exactly how much landowners can expect to receive from fracking leases).

56. *See id.* (describing other positive effects).

57. *See id.* (noting job growth as a positive result from fracking).

58. Kristen Allen, Comment, *The Big Fracking Deal: Marcellus Shale—Pennsylvania’s Untapped Resource*, 23 VILL. ENVTL. L.J. 51, 52 (2012).

59. *Id.*

60. *See* AMERICAN PETROLEUM INSTITUTE, SHALE ANSWERS, at slide 5 (2013), available at http://www.api.org/~media/Files/Policy/Hydraulic_Fracturing/Shale-Answers-Brochure.pdf, (listing positive effects for everyday energy consumers) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

61. *Id.*

62. *See* Joshua P. Dennis, Comment, *The Emergence of Natural Gas and the Need for Cooperative Federalism to Address a Big “Fracking” Problem*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 253, 255 (2012) (illustrating how

significant natural gas reserves.⁶³ The Energy Information Administration in 2011 “estimated that the United States possesses approximately 2,552 TCF of potential natural gas resources, enough to supply the United States for approximately 110 years.”⁶⁴ TCF is an abbreviation for trillion cubic feet, and it is a common volume measurement of natural gas.⁶⁵ Of that 2,552 TCF, 862 TCF is technically recoverable shale gas.⁶⁶ The 862 TCF makes the United States’ reserves the second largest in the world.⁶⁷

C. Effect on the United States’ Energy Industry

Fracking “has transformed America’s prospects as a hydrocarbons producer.”⁶⁸ Fracking has increased both gas and oil output at least thirty percent since the mid 2000s.⁶⁹ Fracking has also helped push the United States’ expected oil and gas production combined beyond that of any country in the world.⁷⁰ “Jobs in energy have nearly doubled in the United States since 2005, . . . [and] North Dakota, which sits on the huge Bakken oil and gas field, now boasts an unemployment rate of just three

natural gas could be used as a viable alternative energy source to help reduce greenhouse gas emissions).

63. See *id.* at 256 (describing the United States’ natural gas resources).

64. *Id.*

65. See *Trillion Cubic Feet – TCF*, INVESTOPEDIA, (last visited Dec. 29, 2014), <http://www.investopedia.com/terms/t/trillion-cubic-feet.asp> (noting the volume measurements for natural gas) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

66. See Dennis, *supra* note 62, at 256 (describing how much of the United States’ natural gas is recoverable).

67. See *id.* (noting the United States’ rank compared to other nations’ amount of recoverable natural gas).

68. *From Sunset to New Dawn*, THE ECONOMIST, (Nov. 16, 2013), <http://www.economist.com/news/business/21589870-capitalists-not-just-greens-are-now-questioning-how-significant-benefits-shale-gas-and> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

69. See *id.* (explaining the growth in extracted natural resources because of fracking).

70. See *id.* (outlining the global effect fracking has had on the current natural gas and oil production hierarchy).

percent, the lowest among the states.”⁷¹ Natural gas prices “ha[ve] [also] fallen by two-thirds.”⁷²

Various industry reports project that, within six to ten years, shale gas and oil will add between \$380 billion and \$690 billion to the United States’ annual gross domestic product.⁷³ The reports state that the drilling process itself will not be the only factor leading to this GDP growth.⁷⁴ “[A]ll the other activities needed to produce and distribute the fuels . . . [are] being transformed too.”⁷⁵ Gas-fired power stations are replacing coal-fired stations in the electricity production sector, and this effect even reduced greenhouse-gas emissions from power generation in the United States between 2010 and 2012.⁷⁶ Overall, “[t]he spending-power of . . . new workers [from incidental business growth], and the cut in businesses’ and households’ energy bills, should provide a broad boost to the economy.”⁷⁷

With that said, cheap natural gas has pressed energy companies to move away from other forms of energy, like nuclear power.⁷⁸ An executive at Exelon Corporation, a leading U.S. power generator, has said the recent natural gas trends have “not only made new nuclear plants unfeasible . . . but [have] undermined Exelon’s plans to upgrade its existing fleet.”⁷⁹ In May of 2013, Duke Energy, another U.S. power generator, told the Nuclear Regulatory Commission (“NRC”), the federal agency that approves the construction of new nuclear power plants,⁸⁰ that it

71. *Id.*

72. *Id.*

73. *See id.* (noting potential future growth due to fracking).

74. *See id.* (describing incidental growth).

75. *Id.*

76. *See id.* (listing further environmental benefits).

77. *Id.*

78. *See* Jeff McMahon, *How Fracking Killed Nuclear Power*, FORBES (June 6, 2013), <http://www.forbes.com/sites/jeffmcmahon/2013/06/16/fracking-not-wind-killed-exelons-nuclear-upgrades/> (explaining how fracking has altered the whole energy sector) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

79. *Id.*

80. *See generally* Organization & Functions, UNITED STATES NUCLEAR REGULATORY COMM’N (Nov. 27, 2013), <http://www.nrc.gov/about-nrc/organization.html> (providing functional descriptions for committees and offices of the NRC) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

would not be building two of the six originally planned reactors.⁸¹ Yet another American power company, Dominion Resources, shut down one of its nuclear plants in May of 2013 “based purely on economics,” such as the falling price of natural gas.⁸²

But as the United States pushes for alternative and renewable energy options, fracking appears to be an environmental middle ground because natural gas power plants “produce less air pollution than coal-burning plants.”⁸³

D. Current Regulatory Scheme

1. Regulatory Overview

Fracking is highly regulated, but one governmental body does not regulate the entire industry.⁸⁴ The fracking industry is regulated through a three-prong regime.⁸⁵ The industry is governed on the federal level by administrative agencies including the Environmental Protection Agency (“EPA”), the Department of the Interior’s Bureau of Land Management (“BLM”), and the Department of Energy (“DOE”).⁸⁶ Additionally, state agencies—such as the Pennsylvania Department of Environmental Protection (“PaDEP”) and the West Virginia Department of Environmental Protection (“WVDEP”)—and local governments regulate the fracking industry.⁸⁷ The three-part regulatory system exists because fracking has “many

81. See *Fracked Off*, THE ECONOMIST (May 30, 2013), <http://www.economist.com/news/united-states/21578690-thanks-cheap-natural-gas-americas-nuclear-renaissance-hold-fracked> (noting specific energy companies changing strategies because of fracking) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

82. *Id.*

83. NATURAL RES. DEF. COUNCIL, THE ROLE OF NATURAL GAS IN AMERICA’S ENERGY MIX, (June 2012), *available at* <http://www.nrdc.org/energy/files/energymixII.pdf> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

84. See Schumacher & Morrissey, *supra* note 9, at 257–58 (describing the complex regulatory scheme generally).

85. See *id.* (outlining the existing regulatory scheme).

86. See *id.* (elaborating on the federal part of the regulatory scheme).

87. See *id.* at 284–94 (listing state agencies involved in fracking regulation).

variables . . . [including] local geology . . . [but also national] economics.”⁸⁸ As federal, state, and municipal fracking regulations are spliced together, this regulatory regime is complex, convoluted, and costly.⁸⁹ Consequently, some legal authors propose increasing federal regulation and centralizing all regulatory power on the federal level.⁹⁰

2. Federal Regulation

Although “there is no comprehensive regulatory scheme at the federal level,” the federal government does regulate key aspects of fracking.⁹¹ The Federal Water Pollution Control Act, commonly known as the Clean Water Act (“CWA”), regulates surface water discharges and storm water runoff.⁹² The Safe Drinking Water Act (“SDWA”) “regulates the disposal of fluid waste deep underground.”⁹³ The EPA enacted its first comprehensive regulation of fracking emissions in 2012 using their authority from the Clean Air Act (“CAA”).⁹⁴ The Comprehensive Emergency Response, Compensation, and Liability Act (“CERCLA”) requires drillers to report the use and release of certain hazardous chemicals into the environment.⁹⁵ Furthermore, “the National Environmental Policy Act (“NEPA”) requires permits and environmental impact assessments to be conducted prior to drilling.”⁹⁶

88. *Id.* at 260.

