

In the Supreme Court of Ohio

STATE OF OHIO ex rel. JACK)
MORRISON, JR., Law Director,)
City of Munroe Falls, Ohio, et al.,)
) Case No. 13-0465
Plaintiffs-Appellants,)
) On Appeal from the Ninth Appellate
v.) District Court of Appeals, Summit County,
) Ohio (Case No. 25953)
BECK ENERGY CORPORATION, et al.,)
))
Defendants-Appellees.)

BRIEF OF AMICUS CURIAE OHIO CONTRACTORS ASSOCIATION IN SUPPORT OF APPELLEES BECK ENERGY CORPORATION AND JOSEPH WILLINGHAM

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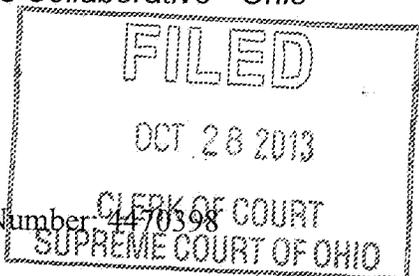
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STATEMENT OF INTEREST OF AMICUS CURIAE OHIO CONTRACTORS ASSOCIATION

The Ohio Contractors Association ("OCA") is a statewide business and trade association representing approximately 500 companies engaged in the heavy highway and utilities industries. These entities include general contractors and subcontractors, as well as those that supply contractors, who engage in construction projects for the oil and gas industry throughout the state. The OCA provides a variety of services to its members -- among them the support of fair and consistent regulation of the construction processes.

These proceedings involve the exclusive statewide regulation by the Ohio Department of Natural Resources of the oil and gas industry which provides opportunity for work by the employees of the contractor and subcontractor members of the OCA. The concern of the OCA stems from the statewide implications that may follow from the trial court's issuance of an injunction enjoining drilling operations until the drilling company, which had already secured the necessary permit from the Ohio Department of Natural Resources, complies with the local municipality's ordinances pertaining to drilling.

Imposing layers of regulation upon an already highly regulated industry is the gravamen of this case. The interest of the OCA is that "home rule" ordinances do not interfere and disrupt the statewide uniform regulation of oil and gas drilling operations. Local legislation of oil and gas drilling conflicts with the general laws of the state, which has the "sole and exclusive" authority to regulate drilling, and hinders the construction industry. The effort of contractors to conform to regulations put in place by local entities that would otherwise be industry standard through statewide application results in increased project costs as they relate to overhead, time delays, and administrative actions to meet the overlapping local regulations.

STATEMENT OF FACTS

Amicus Curiae Ohio Contractors Association adopts and incorporates by reference the Statement of Facts set forth in the merits brief of Appellees.

ARGUMENT

In recent years, Ohio has seen a significant rise in oil and gas production, in large part due to emerging technology that facilitates economic production from deep reserves in the Utica Shale. Rather than allow potentially unregulated drilling or inconsistent and inefficient patchwork regulation, the State of Ohio has enacted a comprehensive uniform system of statewide regulation of oil and gas drilling. Ohio has benefitted from its enactment of a centralized regulatory system that is best equipped to handle the safety challenges caused by the boom in oil and gas production while maximizing the associated economic opportunities.

While much has been said about the economic benefits of statewide regulation, equally important are the safety and welfare concerns that statewide regulation addresses. Local communities do not generally have the technical expertise, resources, or access to studies or other tools necessary to effectively regulate such a complex industry and all of the corresponding environmental issues. The statewide system established under the Ohio Department of Natural Resources has such resources, and the statewide regulatory system was only established after all of these many resources were accessed to insure the best science and technology was applied to safety and welfare issues as well.

The Ninth District Court of Appeals has affirmed the constitutional ability of the state of Ohio to maintain its centralized regulatory system and avoid the negative effects of sporadic regulation. Allowing Ohio's centralized regulatory system to remain in place serves the best interest of the state of Ohio and its citizens because it is the superior means of achieving the

state's goals of maximizing economic production of its mineral resources and preserving the health and safety of its citizens.

