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# New York Oil and Gas Update

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# NEW YORK OIL AND GAS UPDATE


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TABLE OF CONTENTS



## I. ZONING CASES

The town of Dryden (the "Town") amended its zoning ordinance on August 2, 2011, to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum.[2] In *Anschutz Exploration Corp. v. Town of Dryden*, an oil and gas operator holding leases covering more than one-third of the acreage in the Town sought to invalidate the ordinance, claiming that the ordinance was pre-empted by the Oil, Gas and Solution Mining Law ("OGSML"), under section 23-0303 of the New York Environmental Conservation Laws.[3] The Supreme Court of Tompkins County granted summary judgment to the Town.[4] Section 23-0303 provides that "[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[5] The court held

1. Attorney with Steptoe & Johnson PLLC; J.D. 2006, Cornell Law School; A.B. 2002, Princeton University.
2. Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 461 (Sup. Ct. 2012).
3. *Id.* at 467.
4. *Id.* at 474.
5. N.Y. ENVTL. CONSERV. LAW § 23-0303 (Consol. 1992).



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that it was constrained by the prior decision of the New York Court of Appeals in *Frew Run Gravel Products, Inc. v. Town of Carroll*, which upheld a town ordinance banning surface mining operations despite a similar provision in the Mined Land Reclamation Law.[6] The court held that the cited provision did not expressly preempt local regulation of land use, but only regulations dealing with operations.[7] The court also held that the town-wide ban on oil and gas operations was permissible.[8]

In *Cooperstown Holstein Corp. v. Town of Middlefield*, an oil and gas owner–lessor filed a lawsuit in the Supreme Court of Otsego County to declare the town of Middlefield's zoning ordinance banning oil and gas operations invalid under the same provision cited in *Anschutz*.[9] The court granted Defendant Township's motion for summary judgment.[10] The court noted that "the OGSML supersession clause preempts local regulation solely and exclusively as to the method and manner of oil, gas and solution mining or drilling, but does not preempt local land use control."[11]

## II. LEGISLATION

2011 Session Laws of New York, chapter 501 amended the New York property law, adding section 329-a, which provides with regard to severed oil and gas interest in and under the Allegany State Park, that such interests that have not been "used" for twenty years prior to the effective date of the Act shall extinguish and revert to the state unless a statement of claim is filed within two years of the effective date of the Act.[12] An interest is deemed "used" if:

> (a) oil and gas is produced; (b) operations are being conducted for injection, withdrawal, storage or disposal of water, gas or other fluid substances; (c) rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights; (d) any such use is being carried out on any tract with which such oil and gas interest is being unitized or pooled for production purposes; or (e) taxes are paid on such oil and gas interest by the owner thereof.[13]

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6. *Anschutz Exploration Corp.*, 940 N.Y.S.2d at 466 (citing Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920 (N.Y. 1987)).

7. *Id.* at 467.

8. *Id.* at 471 (citing Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226 (N.Y. 1996) and noting that "[i]n *Matter of Gernatt,* the Court of Appeals rejected the argument that if the land within a municipality contains extractable minerals, then the municipality is required to permit them to be mined somewhere").

9. Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722, 723–24 (Sup. Ct. 2012).

10. *Id.* at 729–30.

11. *Id.* at 730.

12. 2011 Sess. Laws ch. 501, §§ 1–2 (McKinney) (approved and effective Sept. 23, 2011).

13. *Id.*

The notices of claim must recite the owner and address, a description of the land, and a copy of the instrument creating the interest.[14] The notices must be filed in the Office of the Clerk of the County of Cattaraugus.[15]

2011 Session Laws of New York, chapter 568 amends the New York parks, recreation and historic preservation law, adding section 13.31, which provides that no oil and gas operations may take place in the Allegany State Park without obtaining a surface access permit from the New York State Office of Parks Recreation and Historic Preservation.[16] Such permits may limit the number of wells; shall preclude storage or disposal of liquid or solid wastes in the park; may limit access roads; may restrict seasonal access to minimize impacts on recreational uses; and shall require the permittee to pay funds sufficient to pay for monitoring of impacts.[17] Additionally, the permits must impose insurance requirements, financial security requirements, and shall mandate corrective actions necessary to restore adverse impacts.[18]