89. See Jason T. Gerken, Comment, *What the Frack Shale We Do? A Proposed Environmental Regulatory Scheme for Hydraulic Fracturing*, 41 *CAP. U. L. REV.* 81, 101–22 (2013) (explaining the many levels of regulation and how they relate).

90. See *id.* at 128 (describing a potential regulatory scheme focused on the federal government).

91. Schumacher & Morrissey, *supra* note 9, at 260.

92. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

93. Schumacher & Morrissey, *supra* note 9, at 261 (citing the Safe Drinking Water Act, 42 U.S.C. § 300f (2012)).

94. The Clean Air Act of 1955, 42 U.S.C. § 7401 (2012).

95. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

96. Schumacher & Morrissey, *supra* note 9, at 263 (citing the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012)).

In addition to those statutes, the EPA and BLM may control more aspects of the fracking process in the near future.⁹⁷ In 2011, “the EPA announced plans . . . to initiate a rulemaking under the Toxic Substances Control Act⁹⁸ regarding disclosure of chemicals used in the drilling process.”⁹⁹ The BLM has drafted an initial set of rules solely for fracking on public land, but a final set of rules has not been issued.¹⁰⁰

Several agencies provide additional oversight of fracking activity.¹⁰¹ The EPA has previously conducted and continues to conduct studies of water quality issues related to fracking.¹⁰² These studies are likely in response to the primary issue opponents of fracking cite when discussing the process’s alleged negative consequences. The BLM also issues permits for drilling on federal land and has designed a plan for “a new automated system designed to track permit applications through the entire review process and quickly flag missing or incomplete information, permitting time delays are expected to be greatly reduced.”¹⁰³

The DOE oversees the fracking industry because it controls the approval of natural gas exportation.¹⁰⁴ The DOE determines if domestically produced natural gas should be exported overseas.¹⁰⁵ “[P]olicymakers are concerned about the long-term effects of natural gas exports on domestic supplies and price,” so the DOE is hesitant to allow exportation.¹⁰⁶

The DOE allows exportation across the board “to countries with which the U.S. has a Free Trade

97. See *id.* at 263–64 (explaining proposed regulations).

98. Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–92 (2012).

99. Schumacher & Morrissey, *supra* note 9, at 263 (citing Letter from Stephen A. Owens, Assistant Administrator, Environmental Protection Agency, to Deborah Goldberg, Earthjustice (Nov. 23, 2011) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT)).

100. See *id.* at 264 (outlining a possible addition to the regulatory regime, but specifying the addition has not been finalized).

101. See *id.* at 264–74 (describing that there is vast federal oversight).

102. See *id.* at 264–65 (noting studies currently being conducted to determine fracking’s safety).

103. *Id.* at 269.

104. See *id.* at 271 (describing the DOE’s indirect regulatory power).

105. See *id.* (explaining the DOE’s natural gas job).

106. *Id.*

Agreement (“FTA”) . . . [because those actions are] ‘consistent with the public interest,’” but the DOE requires a case-by-case determination on whether exportation to a non-FTA country is consistent with the public interest.¹⁰⁷ “That public-interest determination can involve a number of factors including the short- and long-term effects on U.S. energy markets, supplies, and price.”¹⁰⁸

3. State Regulation

There are many more federal regulations and federal agencies that have a role in the regulatory process, but “as with oil and gas drilling overall, hydraulic fracturing regulation is inherently local” because states regulate the key aspects of the process and impose additional rules.¹⁰⁹

States have broad powers to regulate, permit and enforce the drilling and fracture of the well, production and operations, management and disposal of wastes, and abandonment and plugging of the well, . . . [and] [s]tate laws generally give an agency or director of state oil and gas operations discretion to require whatever is necessary to protect human health and the environment.¹¹⁰

Pennsylvania’s oil and gas regulations specifically mention fracking and restrictions imposed on it, which is atypical. Pennsylvania even has regulations specifically addressing fracking the Marcellus Shale.¹¹¹ The Pennsylvania Department of Environmental Protection (“PaDEP”) oversees all applications to conduct hydraulic fracturing operations in Pennsylvania.¹¹² The

107. *Id.*

108. *Id.* at 272.

109. *Id.* at 260.

110. Dennis, *supra* note 62, at 269.

111. *See generally*, 25 PA. CODE § 78.1 (2014) (defining several terms relate to fracking including “Marcellus Shale well”); 25 PA. CODE § 78.121 (outlining reporting requirements for Marcellus Shale wells).

112. *See* 58 PA. CONST. STAT. ANN. § 3211 (2012) (listing the requirements to obtain well permits, which are issued by “the department”); 58

applications to PaDEP require information about the proposed site and the surrounding land, including “the proposed location of the well and ‘the name of all surface landowners or water purveyors whose water supplies are within 1,000 feet of the proposed well location,’” to protect the state’s citizens and surrounding environment from any potential harm.¹¹³

If fracking taints a water supply, PaDEP will assume the well operator liable if the well is within 1,000 feet of a water supply and “the pollution occurred six months after completion of drilling or alteration” to the well.¹¹⁴ Pennsylvania also requires each well operator list the chemicals in its fracking fluid, the wastes generated from the process, and the methods for cleanup, disposal, and waste management.¹¹⁵ Like the studies conducted by the EPA, the required disclosures and presumptions are likely a direct answer to concerns fracking opponents have about water quality in fracking areas.¹¹⁶

Colorado has more stringent regulations than the federal government in an attempt to protect its water resources.¹¹⁷ Colorado created an agency called the Colorado Oil and Gas Conservation Commission (“COGCC”) in the 1970s through Colorado’s Oil and Gas Conservation Act whose purpose is to regulate oil and gas development.¹¹⁸ The COGCC regulations require: establishing protection zones around streams that provide drinking water supplies; reporting the chemicals used in any fracking operations; consultation with state and wildlife officials on fracking applications; and cleaning up of a well site after fracking is completed.¹¹⁹ Colorado restricts oil and gas development near homes and schools because of concern over the

PA. CONST. STAT. ANN. § 2301 (2012) (defining “Department” as “The Department of Environmental Protection of the Commonwealth”).

113. 58 PA. CONST. STAT. ANN. § 3211(b)(1) (2012).

114. See 58 PA. CONST. STAT. ANN. § 3218 (outlining ways in which Pennsylvania’s water supplies will be protected from fracking).

115. See 58 PA. CONST. STAT. ANN. § 3222.1 (2012) (listing the disclosure requirements for unconventional hydraulic fracturing); 25 PA. CODE § 78.55 (2014) (requiring a waste management plan).

116. *Id.*

117. See Dennis, *supra* note 62, at 267 (describing Colorado’s state regulations).

118. See Colo. Rev. Stat. § 34-60-100 (creating the COGCC).

119. See Colo. Code Regs. § 404-1 (creating regulations under the COGCC)

health of children.¹²⁰ Finally, “[a]ll [oil and gas] development proposals require landowner notification and public comment periods.”¹²¹

New York issued a temporary moratorium on fracking in August of 2010, pending the outcome of a groundwater contamination study by the New York Department of Environmental Conservation (“NYDEC”),¹²² but the moratorium will continue as New York’s Assembly recently approved a two-year ban on the process.¹²³ If the moratorium is lifted at some point in the future, New York already has regulations dealing with the energy industry’s water use.¹²⁴

While not a complete description of every state’s regulatory regime, Pennsylvania, Colorado, and New York’s regulations provide a wide array of state fracking regulations. Most states have some form of fracking regulation, and many try to provide a comprehensive set of rules to reduce the alleged dangers for its citizens and landscape.¹²⁵ Those states that do not have regulatory rules specifically addressing fracking, like New York, are studying the impacts of the process before allowing the industry to move forward.¹²⁶

4. Municipal Regulation

120. See *id.*, § 404-1:604 (restricting development near “high occupancy buildings,” defined as homes and schools, among others.)