I. **The Development of Ohio's Natural Resources with New Technology Is an Unprecedented Opportunity for the State of Ohio.**

In areas of Ohio that have not seen substantial economic development in decades, oil and gas producers are now investing heavily in order to develop the resources of the Utica Shale. Over \$4 billion have gone directly to landowners for leases, and more than \$3 billion have been invested in the production and transport sectors.¹ In 2011, 4.8 million barrels of oil and 78 billion cubic feet of gas were produced in Ohio.² Between 2011 and March of 2013, 255 of the 548 Utica wells for which permits had been issued were drilled and completed, and 74 began producing natural gas.³ Additional exploration is underway throughout the Utica Shale region of Ohio, with 28 drilling rigs in operation this Spring.⁴ Accordingly, Ohio's oil and gas production is poised to expand exponentially in the coming years. This economic activity had already translated into an estimated 39,000 jobs in 2012, and a recent study by the U.S. Chamber of Commerce's Institute for 21st Century Energy found that increasing oil and gas activity could be responsible for as many as 266,000 new jobs in Ohio by the year 2035.⁵

¹ See Schneider, *New Value for Land in Rural Ohio*, N.Y. Times (June 5, 2012) A11, available at <http://www.nytimes.com/2012/06/05/us/mineral-leases-give-boost-to-rural-ohio.html> (accessed Oct. 23, 2013).

² See Schneider, *Ohio's Resurgent Natural Gas Industry Spends Millions to Set Up Shop*, N.Y. Times (Mar. 12, 2013) B4, available at <http://www.nytimes.com/2013/03/13/realestate/commercial/natural-gas-industry-drives-construction-surge-in-ohio.html?pagewanted=all> (accessed Oct. 23, 2013).

³ *Id.*

⁴ *Id.*

⁵ See Junkins, *Report: Shale Boom Brings Ohio 39K Jobs, W.Va. 11.8K*, The Intelligencer/Wheeling News-Register (Jan. 2, 2013) available at <http://www.theintelligencer.net/page/content.detail/id/579325/Report-Shale-Boom-Brings-Ohio-39K-Jobs-W-Va-11-8K.html?nav=510> (accessed Oct. 23, 2013).

II. Ohio's Centralized Regulatory System Encourages Investment in the Production of These Natural Resources, While Safeguarding the Interests of Its Citizens.

A. The State of Ohio encourages coordinated and safe economic development.

An investment in an oil and gas well, especially a horizontal well designed to drill into the Utica Shale, however, is an expensive proposition. A completed Utica Shale well costs between \$6 and \$10 million.⁶ The people of the State of Ohio have encouraged these significant investments in Ohio's economy through legislative creation of an efficient and predictable system for regulating oil and gas drilling activities.

B. Regulatory authority is given to ODNR to achieve a uniform system.

With the enactment of Revised Code Sections 1509.01-.99, the state of Ohio established a comprehensive, uniform system for regulating oil and gas drilling. The statute grants the Ohio Department of Natural Resources (ODNR) "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 and activities regulated under sections 6111.02 to 6111.028 of the Revised Code." R.C. 1509.02.

The state chose this uniform system because it is the most practical, effective method for achieving the state's dual goals of developing its natural resources while protecting the health and safety of its citizens. As the Court recognized in *Newbury Township Board of Township Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992):

[i]t is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat

⁶ *Id.*

of harm to the health, safety and welfare of the citizens of Ohio. To further this policy and to ensure some degree of uniformity throughout the state, local regulation of some aspects of oil and gas well exploration and development is preempted by the statutory plan embodied in R.C. Chapter 1509.

