

CONFIDENTIAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. JACK) CASE NO. 2013-0465
 MORRISON, JR., LAW DIRECTOR, CITY)
 OF MUNROE FALLS, OHIO, et al.)
)
 Plaintiffs-Appellants) APPEAL FROM THE SUMMIT
) COUNTY COURT OF APPEALS,
) NINTH APPELLATE DISTRICT,
 vs.) CASE NO. 25953
)
 BECK ENERGY CORPORATION,)
 et al.)
)
 Defendants-Appellees)

FILED
 NOV 18 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

APPELLANT, CITY OF MUNROE FALLS' REPLY BRIEF

Counsel for Plaintiff/Appellant:
 Jack Morrison, Jr. #0014939
 Thomas M. Saxer #0055962
 Thomas R. Houlihan #0070067*
 AMER CUNNINGHAM CO., L.P.A.
 159 S. Main Street, Suite 1100
 Akron, Ohio 44308-1322
 (PH) 330-762-2411
 (FAX) 330-762-9918
Houlihan@Amer-law.com
 * denotes counsel of record
 Representing Appellant Munroe Falls

DAVID C. MORRISON* (0018281)
 *Counsel of Record
 MORRISON & BINDLEY
 987 Professional Parkway
 Heath, OH 43056
 (740) 323-4888

Counsel for Defendant/Appellee:
 John R. Keller #0019957
 VORYS SATER SEYMOUR & PEAS
 525 E. Gay Street, P.O. Box 1008
 Columbus, Ohio 43216

Representing Appellee Beck Energy Corporation
 KATHLEEN M. TRAFFORD (0021753)
 PORTER WRIGHT MORRIS &
 ARTHUR LLP
 41 S. High Street Suites 2800-3200
 Columbus, Ohio 43215
 (614) 227-1915
 (614) 227-2100 (facsimile)
Counsel for Amici Curiae American Petroleum Institute, the Ohio Chamber of Commerce, the Canton Regional Chamber of Commerce, and the Youngstown/Warren Regional Chamber

RECEIVED
 NOV 18 2013
 CLERK OF COURT

Curiae City of Heath

BENJAMIN NORRIS (PHV 4473-2013)
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8000
*Counsel for Amicus Curiae American
Petroleum Institute*

LINDA WOGGON (0059082)
THE OHIO CHAMBER OF COMMERCE
230 E. Town St.
P.O. Box 15159
Columbus, OH 43215
(614) 228-4201
*Counsel for Amicus Curiae Ohio Chamber of
Commerce*

TIMOTHY R. FADEL* (0077531)
WULGER FADEL & BEYER
*Counsel of Record
The Brownell Building
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
(216) 781-0621 (facsimile)
tfadel@sfbllaw.com
*Counsel for Amicus International Union of
Operating Engineers, Local 18*

MELEAH GEERTSMA* (PHV 4257-2013)
*Counsel of Record
KATHERINE SINDING (PHV 4256-2013)
PETER PRECARIO (0027080)
NATURAL RESOURCES
DEFENSE COUNCIL
20 N. Wacker Dr., Ste. 1600
Chicago, IL 60606-2600
(312) 663-9900
mgeertsma@nrdc.org
Counsel for Municipal Amici Curiae

ROGER R. MARTELLA, JR.*
(PHV 4318-2013)
JOSEPH R. GUERRA (PHV 4317-2013)
SAMUEL B. BOXERMAN (PHV 4316-2013)
LOWELL SCHILLER (PHV 4315-2013)
*Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (facsimile)
nnartella@sidley.com
*Counsel for Amici Curiae American Petroleum
Institute, the Ohio Chamber of Commerce, the
Canton Regional Chamber of Commerce, and
the Youngstown/Warren Regional Chamber*

TRENT A. DOUGHERTY* (0079817)
*Counsel of Record
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue Suite 201
Columbus, OH 43212
(614) 487-7506
(614) 487-7510 (facsimile)
tdougherty@theoec.org
Counsel for Ohio Local Businesses

BARBARA A. TAVAGLIONE* (0063617)
*Counsel of Record
9191 Paulding Street NW
Massillon, OH 44646
(330) 854-0052
bartavaglione@gmail.com
*Counsel for Amicus Curiae People's Oil and
Gas Collaborative -- Ohio*