121. Dennis, *supra* note 62, at 267.

122. See Mireya Navarro, *N.Y. Assembly Approves Fracking Moratorium*, NEW YORK TIMES (Nov. 30, 2010), <http://green.blogs.nytimes.com/2010/11/30/n-y-assembly-approves-fracking-moratorium/> (stating the issuance of the temporary moratorium) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

123. See Freeman Klopott, *New York Assembly Approves Two-Year Moratorium on Fracking*, BLOOMBERG (Mar. 6, 2013), <http://www.bloomberg.com/news/2013-03-06/new-york-assembly-approves-two-year-moratorium-on-fracking.html> (noting New York’s continuing fight with fracking) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

124. See Schumacher & Morrissey, *supra* note 9, at 280 (listing New York’s potential fracking regulations).

125. See *id.* (describing state regulations overall).

126. See *id.* at 281–82 (explaining why some state’s do not have regulations).

In response to the possibility of having oil derricks placed in small towns, local municipalities across the U.S. have begun to ban fracking on the municipal level because of its potential negative consequences.¹²⁷ Towns along the Marcellus Shale formation have been the most vehement in their anti-fracking campaigns. Morgantown, West Virginia; Dryden, New York; Robinson, Pennsylvania; and Munroe Falls, Ohio have each enacted bans against fracking or zoning ordinances severely restricting fracking.¹²⁸ Some cities not on the Marcellus Shale have also enacted fracking limitations.¹²⁹ For example, Longmont, Colorado banned fracking altogether.¹³⁰ Each city believes it can enact these bans because they have legal authority to care for its citizens' and environment's health and well-being.¹³¹

Limitations set by municipalities often conflict with state laws, so legal preemption issues tend to dominate state courts.¹³² State regulators and energy companies assert towns, like the ones listed above, cannot create moratoriums on fracking because the states issuing fracking permits have oil and gas development laws already in place.¹³³ Thus, it is argued that any municipal fracking law would be preempted.¹³⁴ Some municipalities disagree with that argument because states grant municipalities police power and the power to create zoning laws specifically tailored to protect their citizenry and environment.¹³⁵

127. See *id.* at 284 (outlining municipal responses to state fracking permitting).

128. See Goho, *supra* note 19 (listing specific towns embroiled in litigation over their local fracking restrictions).

129. See *id.* (explaining towns across the country restrict fracking).

130. See Shippen Howe, Of Counsel, Van Ness Feldman LLP, Speaker at the Energy Bar Association Conference: Round II - Legal and Regulatory Issues Associated with Hydraulic Fracturing of Oil and Gas Shale Formations (Oct. 2, 2013), PowerPoint Slide 53 (listing a specific town in Colorado that banned fracking) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

131. See Goho, *supra* note 19 (describing the basic argument towns make in support of their local ordinances).

132. See *id.* (noting litigation because of the differing laws).

133. See *id.* (stating the state's basic argument against municipal restrictions).

134. See *id.* (explaining the result states and energy companies hope for).

135. See *id.* (listing the municipalities' basic argument).

III. Analysis and Discussion

A. Preemption Litigation Overview

Three states, West Virginia, Pennsylvania, and New York, have completed their legal preemption litigation, and two states, Ohio, and Colorado, have preemption litigation currently pending in their state courts.¹³⁶ Although the basic arguments are the same in every case, it is important to understand the varying facts of each case. The facts include how each party became involved in the litigation and the exact language of each state's and each municipality's fracking legislation. The language of the regulations in each state sparking the preemption litigation varies greatly, and the language is key because the comprehensiveness of each state's and each municipality's laws may determine the outcome of the pending cases.

B. Completed Preemption Cases

1. West Virginia

Overview

West Virginia is one of three states to have completed its preemption litigation.¹³⁷ In *Northeast Natural Energy, LLC v. The City of Morgantown*, the Circuit Court of West Virginia, Division No. 1, Monongalia County, analyzed whether West Virginia's oil and gas exploration laws,¹³⁸ as promulgated by West Virginia's Department of Environmental Protection ("WVDEP"), preempted a municipal ordinance completely banning fracking¹³⁹ in

136. See *id.* (outlining the states involved in preemption litigation).

137. See *id.* (describing the facts of West Virginia's legal preemption case).

138. See W.VA. CODE § 22-1-1, 6 (2014).

139. MORGANTOWN, W.VA., ORDINANCE 721.01-03, available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_MorgantownWV-ban.pdf (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

Morgantown.¹⁴⁰ The court held that West Virginia's state law preempted Morgantown's fracking ban.¹⁴¹

Facts and Arguments

In 2011, Northeast Natural Energy, LLC ("Northeast") entered into a lease agreement for an industrial park just outside the corporate limits of Morgantown, West Virginia, and the lease agreement gave Northeast the right to drill, develop, and extract natural gas under the property.¹⁴² Subsequently, WVDEP issued permits to Northeast allowing it to drill on the site.¹⁴³ After the permit issuance, the City of Morgantown enacted its ban on fracking.¹⁴⁴ Because of the ordinance, Northeast would have been unable to drill. Northeast challenged the ban hoping to preclude its enforcement.¹⁴⁵ Northeast contended that WVDEP's oil and gas exploration laws, which were enacted years before Morgantown's ban, preempted Morgantown's fracking ordinance.¹⁴⁶

West Virginia's oil and gas laws declare that "[t]he state has the *primary responsibility for protecting the environment*; other governmental entities, public and private organizations and our citizens have the *primary responsibility of supporting the state in its role as protector of the environment*."¹⁴⁷ The laws also state that the purpose of the WVDEP is to "consolidate environmental regulatory programs in a *single state agency*, while also *providing a comprehensive program* for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia."¹⁴⁸ Lastly, the laws declare that the state shall "[p]erform *all duties* as the

140. See *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *5–9 (W. Va. Cir. Ct. Aug. 12, 2011) (explaining the details behind West Virginia's preemption litigation).

141. See *id.* at *10 (noting the holding in the case).

142. See *id.* at *1 (describing Northeast's interest in the litigation).

143. See *id.* at *3 (elaborating on Northeast's permitting process).

144. See *id.* (explaining Morgantown's response to the permit issued to Northeast).

145. See *id.* at *1 (noting the initial legal action taken by Northeast).

146. See *id.* (outlining Northeast's basic argument).

147. W. VA. CODE § 22-1-1 (2014) (emphasis added).

148. *Id.*

permit issuing authority . . . in *all matters pertaining to* the exploration, development, production, storage and recovery of this state's oil and gas.”¹⁴⁹ Northeast asserted that the State controlled fracking regulation because the State had a comprehensive regulatory scheme in place.¹⁵⁰ Thus, no local ordinances contravening the state fracking law, like Morgantown’s, were permitted.¹⁵¹

Morgantown completely banned fracking within the city limits and within one mile of the corporate city limits.¹⁵² The city’s ordinance states:

It is hereby found that the drilling for oil and gas is an activity which *adversely impacts the environment, interferes with the rights of the citizens in the enjoyment of their property, and has the potential for adversely affecting the health, well being and safety of persons* living and working in and around areas where drilling operations exist.¹⁵³

The ordinance also specifically refers to fracking as a process with:

[A]n *increased level of potential harm* which includes, but may not be limited to, contamination of ground water and hazards associated with the storage, treatment and transportation of the water or other liquids after being used in the process . . . *[that] may impact the citizens, drinking water, and property within the City of Morgantown.*¹⁵⁴

Morgantown contended that it had the right to enact the ban because there was a “Home Rule for Municipalities” within the

149. *Id.* § 22-6-2 (2014) (emphasis added).