C. Fragmented local patchwork regulation threatens development.

Unlike other states dealing with increasing natural resource production in recent years, Ohio anticipated the problems that fragmented, local regulation could cause. The ODNR-based regulatory system set a uniform regulatory framework, developing one set of standards to govern all oil and gas development activity throughout the state. Importantly, however, contrary to what appellants in this case claim, the regulatory system established in R.C. 1509 does not preempt all local rules. The Court of Appeals acknowledged as much, leaving intact the Munroe Falls road ordinances. In fact, the centralized system ensures uniform protection of local interests throughout the state.

In the 88 counties of the state of Ohio, there are more than 930 cities and villages and 1310 townships.⁷ If each locality were permitted to independently regulate oil and gas production, the result would be a fragmented system, in which oil and gas producers would be subject to different and potentially conflicting permitting processes and regulations each time they cross a political subdivision boundary. This patchwork approach would be inefficient and unpredictable, and could bring oil and gas development to a standstill.

Subdivision-based regulation also is impractical. Oil and gas deposits generally bear no relation to municipal corporation boundaries. Given the mandated minimum size of drilling units, especially for horizontal wells, that must be pooled into units of no less than forty acres, it

⁷ See Ohio Secretary of State, *The Ohio Municipal, Township and School Board Roster: 2008-2009*, iii, available at <http://www.sos.state.oh.us/sos/upload/publications/election/muniroster2008-2009/MuniRoster2008-2009.pdf> (accessed Oct. 23, 2013).

is likely that a single drilling unit often will overlap with more than one municipality, and it is especially likely that a single operator will encounter many municipalities in its operations.⁸

The piecemeal process that would result from the cross-currents of local regulations regarding oil and gas drilling activities would lead to unnecessary delays and inefficiencies, driving up the cost of production and impacting local economies, with no corresponding benefit to the local communities. For example, if each local government had constitutional authority to enforce a different permitting process, it is quite conceivable that an operator could face the expiration of one permit before the granting of another. These impediments and other inefficiencies could have the practical effect of preventing drilling that the people of the State of Ohio have determined to be in the best interest of the state and, accordingly, authorized through the ODNR permit process.

III. Uniform Regulation Also Addresses the Needs of Local Communities and Protects Their Resources.

Contrary to the assertions of Appellants, the ODNR Division of Oil and Gas Resources Management engages in significant, far-reaching regulatory oversight of oil and gas activity, including efforts to protect the interests that Appellants claim to be purely local in nature. The ODNR regulations include extensive protections designed to safeguard local interests, but in a uniform, efficient manner that allows for predictability in standards and enforcement. Under the current version of R.C. Chapter 1509, and limits placed by the Ohio General Assembly on the state's preemptive authority, the Division of Oil and Gas Resources Management now

⁸ A horizontal well may extend thousands of feet from the well head. See Nolon & Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 Case W.Res.L.Rev. 995, 996 (2013), citing Levelle, *Forcing Gas Out of Rock with Water*, Nat'l Geographic Daily News (Oct. 17, 2010), available at <http://news.nationalgeographic.com/news/2010/10/101022-energy-marcellus-shale-gas-science-technology-water> (accessed Oct. 23, 2013).

exclusively oversees and enforces regulations including the following: (1) minimum distance regulations on the location of wells and other facilities in relation to existing property lines and dwellings (R.C. 1509.021); (2) terms and conditions that ensure safe operations of wells, protect public and private water supplies (including rules for well construction to protect fresh water aquifers), require fencing and screening, and mitigate noise (R.C. 1509.03); (3) enforcement mechanisms to ensure compliance and allow the state to suspend any well operations that threaten public safety or damage natural resources (R.C. 1509.04); and (4) insurance and surety requirements (R.C. 1509.07). The Division also has additional enforcement tools that enable it to plug wells that cause or threaten harm to health, safety or the environment and to establish mandatory standards for well construction and operation. R.C. 1509.12, .23. Inspectors from the Division performed more than 13,138 site inspections in 2010 alone.⁹

