2014 New York Hydraulic Fracturing Caselaw Update
By Seth Pullen

As we approach the end of 2014, it may be useful to reflect on the impact of several important court cases decided in New York this year relating to oil and gas. While the decisions have mainly been against the industry and landowners, other cases are now dealing with the consequences of local laws, particularly in the tax area.

Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp. USA v. Town of Dryden et al. and *Cooperstown Holstein Corporation v. Town of Middlefield* (23 N.Y.3d 728). On June 30, 2014 the Court of Appeals held that towns may ban oil and gas production activities within town boundaries by adoption of local zoning laws. This is based on an interpretation that the supersession clause of the state Oil, Gas and Solution Mining Law (OGSML) does not preempt municipal land use regulation powers. On October 16, 2014, the Court of Appeals denied a motion for reargument of the case (2014 N.Y. LEXIS 2858).

The Court of Appeals rejected the argument put forth by the plaintiffs, and supported by IOGA, that the plain language of the supersession clause preempts any local regulation or prohibition of oil, gas or solution mining activities. Essentially, the Court of Appeals adopted the arguments of the Towns of Dryden and Middlefield that prohibition of an activity is not "regulation" of that activity. This argument relied an application of the Court of Appeals decision in *Matter of Frew Run Gravel Products v. Town of Carroll* (71 N.Y.2d 126 [1987]), which interpreted language in the state Mined Land Reclamation Law (MLRL) preempting local regulations, but specifically allowed for stricter local zoning ordinances and mining laws. The Court treated the MLRL and OGSML preemption provisions, as essentially equivalent, even though the Legislature had amended the MHRL to reflect *Frew* and related decisions, while leaving the OGSML preemption intact.

The inconsistency of holding that prohibition does not constitute regulation was pointed out in a dissenting opinion by Judge Pigott, joined by Judge Smith. The dissent argued that the zoning ordinances passed by the Towns of Dryden and Middlefield banned oil and gas activities within the town, without specifying zones where oil and gas uses are permitted or prohibited, making them regulations of oil, gas and solution mining activities, rather than simply land use restrictions. Unfortunately, the majority opinion and not the dissent carries authority, so unless the Legislature acts, municipalities now have the authority to ban oil and gas production activities.

In a subsequent case, *Lenape Resources, Inc. v. Town of Avon et al.* (2014 N.Y. App. Div. LEXIS 6712), the Fourth Department of the Appellate Division citing the *Dryden* and *Middlefield* decision to note that municipal bans of hydraulic fracturing are allowed, but decided the case on mootness grounds because the town had enacted a now-expired moratorium rather than a permanent ban. As moratoria on hydraulic fracturing expire, producers and landowners should be alert to potential new moratoria or bans.

Joint Landowners Coalition of New York, Inc. et al. v. Cuomo, et al. (unpublished, Supreme Court for Albany County Index No. 843-2014). This Article 78 proceeding sought to force the

State to finish the State Environmental Quality Review Act (SEQRA) review and issue the Supplemental Generic Environmental Impact Statement (SGEIS) for high volume hydraulic fracturing. The Court did not reach the merits of that position, holding that the petitioners did not have standing to challenge the actions or inactions of the governor and state agencies relating to their responsibilities under SEQRA because the situation and damages claimed by the petitioners is no different than that of the general public, and further, such damages consist solely of economic impacts, not environmental impacts such as SEQRA is intended to address. The petitioners filed an appeal with the Third Department of the Appellate Division in July.

Mark S. Wallach, as the Bankruptcy Trustee for Norse Energy Corp. USA, et al. v. *New York State Department of Environmental Conservation*, et al. (unpublished, Supreme Court for Albany County Index No. 6773-2013). This Article 78 proceeding also sought to force the State to issue the SGEIS. The arguments in the case were very similar to those in *Joint Landowners Coalition of New York, Inc.*, and the petition was also dismissed by the Court for lack of standing, without addressing the merits of the petitioners' claims.

One recent case that can benefit landowners is the *Matter of Holcomb v. Town of Richford*, (unpublished , Supreme Court for Tioga County Index No. 43048). The Court held that town assessors cannot base assessments on land sales driven by leasing for planned shale development, because the State moratorium on high volume hydraulic fracturing makes such development impossible.