150. *See Ne. Natural Energy*, 2011 WL 3584376, at *7 (describing why Northeast believes it should prevail).

151. *See id.* (explaining Northeast’s desired result).

152. *See* MORGANTOWN, W. VA., ORDINANCE 721.01-.03 (noting the purpose of Morgantown’s ordinance).

153. *Id.* at .01(emphasis added).

154. *Id.* (emphasis added).

West Virginia Constitution.¹⁵⁵ Morgantown asserted that the “Home Rule” gave the city the right to self-governance in municipal matters including regulating nuisances for the protection of its citizens, and the city likened fracking to a nuisance because it could disturb the city’s citizens.¹⁵⁶

Outcome

The Court agreed with Northeast and declared the Morgantown fracking ban invalid.¹⁵⁷ The ban was invalid because the state already had comprehensive oil and gas exploration regulations, so any local fracking regulation was preempted.¹⁵⁸ Under West Virginia law, an appeal must be filed within four months of a court’s holding.¹⁵⁹ Morgantown did not appeal within that time frame.¹⁶⁰ This case finalized West Virginia’s fracking preemption litigation, and no more fracking preemption litigation has arisen since the ruling.

2. Pennsylvania

Overview

Pennsylvania has also completed its fracking preemption litigation.¹⁶¹ In *Robinson Township, Washington County v. Commonwealth*, the Pennsylvania Supreme Court analyzed

155. See *Ne. Natural Energy*, 2011 WL 3584376, at *2 (stating what Morgantown argues is the basis for its authority to enact and enforce the ordinance); see also W.VA. CODE § 8-12-2 (1969) (granting “Home rule power for all cities”).

156. See *Ne. Natural Energy*, 2011 WL 3584376, at *2 (noting Morgantown’s specific reasoning underlying its argument).

157. See *id.* at *10 (describing the outcome in West Virginia’s preemption litigation).

158. See *id.* (identifying the West Virginia court’s reasoning).

159. See W. VA. CODE § 58-5-4 (2014) (describing the amount of time allotted to file an appeal of a circuit court decision).

160. See Goho, *supra* note 19, at 4 (addressing the fact that West Virginia did not appeal the Court’s decision).

161. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 915 (2013) (listing Pennsylvania as a state with fracking preemption litigation).

whether an amendment to the Pennsylvania Oil and Gas Act¹⁶² violated the authority granted to Pennsylvanian municipalities to protect the well-being of their citizens¹⁶³ in the Pennsylvania Constitution.¹⁶⁴ This is the rare case where a town did not enact an ordinance before litigating the issue. The Court held that the amendment to Pennsylvania's Oil and Gas Act violated the state's constitution and cities may impose municipal fracking restrictions.¹⁶⁵

Facts and Arguments

In February 2012, the Pennsylvania legislature added provisions to the Pennsylvania Oil and Gas Act.¹⁶⁶ These revisions included restricting prohibitive local oil and gas regulations and required uniformity among local oil and gas zoning ordinances.¹⁶⁷ Pennsylvania's amended Oil and Gas Act stated, "[e]nvironmental acts are of *Statewide* concern and, to the extent that they regulate oil and gas operations, *occupy the entire field of regulation, to the exclusion of all local ordinances.*"¹⁶⁸

In the following month, the citizens of Robinson sued requesting a declaration that the revisions to the Oil and Gas Act were unconstitutional because they wanted the ability to regulate fracking in the future.¹⁶⁹ Robinson's citizens contended that the revisions violated the Pennsylvania Constitution, specifically the "Environmental Rights Amendment."¹⁷⁰ The "Environmental Rights Amendment," enacted in 1971, states:

162. 58 PA. CONS. STAT. § 3303 (2014) (granting exclusive regulation of oil and gas industry to the state).

163. PA. CONST. Art. 1, § 27 (2014) (outlining that natural resources belong to the people of the state).

164. *See Robinson Twp.*, 83 A.3d at 913 (describing the litigation's players in detail).

165. *See id.* at 977 (describing Pennsylvania's preemption litigation result).

166. *See id.* at 901 (describing the initial step that led to the litigation).

167. *See id.* at 903 (elaborating on what specific state law additions led to the litigation).

168. 58 PA. CONS. STAT. ANN. § 3303 (2014).

169. *See Robinson Twp.*, 83 A.3d at 903 (2013) (explaining Robinson's legal action against the state).

170. *See id.* (listing Robinson's basic argument).

[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹⁷¹

Robinson asserted that the state cannot “remove necessary and reasonable authority from local governments to carry out these constitutional duties” through legislation like the 2012 Pennsylvania Oil and Gas Act amendment.¹⁷² Robinson contended that the revisions “denie[d] municipalities the ability to carry out their constitutional obligation to protect public natural resources”¹⁷³ under the Environmental Rights Amendment because they would not have the ability to regulate an industry that extracted public natural resources.¹⁷⁴ Robinson declared that the constitutional command for municipalities to protect the environment limited the state’s police power.¹⁷⁵

The Commonwealth of Pennsylvania contended that the amended Pennsylvania Oil and Gas Act preempted any municipal zoning ordinances enacted “to plan for environmental concerns for oil and gas operations” because the Oil and Gas Act “occup[ied] the entire field of regulation [(referring to oil and gas exploration)] to the exclusion of all local ordinances.”¹⁷⁶

Outcome

171. PA. CONST. Art. 1., § 27 (2014).

172. See *Robinson Twp.*, 83 A.3d at 901 (outlining Robinson’s argument that the Pennsylvania constitution cannot be preempted by state statutes).

173. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 470 (2013).

174. See *id.* (outlining arguments that the regulation interferes with the police powers granted under the Pennsylvania Constitution).

175. See *Robinson Twp.*, 83 A.3d at 957 (describing Robinson’s general constitutional point).

176. *Robinson Twp.*, 52 A.3d at 470.

The Supreme Court of Pennsylvania sided with Robinson and ruled that the amended Pennsylvania Oil and Gas Act violated Pennsylvania's Constitution.¹⁷⁷ Pennsylvania's Supreme Court declared that the state's police power could not disrupt a municipal regulation if the local law involves the fundamental power of respecting the city's environment granted to municipalities in the state's constitution.¹⁷⁸ Pennsylvania's Supreme Court's handing down of this ruling completed Pennsylvania's fracking preemption litigation.¹⁷⁹ Following the ruling, Jordan Yeager, the attorney representing Robinson Township, lauded the decision and said, "[c]ommunities can now move forward to protect their residents" by enacting fracking bans and not having to worry about preemption litigation.¹⁸⁰

3. New York

Overview

New York completed its fracking preemption litigation in Summer 2014.¹⁸¹ The Court of Appeals analyzed whether the state's Oil, Gas and Solution Mining Law¹⁸² preempts a town zoning ordinance in Dryden banning all activities related to exploration, production, and storage of natural gas and petroleum.¹⁸³

177. See *Robinson Twp.*, 83 A.3d at 977 (describing Pennsylvania's preemption litigation result).

178. See *id.* at 957 (outlining the Pennsylvania court's reasoning).

179. See *id.* (laying out the Pennsylvania Supreme Court's opinion on the Pennsylvania statute).

180. Kelly Knaub, *Pa. Justices Won't Reconsider Landmark Fracking Decision*, LAW 360 (Feb. 21, 2014), <http://www.law360.com/articles/512396/pa-justices-won-t-reconsider-landmark-fracking-decision> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

181. See *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1191 (N.Y. 2014) (noting New York's settled preemption litigation).