Moreover, contrary to the implications of appellants, the Oil and Gas Technical Advisory Council is carefully constructed to obtain balanced, objective input from a spectrum of interests in the regulation of oil and gas drilling activity. The Council has eight members appointed by the Governor to a three-year term. Pursuant to R.C. 1509.38, three members must represent independent oil and gas producers operating and producing primarily in Ohio; three members must represent oil or gas producers having substantial production in Ohio and at least one other state; one member must represent the public; and one member must represent persons having landowner royalty interests in oil and gas production. The result is a comprehensive process that incorporates the diverse perspectives of the State of Ohio's citizens on oil and gas drilling activity.

⁹ ODNR Division of Oil and Gas Resources, *About Us: Division of Oil & Gas Program History*, <http://oilandgas.ohiodnr.gov/contacts-about-us/about-us> (accessed Oct. 23, 2013).

IV. Revised Code Chapter 1509 Was Designed to Resolve Conflicts among Local Regulations and Create an Efficient System of Oil and Gas Production.

Revised Code Chapter 1509 was originally enacted in 1965 to address the problem in Ohio of conflicting local regulation of natural resource production and, in some cases, localized opposition to development.¹⁰ The statute was designed to balance the state's interests in preventing the waste of natural resources with protecting the health and safety of its citizens.

R.C. Chapter 1509 created what is now the Division of Oil and Gas Resources Management within ODNR, with a Chief whose duty was to enforce the provisions of the Act and to make such additional rules as necessary for its administration and implementation.¹¹ The Act also called for the establishment of two other specialized regulatory agencies, the Technical Advisory Council and the Oil and Gas Board of Review.¹² The Technical Advisory Council consults with and advises the Chief in the performance of her or his duties. R.C. 1509.38. The Oil and Gas Board of Review, now known as the Oil and Gas Commission, hears appeals from orders of the Chief. R.C. 1509.36.

R.C. Chapter 1509, as initially enacted, reserved regulatory power over oil and gas drilling to local governments, but only to the extent that such local regulations "are not less restrictive than the provisions of this chapter or the rules adopted thereunder by the division of oil and gas, and provided further that no county, or township may adopt or enforce any ordinances, resolutions, rules, or requirements relative to the minimum acreage requirements for drilling units, and minimum distances from which a new well may be drilled or an existing well deepened, plugged back, or reopened to a source of supply different from the existing pool from

¹⁰ See Russell & Krummen, *Ohio's Experience With Preempting Local Regulation of Oil and Gas Development*, 19 Tex. Wesleyan L.Rev. 37, 41 (2012).

¹¹ Ohio Rev. Code Ann. 1509.02-.03 (1965) (current version at Ohio Rev. Code Ann. 1509.02-.03 (West 2011)). Effective October 1, 2011, R.C. 1509 created the Division of Oil and Gas Resources Management within the Ohio Department of Natural Resources.

¹² Meyers & Williams, *Petroleum Conservation in Ohio*, 26 Ohio St.L.J. 591, 593 (1965).

boundaries of tracts, drilling units, other wells, and from streets, roads, highways, railroad tracks, or the restoration or plugging of an oil and gas well." R.C. 1509.39 (repealed 2004). It further provided that permits, licenses, fees, bonds and other securities for activities associated with oil and gas drilling were within the sole purview of ODNR and could not be required by local governments. *Id.*

A. This Court recognized the need for uniform regulatory authority.

This Court affirmed the state's legitimate interest in maintaining centralized regulatory authority in ODNR in *Newbury*, expressly upholding the preemptive power of R.C. Chapter 1509 over local government attempts to impose separate regulatory schemes over oil and gas activity. 62 Ohio St.3d at 394, 583 N.E.2d 302. There, this Court affirmed the state of Ohio's interest in furthering the "public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety, and welfare of the citizens of Ohio." 62 Ohio St. 3d at 389. This Court further made clear that preemption of some local regulations related to oil and gas activity was essential: "to further this policy and to ensure some degree of uniformity through the state, local regulation of some aspects of oil and gas well exploration and development is preempted by the statutory plan embodied in R.C. Chapter 1509." *Id.*

B. R.C. 1509 was broadened further to express the state's clear interest in acting as the sole and exclusive regulatory authority.