## III. Additional Significant Cases

In *Alexander v. Chesapeake Appalachia, LLC*, the United States District Court for the Northern District of New York stayed an action by lessors to invalidate oil and gas leases, holding that a dispute over whether force majeure applied to prevent termination was covered by an arbitration clause in the lease, pursuant to the Federal Arbitration Act.[19]

In *Aukema v. Chesapeake Appalachia, LLC*,[20] the United States District Court for the Northern District of New York dismissed a motion to stay an action to invalidate leases without arbitration clauses, pending the arbitration in *Alexander v. Chesapeake Appalachia, LLC*,[21] involving similar issues.[22] The district court noted that the leases at issue contained different provisions and that none of the plaintiffs would be bound by the arbitration in *Alexander*.[23] The dis-

14. *Id.*

15. *Id.*

16. 2011 Sess. Laws ch. 568, § 1 (McKinney) (approved and effective Sept. 23, 2011).

17. *Id.* § 1(3)(a)–(d), (f).

18. *Id.* § 1(3)(h)–(j).

19. Alexander v. Chesapeake Appalachia, LLC, 839 F. Supp. 2d 544, 554–55 (N.D.N.Y. 2012).

20. Aukema v. Chesapeake Appalachia, LLC, 839 F. Supp. 2d 555, 561 (N.D.N.Y. 2012).

21. *Alexander*, 839 F. Supp. 2d at 554–55.

22. *Aukema*, 839 F. Supp. 2d at 561.

23. *Id.* at 560–61.

trict court also found that the plaintiffs would be prejudiced as they would be unable to release their mineral rights.[24]

In *Coalition for Responsible Growth & Resource Conservation v. United States Federal Energy Regulatory Commission*, environmental groups challenged the issuance of a Certificate of Public Convenience and Necessity by the Federal Energy Regulatory Commission ("FERC") to the Central New York Oil and Gas Company for the MARC I Hub Line Project natural gas pipeline.[25] Plaintiffs challenged FERC's decision that an environmental impact statement ("EIS") was not required under the National Environmental Policy Act ("NEPA").[26] The court held that it must consider: (1) whether the agency took a "hard look" at the possible effects of the proposed action; and (2) if the agency had taken a "hard look," whether the agency's decision was arbitrary or capricious.[27] The Second Circuit affirmed, reviewing FERC's environmental assessment and subsequent finding of no significant impact and concluding that "FERC took a 'hard look' at the possible effects of the Project and that its decision that an EIS was not required was not arbitrary or capricious."[28] The court specifically concluded that "FERC reasonably concluded that the impacts of [Marcellus Shale] development are not sufficiently causally-related to the project to warrant a more in-depth analysis" and that FERC took "concrete steps to address environmental concerns" relating to incremental effects of the project on forests and migratory birds.[29]

In *Weiden Lake Property Owners Association, Inc. v. Klansky*, the Supreme Court of Sullivan County granted summary judgment in favor of a property owners' association in a declaratory judgment action against the landowner and operator, holding that deed covenants restricting property use to single family homes and restricting commercial uses barred oil and gas development under a lease.[30] The court also granted summary judgment in favor of the landowner on the operator's cross-claims for rescission of the lease and fraud in the inducement, finding that the operator had notice of the protective covenants prior to taking the lease.[31] The court additionally denied the operator's request to file an amended answer with additional

24. *Id.* at 561.

25. Coal. for Responsible Growth & Res. Conservation v. U.S. Fed. Energy Regulatory Comm'n, No. 12-566-ag, 2012 WL 2097249, at *1 (2d Cir. June 12, 2012).

26. *Id.* at *2; 42 U.S.C. §§ 4321–47 (2006).

27. *Coal. for Responsible Growth & Res. Conservation*, 2012 WL 2097249, at *1 (citing Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997)).

28. *Id.* at *2.

29. *Id.*

30. Weiden Lake Prop. Owners Ass'n, Inc. v. Klansky, No. 3885/09, 2011 WL 3631955, at *4 (N.Y. Sup. Ct. Aug. 18, 2011).

31. *Id.* at *5.

cross-claims for unjust enrichment and unilateral and mutual mistake, on the same grounds.[32]

32. *Id.*