182. N.Y. ENERGY LAW §§ 23-0303[2]; 23-0101[20][c]; 23-0503[2] (McKinney 2013) (stating that it is in the public interest to regulate oil and gas).

183. See *Norse Energy Corp. v. Town of Dryden*, 964 N.Y.S.2d 714, 716 (N.Y. App. Div. 2013) (outlining the basic arguments in New York's preemption litigation).

Facts and Arguments

In August 2011, the Town of Dryden in New York enacted a zoning ordinance that “ban[ned] all activities related to the exploration for, and the production or storage of, natural gas and petroleum” including fracking within the town.¹⁸⁴ Soon thereafter Anschutz Exploration Corporation (“Anschutz”), a driller and developer of oil and natural gas wells with preexisting leases for land in Dryden, filed suit and sought a declaratory judgment that would invalidate the town’s ordinance.¹⁸⁵ Anschutz lost at the lowest court level and then appealed to an intermediate appellate court.¹⁸⁶ Anschutz also lost at the intermediate appellate level and immediately appealed to New York’s highest court.

Anschutz asserted that New York’s Oil, Gas, and Solution Mining Law (“OGSML”), enacted in the 1980’s, preempted Dryden’s recent zoning ordinance.¹⁸⁷ New York’s OGSML declares that state law “shall *supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.*”¹⁸⁸ New York’s OGSML also concerns the details and procedures of well spacing by drilling operators stating “[t]he [D]epartment [of Environmental Conservation] shall issue a permit to drill . . . if the proposed spacing unit submitted . . . conforms to *statewide* spacing and is of approximately uniform shape.”¹⁸⁹

Anschutz contended that the zoning ordinance was expressly preempted or, in the alternative, impliedly preempted.¹⁹⁰ Anschutz believed expressed preemption applied because “the plain language of this provision prohibits municipalities from enacting laws or ordinances ‘relating to the

184. *Id.* at 716–18.

185. *See id.* at 716 (outlining the initial fact that led to the preemption litigation).

186. *See Wallach*, 16 N.E.3d at 1193 (explaining the procedural history of the case).

187. *See Norse Energy*, 964 N.Y.S. 2d at 716 (noting the energy company’s basic argument).

188. N.Y. ENERGY LAW § 23-0303[2] (McKinney 2013) (emphasis added).

189. *Id.* §§ 23-0101[20][c]; 23-0503[2] (emphasis added).

190. *See Norse Energy*, 964 N.Y.S.2d 714, 718–23 (N.Y. App. Div. 2013) (listing the energy company’s specific arguments).

regulation of the oil, gas and solution mining industries.”¹⁹¹ Anschutz also believed implied preemption applied because “a local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law,” and both the state law and the municipal law address and conflict on where drilling is to occur.¹⁹²

Dryden contended that each town has “home rule powers,” granted to it through New York’s Municipal Home Rule Law,¹⁹³ which include the right to regulate land use through zoning ordinances in order to protect the environment.¹⁹⁴ Dryden further asserted that its zoning ordinance did not “seek to regulate the details or procedure of the oil, gas and solution mining industries. Rather, it simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally.”¹⁹⁵

In its zoning ordinance, Dryden proclaimed that “[n]o land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; [or] to drill any well for natural gas and/or petroleum.”¹⁹⁶ The zoning ordinance lists various potential dangers associated with natural gas exploration as its reasons for restricting exploration.¹⁹⁷ Potential dangers to “the health, safety and general welfare of the community” including “deposit of toxins into the air, soil, water, environment, and in the bodies of residents.”¹⁹⁸ The town clarified as well that:

the Zoning Ordinance is not directed at the regulatory scheme for the operation of natural gas wells under ECL Article 23, it addresses land use

191. *Id.* at 719.

192. *Id.* at 723.

193. *See* N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11) (McKinney 2011) (describing the home rules powers granted to towns in New York).

194. *See Norse Energy*, 964 N.Y.S.2d at 718 (explaining that “Among the powers delegated to local governments is the authority to regulate the use of land through the enactment of zoning laws.”).

195. *Id.* at 719.

196. *See* Dryden Ordinance, available at http://dryden.ny.us/Downloads/PROPOSED_AMENDMENTS_ZONING_ORDINANCE.pdf (explaining prohibited uses for land in Dryden) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

197. *See id.* (describing the reasoning behind Dryden’s local ban).

198. *Id.*

*and nuisance concerns and the protection of the health, safety and general welfare of the people of the Town of Dryden and the enhancement of its physical environment.*¹⁹⁹

Thus, the town believed that while the ordinance may have an incidental effect on the fracking industry, New York's OGSML did not preempt this zoning ordinance.²⁰⁰ Dryden also rebutted Anschutz's implied preemption argument by explaining that the state law focused on the details and procedures of drilling while the municipal law addressed traditional land use zoning considerations.²⁰¹ Thus, the two laws "do not conflict, but rather, may harmoniously coexist."²⁰²

Outcome

New York's highest court agreed with Dryden.²⁰³ The court acknowledged in its opinion that this case involved "major policy questions for the coordinate branches of government to resolve[, but] the discrete issue before us . . . is whether the state legislature eliminated the home rule capacity of municipalities to pass zoning laws that exclude oil, gas and hydrofracking activities in order to preserve the existing character of their communities."²⁰⁴

The Court ruled that a reading of the plain language, legislative history, and the purpose and policy of New York's OGSML did not lead the court to conclude that Dryden's ordinance was expressly or impliedly preempted.²⁰⁵ "[I]n light of ECL 23-0303(2)'s plain language, its place within the OGSML's framework and the legislative background, we cannot say that

199. *Id.* (emphasis added).

200. *See Norse Energy*, 964 N.Y.S.2d at 719 (explaining the city's reasoning).

201. *See id.* at 723 (presenting the city's reasoning to the energy company's alternative theory).

202. *Id.*

203. *See Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1203 (N.Y. 2014) (noting the New York Court of Appeals holding).

204. *Id.*

205. *See id.* at 1196-1203 (explaining the reasoning behind the New York court's holding).

the supersession clause—added long before the current debate over high-volume hydrofracking and horizontal drilling ignited—evinces a clear expression of preemptive intent.”²⁰⁶ More than 170 towns in New York have passed bans or moratoria on fracking similar to Dryden’s ban, and those towns can now rest easy because New York’s highest court cemented their local regulations.²⁰⁷

c. Current Preemption Litigation

1. Ohio

Overview

Ohio has not completed its fracking preemption litigation, but the state’s highest court heard oral arguments over the issue in early 2014.²⁰⁸ The Ohio Supreme Court will determine if Ohio’s state law granting Ohio’s Department of Natural Resources sole regulation of gas and oil operations within the state²⁰⁹ preempts Munroe Falls’ drilling ordinance.²¹⁰

Facts and Arguments

In February 2011, Ohio’s Department of Natural Resources issued drilling permits to Beck Energy Corporation allowing the company to frack on property in Munroe Falls, Ohio.²¹¹ Soon after drilling began, the city sought an injunction to stop Beck Energy from drilling.²¹² “The city claimed Beck Energy

206. *Id.* at 1203.

207. *See id.* stating that the ban “encourages the increasing number of communities across the country opting to place limits on the controversial practice.”)

208. *See State ex rel. Morrison v. Beck Energy Corp.*, 135 Ohio St.3d at 1469 (Ohio 2013) (noting the unresolved nature of Ohio’s fracking preemption litigation).

209. OHIO REV. CODE ANN. § 1509.02 (West 2013) (explaining rules for the statewide regulation of oil and gas activities).