Since the Court's ruling in *Newbury*, the General Assembly has broadened R.C. Chapter 1509 to further centralize regulatory authority over oil and gas activity in the state government.¹³ In particular, in 2004, the Ohio General Assembly passed Am.Sub.H.B. No. 278 ("H.B. 278"),

¹³ See Russell & Krummen, 19 Tex. Wesleyan L.Rev. at 43.

declaring that sole and exclusive authority to regulate the permitting, locating and spacing of oil and gas wells resided in the state, effectively eliminating duplicate local regulations that had disrupted or unnecessarily delayed oil and gas developments.¹⁴ As Appellants note in their brief, the General Assembly passed H.B. 278 because the existing "patchwork of local oil and gas drilling ordinances was difficult for drillers to navigate, and was enforced by local governments which typically did not have geologists on staff and generally lacked expertise in well construction." Brief of Appellants at 10.

C. Munroe Falls concedes the preemption issue, but claims that its duplicative zoning still controls over state rules.

While acknowledging the express preemption provision in the current version of R.C. Chapter 1509, the City nevertheless argues that zoning provisions are somehow exempted. But there is no support for this contention in the language of the statute, and the adverse practical effects of the argument are clear from the facts of this case. Even though the City of Munroe Falls characterized its local regulations as zoning regulations, the regulations nevertheless had the practical effect of nullifying the valid drilling permit that the State of Ohio had issued to Beck Energy Corporation. There is no practical basis for distinction between a local ordinance that purports to be a zoning ordinance regulating the placement of a well, and an ordinance that does not purport to be a zoning ordinance but has the same effect.

Local regulations that conflict with R.C. Chapter 1509 were expressly preempted by the Ohio General Assembly, without respect to whether they are labeled zoning ordinances. The Court of Appeals was correct when it found that Munroe Falls' zoning and drilling ordinances purport to prohibit the drilling operations on Mr. Willingham's land that the State has specifically

¹⁴ *Id.*

permitted and therefore "undeniably conflict" with R.C. 1509.02 and "are preempted by state law and cannot be enforced against Beck Energy's drilling activity." Opinion, Feb. 6, 2013, at ¶ 74. For this reason, this Court in *Newbury* explicitly included zoning regulations within the preemptive scope of Chapter 1509. *Newbury*, 62 Ohio St.3d 387, paragraph one of the syllabus.

Accordingly, the current language of R.C. Chapter 1509 makes clear that the central regulatory system set up by the state through ODNR is the result of a deliberative decision to serve the people's interest:

The 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 state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.

R.C. 1509.02.

V. Technological Advances in Drilling Have Increased the Need for a Central, Knowledgeable State Regulatory Agency.

Further, the oil and gas industry has become an intensively technical sector of the Ohio economy. Over time, the officials of the state's Division of Oil and Gas Resources Management, many of whom are geologists, have developed along with the advances in the industry, acquiring both resources and the scientific and technical expertise necessary to exercise their regulatory power knowledgeably.¹⁵ All members of the Division's Technical Advisory Council, with the exception of the members representing the public and landowners with royalty interests, must have a minimum of five years of practical or technical experience in oil or gas drilling and production. R.C. 1509.38.

¹⁵ Russell & Krummen, 19 Tex. Wesleyan L.Rev. at 44.

A. Local communities often lack the expertise that is necessary for effective regulation.

In contrast, in many of the counties and municipalities in which oil and gas drilling is now taking place or contemplated, local officials may have had little or no prior exposure to oil and gas operations and few opportunities for training. Without the technical expertise and understanding possessed by the specialized state officials, local officials are not as categorically well-positioned to balance the state's dual goals of encouraging development of resources and protecting the public welfare.

