



June 13, 2013

VIA FEDERAL EXPRESS

Andrew W. Klein, Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: *Norse Energy Corp. USA v. Town of Dryden and Town of Dryden Town Board*, Appellate Division, Third Department, Docket No. 515227; Supreme Court, Tompkins County, Index No. 2011-0902

Dear Mr. Klein:

On behalf of Respondents Town of Dryden and Town of Dryden Town Board, we respectfully submit this letter in opposition to the Motion for Leave to Appeal to the New York State Court of Appeals (“Motion”), filed on May 31, 2013, by appellant Norse Energy Corp. USA (“Norse”) in the above-captioned matter. *See* Court of Appeals Rule 500.22(d). Norse asks this Court to review the Appellate Division’s unanimous decision that the Oil, Gas and Solution Mining Law (“OGSML”) grants the State power over “regulation of the oil, gas and solution mining industries,” N.Y. Envtl. Conserv. L. § 23-0303, but does not preempt, expressly or by implication, the constitutionally protected and legislatively delegated local power to regulate land use. *See Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714, 719-24 (3d Dep’t 2013), *aff’g Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 459-66, 940

N.Y.S.2d 458, 466-70 (Sup. Ct. Tompkins County 2012). For the reasons stated concisely below, the Motion should be denied for failure to meet this Court's standard for permissive appeal. *See id.* 500.22(b)(4).

There is no need for the Court of Appeals to reach out at this early point to review the Appellate Division decision. Every Justice of the New York courts to consider the preemption issues presented here has ruled that the OGSML does not preempt local land use laws. Norse admits that seven Justices have done so, *see* Motion at 15, but in fact there are eight: the seven identified by Norse and Justice Lebus of Supreme Court, Broome County. *See Jeffrey v. Ryan*, 37 Misc. 3d 1204(A), 961 N.Y.S.2d 358 (Table), 2012 WL 4513348, *5 (Sup. Ct. Broome County 2012). The consensus among the Justices reflects the clarity of the law, which needs no further interpretation by this Court.

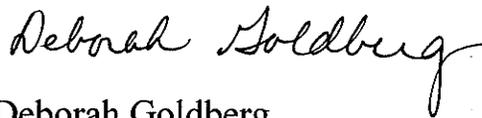
Given that consensus, the decision of the Appellate Division, Third Department, plainly does not conflict with that of any other department of the Appellate Division; nor does the Third Department ruling conflict with prior decisions of this Court. To the contrary, as the well reasoned Appellate Division opinion establishes, *see Norse Energy Corp. USA*, 964 N.Y.S.2d at 719-23, both the trial and intermediate appellate court decisions in this case are consistent with longstanding precedents of this Court, which establish the fundamental difference between regulation of industrial mining activities and regulation of land use. *See*

Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 681-82 (1996) (“Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law [“MLRL”]; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities”) (emphasis in original); *Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126, 131 (1987) (“The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose”). Norse asks this Court to disregard those well-settled precedents precisely because of their persuasive power, but Norse has identified no prior decisions of this Court with which the decision below conflicts.¹ For that reason, and because there is no conflict among the departments of the Appellate Division, the Motion should be denied.

¹ Norse is anxious to distinguish the *Frew Run* line of precedents, *see* Motion at 15-22, even though they are not essential to the Appellate Division decision. In analyzing the supersession clause of the OGSML, the Appellate Division applied standard principles of statutory construction and concluded that the Legislature did not intend to preempt local land use regulation. *See Norse Energy Corp. USA*, 964 N.Y.S.2d at 719-23 (examining the plain language, legislative history, and purpose and policy of the OGSML). Although *Frew Run* “further supports” that conclusion, *id.* at 721, and the Appellate Division was “mindful of the interpretation accorded to MLRL’s similar supersession provision,” *id.* at 722-23, the decision below rejecting Norse’s express preemption claim is well supported even *without* reference to this Court’s precedents under the MLRL. *With* reference to those precedents, the Appellate Division’s conclusion is inescapable.

Norse nevertheless seeks this Court's immediate attention because of the alleged novelty and public importance of the contested issues. Should the Court find that argument persuasive, notwithstanding the firmly established and widely recognized law on which the decision below rests, the Court should address the interest in speedy, statewide resolution of the dispute by deciding the appeal on the Appellate Division record and briefs and summarily affirming the decision below for the reasons stated by the Third Department.²

Respectfully submitted,



Deborah Goldberg
*Counsel for Respondents Town of Dryden
and Town of Dryden Town Board*

cc: Thomas S. West, Esq.
Cindy Monaco, Esq.

² The Third Department opinion in this case also provided the basis for the Appellate Division's unanimous decision in *Cooperstown Holstein Corp. v. Town of Middlefield*, which was decided the same day. 106 A.D.3d 1170, 964 N.Y.S.2d 431 (3d Dep't 2013), *aff'g* 35 Misc. 2d 767, 943 N.Y.S.2d 722 (Sup. Ct. Otsego County 2012). Appellant Cooperstown Holstein Corp. also seeks leave to appeal to this Court. Should the Court decide to hear either appeal, we respectfully request that it grant the motions in both cases.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

ABRAHAM ALLISON, being duly sworn, deposes and says:

1. I am over eighteen years of age and am not a party to the above action.
2. On the 13th day of June, 2013, I served upon Norse Energy Corp. USA (“Norse”) the foregoing letter in opposition to Norse’s Motion for Leave to Appeal to the New York State Court of Appeals, by (i) delivering two true and correct hard copies thereof, properly addressed to the following counsel of record, to the U.S. Postal Service, First Class postage prepaid, and (ii) sending a true and correct electronic copy to counsel at the e-mail addresses indicated below:

Thomas S. West, Esq.
 Cindy M. Monaco, Esq.
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 cmonaco@westfirmlaw.com
Counsel for Norse



Abraham Allison

Sworn to before me this
 13th day of June, 2013.


 Notary Public

DEBORAH GOLDBERG
 Notary Public, State of New York
 No. 31-4951179
 Qualified in New York County
 Commission Expires May 22, 2015