210. *See State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 97 (Ohio Ct. App. 2013) (elaborating on the issue in the case).

211. *See id.* at 88 (describing the background leading to the case).

212. *See id.* (noting the first legal step taken).

did not comply with its [local] ordinance requiring permits for drilling,” and a trial court granted the injunction.²¹³ Beck Energy appealed the decision quickly to an intermediate appeals court, the Court of Appeals of Ohio, Ninth District, Summit County.²¹⁴

Beck Energy contended that the city’s ordinance, enacted in 1980, directly conflicted with Ohio’s state oil and gas law, enacted in 1965.²¹⁵ The state oil and gas law creates “in the department of natural resources the division of oil and gas resources management,”²¹⁶ and declares that the division of oil and gas resources management has “*sole and exclusive authority* to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state, excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency.”²¹⁷ The law further explains that:

[t]he regulation of oil and gas activities is a *matter of general statewide interest* that *requires uniform statewide regulation*, and this chapter and rules adopted under it constitute a *comprehensive plan* with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state²¹⁸

The statute clarifies that “[n]othing in this section affects the authority *granted to . . . local authorities . . .* provided that the authority granted under those sections *shall not be exercised* in a manner that discriminates against, unfairly impedes, or *obstructs oil and gas activities and operations regulated under this chapter*.”²¹⁹ Under the state law, the state has the sole and exclusive authority to regulate gas production operations within Ohio, and Beck Energy asserted that the existing city ordinances

213. *Id.*

214. *See id.* (noting Beck Energy’s legal response).

215. *See id.* at 91 (outlining generally the energy company’s argument).

216. OHIO REV. CODE ANN. § 1509.02 (West 2013)

217. *Id.* (emphasis added).

218. *Id.* (emphasis added).

219. *Id.* (emphasis added).

also attempted to regulate gas production operations.²²⁰ Thus, the state law preempted the city's ordinance, and Beck Energy argued that it should be allowed to continue drilling.²²¹

Munroe Falls, on the other hand, contended that the local ordinance was valid because "local municipalities have home-rule authority, under Section 3, Article XVIII of [the] Ohio Constitution, to regulate gas drilling operations."²²² Ohio's Constitution states "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."²²³ Munroe Falls' drilling ordinance states that "[n]o . . . entity shall commence to drill a well for oil, gas, or other hydrocarbons within the corporate limits of the Municipality until such time as such persons have wholly complied with all provisions of this chapter and a conditional zoning certificate" issued by the city.²²⁴ The ordinance also requires that a public hearing be held for town citizens to voice their concerns and "the hearing . . . shall be mandatory . . . precedent to the commencement of drilling . . ."²²⁵

Outcome

The Court of Appeals of Ohio agreed with Beck and declared Munroe Falls' drilling ordinance invalid on preemption grounds because the state regulation's wording gave the state sole oil and gas regulatory power.²²⁶ Munroe Falls then appealed the court's ruling, and the Ohio Supreme Court granted appeal and heard oral arguments on February 26, 2014.²²⁷ A ruling is expected by Spring 2015.

220. See *State ex rel. Morrison*, 989 N.E.2d at 91 (explaining the energy company's reasoning).

221. See *id.* (listing the energy company's desired outcome).

222. *Id.* at 92.

223. OH. CONST. Art. XVIII, § 3.

224. MUNROE FALLS, OH., ORDINANCE § 1329.03 (2012) (emphasis added).

225. *Id.* (emphasis added).

226. See *State ex rel. Morrison*, 989 N.E.2d at 97–99 (explaining the outcome in Ohio's preemption litigation).

227. See Julie Carr Smyth, *Ohio Justices Hear Local Drilling Rules Dispute*, THE WASHINGTON TIMES (Feb. 26, 2014), <http://www.washingtontimes.com/news/2014/feb/26/ohio-justices-to-hear-local->

2. Colorado

Overview

Colorado also has not finalized its fracking preemption litigation yet.²²⁸ The Colorado Oil & Gas Association (“COGA”), an oil and gas trade association, sought a declaratory judgment in Colorado District Court invalidating a resolution,²²⁹ which has the same legal power as an ordinance, enacted by the City of Longmont that banned fracking within the city limits.²³⁰ COGA asserted that the state’s Oil and Gas Conservation Act²³¹ preempted Longmont’s fracking ban.²³²

Facts and Arguments

In November 2012, Longmont, Colorado enacted a resolution that prohibited fracking within the city limits.²³³ With the support of the state of Colorado, COGA filed suit seeking to invalidate the city resolution.²³⁴ The trade association filed suit on behalf of the state and many drillers with lease interests in Longmont.²³⁵

drilling-rules-dispute/?page=all (discussing the status of *Morrison*) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

228. See Complaint at 1, Colo. Oil and Gas Ass’n v. City of Longmont, Colo., available at http://ourlongmont.org/wp-content/uploads/2013/01/20121218_010338_COGAfiling.pdf (outlining the lack of finality in Colorado’s preemption litigation).

229. Longmont, Co. Resolution R-2012-67 (2012), available at <http://www.co.weld.co.us/assets/DD0d5d4aa3487776BC8D.pdf>.

230. See Colo. Oil & Gas Ass’n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *1 (Colo. Dist. Ct. Boulder Cnty. July 24, 2014) (explaining what the Colorado Oil and Gas Association wanted).

231. COLO. REV. STAT. § 34-60-106(2)(a) (2013) (explaining the powers allocated to the commission).

232. See *Colo. Oil & Gas Ass’n*, 2014 WL 3690665, at 1 (outlining the Colorado Oil and Gas Association’s basic preemption argument).

233. See *id.* (noting the background leading to Colorado’s fracking preemption litigation)

234. See *id.* (describing the first legal action taken).

235. See *id.* at 2 (explaining the plaintiff’s interest in the case).

COGA claimed that the city’s resolution directly opposed Colorado’s Oil and Gas Conservation Act, which was enacted decades before Longmont’s resolution, “because it prohibits oil and gas activity that the state permits.”²³⁶ Longmont’s Resolution “prohibit[ed] within the city of Longmont the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons, and prohibit[ed] . . . the storage in open pits or disposal of solid or liquid wastes created in connection with the hydraulic fracturing process.”²³⁷

Colorado’s Oil and Gas Conservation Act created the Colorado Oil and Gas Conservation Commission and vested it with the “*authority to regulate [t]he drilling, producing, and . . . all other operations for the production of oil and gas.*”²³⁸ The purpose of the Commission regulating oil and gas operations is “*to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources.*”²³⁹

COGA asserted that this was an irreconcilable operational conflict that should result in the invalidation of the city resolution.²⁴⁰ In the alternative, COGA asserted that the local law “materially impede[d] or destroy[ed] . . . [the] state[s] interest” underlying Colorado’s Oil and Gas Conservation Act because the local law prohibited fracking while the state permitted it.²⁴¹

Longmont did not contest COGA’s “authority to regulate hydraulic fracturing . . . [or] that the Commission is charged with fostering production ‘in a manner consistent with protection of public health, safety and welfare, including protection of the environment and wildlife resources.’”²⁴² Instead, Longmont

236. *Id.* at 9.

237. LONGMONT, CO., ORDINANCE art. XVI, § 16.3 (2012).

238. COLO. REV. STAT. ANN. § 34-60-106(2)(a) (West 2013) (emphasis added).

239. *Id.* § 34-60-106(2)(d) (emphasis added).

240. *See Colo. Oil & Gas Ass’n*, 2014 WL 3690665, at *9 (listing Colorado’s general argument).

241. *Id.* at *8.