B. The Division of Oil and Gas brings expertise, resources and equipment to properly determine the need for regulation.

Additionally, the centralized nature of the Division of Oil and Gas Resources Management allows the regulatory body with responsibility to make decisions about oil and gas drilling in Ohio to pool resources and conduct in-depth research—independent of either industry or environmental groups—to come to informed conclusions about the safety of drilling practices. For example, ODNR is currently planning to spend \$257,287 to buy seismic monitoring equipment to provide the State with information about the potential underground effects of injection wells that are used for disposal of drilling byproducts.¹⁶ No local government in Ohio would be likely to have access to resources to fund such research. In fact, ODNR has had an Underground Injection Control Program for thirty years to closely regulate the disposal of produced water.¹⁷ Decisions regarding the handling of matters such as disposal of byproducts should be made by the regulatory body with the resources and experience to investigate and

¹⁶ See Tribune Chronicle/TribToday.com, Editorial, *ODNR Is Right To Collect Data* (Oct. 13, 2013), available at <http://tribtoday.com/page/content.detail/id/594278/ODNR-is-right-to-collect-data.html?nav=5007> (accessed Oct. 23, 2013).

¹⁷ See ODNR, Shale Development in Ohio, *Deep Injection Well Disposal*, available at <http://ohiodnr.com/Portals/11/pdf/injection-well-fact-sheet.pdf> (accessed Oct. 23, 2013).

evaluate such data. There is a compelling practical necessity for a central regulatory process for such activities that cannot be abrogated and will apply uniformly throughout the state.

VI. A System of Conflicting Local Regulations Would Lead to Subversion of the State's Legitimate Interest in Safe Production of Oil And Gas.

Of course, if all of the county and local governments throughout Ohio were permitted to enact their own oil and gas regulatory programs, conflicts between the state's regulation and local regulation would be inevitable, as occurred in the case at bar. The result of such conflicts would be lengthy delays and inefficiencies during their resolution, or outright suppression of the oil and gas production and the economic development that would accompany it. Munroe Falls is a prime example, having used its local zoning ordinance and drilling ordinances to impose burdensome and time-consuming requirements that had the practical effect of preventing all drilling, in spite of the state's express interest in encouraging rational development of oil and gas resources. See *City of Munroe Falls v. Ohio State Dept. of Nat. Resources*, Franklin C.P. No. 09-CVF-09-14080, 6 (Dec. 30, 2009) ("[i]t is clear from reviewing the arguments of [Munroe Falls] that **no drilling** is the only reasonable drilling that it would accept"), *aff'd*, 10th Dist. Franklin No. 10AP-66, 2010-Ohio-4439, *appeal not accepted*, 2011-Ohio-376, 127 Ohio St.3d 1535, 940 N.E.2d 987.

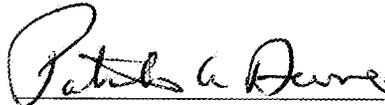
To subject producers who have complied with the state permitting procedure to potentially conflicting local permit procedures would render the state and the producers vulnerable to a multiplicity of vetoes – which is exactly the outcome that the Ohio General Assembly sought to avoid when it established the Division of Oil and Gas and when it enacted the current version of Chapter 1509, expressly preempting such local regulation.

VII. Conclusion

Ohio has enacted a comprehensive regulatory system that centralizes regulatory authority over oil and gas drilling in a specialized agency with the resources and expertise to make informed decisions when balancing the state's dual interests in developing its natural resources while protecting the welfare of its citizens. This approach has encouraged responsible oil and gas development in Ohio, to the benefit of its citizens. This Court should affirm the Ninth District's decision to maintain the centralized system of regulation under R.C. 1509 and avoid its unconstitutional frustration by a patchwork system of conflicting local regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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