242. *Id.* at *11.

complained that COGA was “not doing its job to Longmont’s satisfaction.”²⁴³

Outcome

Judge Mallard of Boulder County District Court agreed with COGA and concluded that “[t]here is no way to harmonize Longmont’s fracking ban with the stated goals of the Oil and Gas Conservation Act, . . . [and] the conflict in this case is an irreconcilable conflict.”²⁴⁴ Thus, the court granted COGA’s initial motion for summary judgment, but the court also stayed the order while Longmont considers an appeal, which is likely.²⁴⁵

D. State and Energy Companies’ Interests and Arguments Are the Same

The energy companies and the Commonwealth of Pennsylvania in the preemption cases listed above seek the same result. They do not want any municipal restrictions on fracking that exceed state limitations.²⁴⁶ The energy companies and Pennsylvania do not want any local fracking regulations that conflict with each state’s existing oil and gas regulatory regime.²⁴⁷

Pennsylvania and the energy companies want to minimize local restrictions because more regulation typically makes it harder to reap the benefits of fracking. A complete ban on fracking would limit natural gas and oil production, limit job growth related to fracking, limit reductions in home gas

243. *Id.*

244. *Id.* at *13.

245. *See id.* (explaining the ruling and potential future litigation).

246. *See id.* at *8–9; *Norse Energy Corp. v. Town of Dryden*, 964 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013); *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 97–100 (Ohio Ct. App. 2013); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957; *Ne. Natural Energy, LLC v. The City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *5–6 (W. Va. Cir. Ct. Aug. 12, 2011) (noting the outcome against the municipalities is the same across the cases).

247. *See Colo. Oil & Gas Ass’n*, 2014 WL 3690665, at *8–9; *Norse Energy*, 964 N.Y.S.2d at 719; *State ex rel. Morrison*, 989 N.E.2d at 97–100; *Robinson Twp.*, 83 A.3d at 957; *Ne. Natural Energy*, 2011 WL 3584376, at *5–6 (describing the desires of the states and energy companies generally).

expenses, and limit state tax revenue.²⁴⁸ Additional permitting processes and more stringent requirements on the fracking process at a municipal level could also discourage companies from drilling within the municipality or state because those restrictions likely make the whole process longer and more costly.

The basic argument that the energy companies and Pennsylvania used is the same.²⁴⁹ Each contended that the oil and gas regulations at the state level preempted the more restrictive municipal laws.²⁵⁰ Each asserted that the municipal regulations conflicted with the state laws, and thus, the municipal laws should be invalidated.²⁵¹ How the local laws conflicted with the state regulations varied based on the wording and legislative history of each states' and municipalities' laws, but generally the conflict boiled down to Pennsylvania and the energy companies believing that the wording and the history of their respective state statutes created a comprehensive

248. See Section II.B.2 (discussing the positive consequences of fracking).

249. See *Colo. Oil & Gas Ass'n*, 2014 WL 3690665, at *8–9 (arguing that the Commission does not regulate hydraulic fracking); *Norse Energy*, 964 N.Y.S.2d at 719 (stating that the regulations were preempted by the state regulations); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (arguing that the locality could not enforce its regulations because the state's regulations took precedence); *Robinson Twp.*, 83 A.3d at 957 (discussing the illegality of a possibly preempted statute); *Ne. Natural Energy*, 2011 WL 3584376, at *5-6 (contending that the locality lacked authority to regulate because the state was the one who held authority to do so).

250. See *Colo. Oil & Gas Ass'n*, 2014 WL 3690665, at *8–9 (arguing that the Commission does not regulate hydraulic fracking); *Norse Energy*, 964 N.Y.S.2d at 719 (stating that the regulations were preempted by the state regulations); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (arguing that the locality could not enforce its regulations because the state's regulations took precedence); *Robinson Twp.*, 83 A.3d at 957 (discussing the illegality of a possibly preempted statute); *Ne. Natural Energy*, 2011 WL 3584376, at *5-6 (contending that the locality lacked authority to regulate because the state was the one who held authority to do so).

251. See *Colo. Oil & Gas Ass'n*, 2014 WL 3690665, at *8–9 (arguing that the Commission does not regulate hydraulic fracking); *Norse Energy*, 964 N.Y.S.2d at 719 (stating that the regulations were preempted by the state regulations); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (arguing that the locality could not enforce its regulations because the state's regulations took precedence); *Robinson Twp.*, 83 A.3d at 957 (discussing the illegality of a possibly preempted statute); *Ne. Natural Energy*, 2011 WL 3584376, at *5-6 (contending that the locality lacked authority to regulate because the state was the one who held authority to do so).

regulatory system or granted the state sole regulatory authority and thus every state law preempted any municipal regulatory attempt.²⁵²

E. Municipalities' Interests and Arguments Are the Same

The municipalities involved in the preemption cases listed above all seek the same result, which is to have their local fracking restrictions remain valid.²⁵³ Most of the municipalities desire outright fracking bans, and one advocated for a lengthier pre-drilling registration process.²⁵⁴ The municipalities try to impose these restrictions because of alleged potential negative consequences associated with fracking: chemical spills, chemical fires, seismic activity, and groundwater contamination among others.²⁵⁵

While none of those negative repercussions definitely will occur, the municipalities would rather minimize the possibility of injury to their environment and citizenry. In enacting these restrictions, the municipalities appear to be invoking the precautionary principle, an international environmental law concept, because they, like countries around the world, “recognize

252. See *Robinson Twp.*, 83 A.3d at 957 (stating the argument is that authority should be given to the governing state body, rather than the municipality).

253. See *Colo. Oil & Gas Ass'n*, 2014 WL 3690665, at *8–9 (arguing that the municipality wishes to maintain their fracking regulations); *Norse Energy*, 964 N.Y.S.2d at 719 (stating that the municipality already has regulations in place); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (stating that, despite the state's regulations, the locality should be able to regulate as well); *Robinson Twp.*, 83 A.3d at 957 (noting the municipality's desire to regulate fracking as well); *Ne. Natural Energy*, 2011 WL 3584376, at *5-6 (contending that the locality should be able to keep their fracking regulations in place).

254. See *Colo. Oil & Gas Ass'n*, 2014 WL 3690665, at *8–9 (arguing for an outright fracking ban); *Norse Energy*, 964 N.Y.S.2d at 719 (arguing for an outright fracking ban); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (arguing for a lengthier pre-drilling registration process); *Robinson Twp.*, 83 A.3d at 957 (arguing for an outright fracking ban); *Ne. Natural Energy*, 2011 WL 3584376, at *5-6 (arguing for an outright fracking ban).

255. See *supra* Part II.B.1 (listing the negative effects the municipalities want to avoid).

as a matter of . . . law that it is preferable to prevent pollution than to deal with pollution after it has occurred.”²⁵⁶

All the municipalities utilized the same basic argument in court.²⁵⁷ The municipalities contended that their respective state statutes did not preempt their local ordinances.²⁵⁸ The municipalities asserted that each was granted power by the state to adopt ordinances concerning local issues, and fracking was an issue of local concern.²⁵⁹ Each supported its local concern theory by arguing that the potential harms associated with fracking would affect its citizenry and its environment, and thus, each city or town should be able to use its power of self-governance to restrict fracking in order to protect its environment and residents.²⁶⁰

F. State and Energy Companies’ Argument Should Prevail

As seen above, state courts have split fairly evenly on the preemption litigation thus far.²⁶¹ West Virginia, Ohio, and Colorado’s courts sided with the energy companies in their cases and invalidated local fracking bans on preemption grounds.²⁶² Pennsylvania and New York’s courts sided with the

256. James E. Hickey Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL. L.J. 423, 423 (1995).

257. *See Colo. Oil & Gas Ass’n*, 2014 WL 3690665, at *8–9 (arguing that the Commission does not regulate hydraulic fracking); *Norse Energy*, 964 N.Y.S.2d at 719 (stating that the regulations were preempted by the state regulations); *State ex rel. Morrison*, 989 N.E.2d at 97–100 (arguing that the locality could not enforce its regulations because the state’s regulations took precedence); *Robinson Twp.*, 83 A.3d at 957 (discussing the illegality of a possibly preempted statute); *Ne. Natural Energy*, 2011 WL 3584376, at *5-6 (contending that the locality lacked authority to regulate because the state was the one who held authority to do so).

258. *See Goho*, *supra* note 19, at 3 (noting the localities’ basic argument).

259. *See id.* at 3 (elaborating on each municipality choosing to argue that they were granted powers by state constitutions).

260. *See id.* at 3–5 (discussing the specific power granted to the municipalities by their state constitutions).

261. *See id.* at 6 (concluding that states have mixed results on fracking bans).

262. *See id.* (showing which states invalidated local fracking bans).

municipalities in their cases.²⁶³ But the preemption litigation in Ohio and Colorado is not yet completed because the Ohio case is up on appeal and the recent Colorado district court ruling will likely be appealed.²⁶⁴

The upcoming final phases of preemption litigation should likely result in victories for the energy companies and state governments rather than the municipalities. Although the state and municipal legislatures each weigh the positive and negative consequences when enacting laws, it is not the court's job to take those policy concerns under consideration. The courts should focus on the constitutional preemption issue and conclude that each state's regulatory restrictions preempt the municipal regulations.

Munroe Falls, Ohio and Dryden, New York both cited their state-granted municipal home-rule powers as evidence they should have the power to regulate fracking because fracking can have an effect on the municipality.²⁶⁵ Longmont, Colorado will likely make the same home-rule power argument as Munroe Falls and Dryden, if the case moves to the appeals court level.

But the home-rule powers granted in Ohio declare “[m]unicipalities shall have authority to exercise all powers of local self-government . . . as are *not in conflict with general laws*[,]” and “general laws” refers to state statutes.²⁶⁶ Ohio's state oil and gas regulation explicitly grants the state sole oil and gas regulatory power.²⁶⁷ Thus, Munroe Falls' municipal law conflicts with the state statute and is impliedly preempted.²⁶⁸ Ohio's

263. See *id.* (discussing which states allowed municipal fracking bans).

264. See *Colo. Oil & Gas Ass'n v. City of Longmont*, No. 13CV63, 8–9 (Colo. Dist. Ct. Boulder Cnty. July 24, 2014); *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013); *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 97–100 (Ohio Ct. App. 2013); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957; *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *5-6 (describing the future litigation certain to occur).

265. See *Norse Energy Corp.*, 964 N.Y.S.2d at 723; *State ex rel. Morrison*, 989 N.E.2d at 97 (explaining both cities preemption arguments).

266. John Martinez, 1 LOCAL GOVERNMENT LAW § 4:7 (2013).

267. OHIO REV. CODE ANN. § 1509.02 (West 2013) (explaining the division of oil and gas resources management).

268. See *id.* § 4:13 (discussing how implied preemption differs from express preemption).

Supreme Court should follow the reasoning of its lower appeals court and rule in favor of Beck.²⁶⁹

The stated goals of the Act and the ban are mutually exclusive, and thus an irreconcilable conflict exists between the state's Act and Longmont's ban.²⁷⁰ If Longmont appeals the district court's order, the appeals court should follow the reasoning of Judge Mallard and affirm the order.

G. Increased Federal Regulation is the Answer

This Note has shown how convoluted the existing three-prong regulatory system is and how it causes significant issues for the nation, the states, citizens, and businesses.²⁷¹ While some legal scholars propose increasing local government control,²⁷² most present plans that focus on increasing federal regulatory power.²⁷³ Although the creation of a comprehensive federal regulatory regime for fracking would likely be arduous, onerous, and costly, many believe it is much needed.²⁷⁴

It would be near impossible to describe every federal fracking regulation scheme put forward, but generally there are two types of proposals: a fully federally regulated "one-size fits all" model or an enhanced federal regulatory standard with some minimal, yet necessary, state regulation "cooperative federalism" model.²⁷⁵ The one-size fits all model has advantages including

269. See *State ex rel. Morrison*, 989 N.E.2d at 97 (outlining why future Ohio litigation should follow Ohio precedent).

270. See COLO. REV. STAT. ANN. § 34-60-106(2)(a) (West 2013) (listing the Colorado Oil and Gas Conversation Commission's regulatory power).

271. See Goho, *supra* note 19 (explaining the intricacy of the existing fracking regulatory regime).

272. See Rachel A. Kitze, *Moving Past Preemption: Enhancing the Power of Local Governments Over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 412–13 (2013) (noting a proposed regulatory scheme seeking to empower local governments more so than the existing regulatory scheme).

273. See Gerken, *supra* note 89, at 128 (describing a potential regulatory scheme focused on the federal government setting the standards for the fracking industry).

274. See *id.* (explaining how a cooperative federal regulatory regime is one possible answer to fracking's existing regulatory issues).

275. See Saby Ghoshray, *Charting the Future Trajectory for Fracking Regulation: From Environmental Democracy to Cooperative Federalism*, 38 T. MARSHALL L. REV. 199, 233–37 (outlining the basic future fracking regulatory models).

having centralized governing bodies that would have sole regulatory control, likely the EPA or the DOE, and being less redundant and costly, which could arise from state and federal bodies performing the same work in a cooperative regulatory regime.²⁷⁶ But most legal scholars believe the disadvantages of the one-size fits all model, including the lack of understanding about each state's local geography and economic situation, outweigh the advantages.²⁷⁷

Most legal scholars champion the cooperative federalism model because it enhances federal power while leaving the states some individualized control.²⁷⁸ The cooperative federalism model would allow federal agencies to create comprehensive mandatory standards for every aspect of the fracking process.²⁷⁹ The mandatory standards would serve as minimums for the states to follow, but the states, because of their specific geographical, economic, and societal nuances, could impose more stringent regulations if they see fit.²⁸⁰

IV. Conclusion

All of the courts currently hearing fracking preemption cases should rule that the respective state laws regulating oil and gas exploration preempt the local fracking ban. The municipalities that ban fracking cite their home-rule powers as support for their local regulations, but all of the municipal home-rule powers currently before the courts have a caveat that ruins the cities' arguments. The home-rule powers only allow municipal laws that are not inconsistent with state law, and all of the local regulations are inconsistent with their respective state laws.

Thus, if fracking grows in the future and occurs in states without fracking regulations, future state fracking laws should be

276. *See id.* at 237 (describing the advantages of a solely federally regulated fracking industry).

277. *See id.* (discussing disadvantages outweighing the potential advantages of fracking).

278. *See id.* (explaining the disadvantages of the one-size fits all federal regulation plan).

279. *See id.* (noting the increased comprehensive power of the federal government).

280. *See id.* (describing how a cooperative federalism regulatory scheme would work in practice).

clear and explain that the state has sole and exclusive authority to regulate the industry and has a comprehensive regulatory regime in place. Then, if a municipality fights back, bans fracking, and litigation arises, the state should win the preemption case because a municipality banning fracking clearly contradicts a state law granting the state all regulatory power.

As seen through this Note, the existing regulatory regime is convoluted, complex, and costly. Politicians have a chance to do the right thing right now and end any future preemption litigation before it begins by creating the new regulatory regime that legal scholars call for.²⁸¹ A regulatory scheme that would enhance the federal government's regulatory power, reduces the states' regulatory authority, and eliminates any local regulatory authority.²⁸² This mainly centralized regulatory system would drastically reduce redundancy and costs and would eliminate potential preemption litigation.

281. *See id.* (noting the most frequently proposed and lauded alternative regulatory system).

282. *See id.* (explaining how much regulatory power each level of government would have in this alternative regulatory regime).