RICHARD C. SAHLI* (00007360)
*Counsel of Record
981 Pinewood Lane
Columbus, OH 43230
(614) 428-6068
rsahli@columbus.rr.com
Counsel for Amici Curiae Health Professionals

PATRICK A. DEVINE (0022919)
ICE MILLER, LLP
250 West Street
Columbus, Ohio 43215
(614) 462-2238
(614) 222-3427 (facsimile)
Patrick.devine@icemiller.com
Counsel for Amicus Curiae Ohio Contractors Association

BRIAN P. BARGER (0018908)
AMANDA L. COYLE (0089482)
BRADY COYLE & SCHMIDT, LTD.
4052 N. Holland-Sylvania Road
Toledo, Ohio 43623-2591
(419) 885-3000
(419) 885-1120 (facsimile)
bpbarger@bcslawyers.com
alcoyle@bcslawyers.com
Counsel for Amicus Curiae Ohio Aggregates Association, Ohio Ready Mixed Concrete Association and Flexible Pavements of Ohio

WILLIAM J. TAYLOR (0055217)
SCOTT D. EICKELBERGER (0015709)
KINCAID TAYLOR & GEYER
50 North Fourth Street
P.O. Box 1030
Zanesville, Ohio 43701-1030
(740) 454-2591
(740) 454-6975 (facsimile)
wjt@kincaidlaw.com
scott@kincaidlaw.com
Counsel for Amicus Curiae Ohio Oil and Gas Association

DEBORAH GOLDBERG (PHV 4255-2013)
EARTHJUSTICE
156 William Street, Suite 800
New York, NY 10038
(212) 845-7376
(212) 918-1556 (facsimile)
dgoldberg@earthjustice.org
Counsel for Amici Curiae Health Professionals

ERIC E. MURPHY* (0083284)
State Solicitor
*Counsel of Record
PETER K. GLENN-APPLEGATE (0088708)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087 (facsimile)
eric.murphy@ohioattorneygeneral.gov
Counsel for Amicus Curiae State of Ohio

BRIAN E. CHORPENNING (0000714)
CHOPPENNING GOOD &
PANDORA CO., LPA
605 South Front Street
Columbus, Ohio 43215-5694
(614) 469-1301
(614) 469-0122 (facsimile)
bec@cgmmlpa.com
Counsel for Amici Curiae Artex Oil Company, Eclipse Resources I, LP, EnerVest Operating, LLC, Hess Ohio Developments, LLC, Hilcorp Energy company, Paloma Resources, LLC, Sierra Resources, LLC and American Energy Partners, LP

I. TABLE OF CONTENTS

	<u>Page</u>
I. Table of Contents.....	i
II. Table of Authorities.....	
III. Reorientation	1
IV. Regarding Proposition of Law One	2
A. There is no conflict between R.C. Chapter 1509, Ohio’s Oil and Gas Statute, and Munroe Falls Ordinance 1163.02, which requires any person seeking to put land to use to obtain a zoning certificate to assure that the use is compatible with Munroe Falls’ zoning districts.	2
1. No conflict exists between a state statute and a local ordinance unless (1) the state statute and local ordinance regulate the same subject matter or (2) the state statute reaches beyond its subject matter to expressly preempt ordinances of a different subject matter.	2
2. A state-issued permit does not give one the right to ignore any and all local ordinances which may impact the business to be conducted under the permit.	5
3. Endorsing the expansions of law advocated by Beck and its Amici would lead to absurd and unworkable results.	6
4. There is no showing that allowing a municipality to restrict drilling to specific zones would have any adverse impact on resource extraction.....	8
5. Regulations empowering the ODNR to require fences around drill sites is not a substitute for zoning.....	9
6. The ODNR’s power to determine “location and spacing” of wells only operates outside of zoning districts with incompatible uses.	10
7. The only properly considered legislative history supports Munroe Falls’ view.	11
8. The 2004 repeal of R.C. §1509.39 further supports Munroe Falls’ view.	13

B.	Even if a full preemption analysis is performed upon Munroe Falls' zoning ordinance, it survives because 2004 Sub. H.B. 278 is not a general law.	14
V.	Regarding Proposition of Law Two.....	18
VI.	Conclusion.....	20
VII.	Certificate of Service.	21

II. TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Am. Fin. Servs. Ass'n v. Cleveland</i> 112 Ohio St.3d 170, 858 N.E.2d 776.....	3
<i>Canton v. State</i> 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963.....	3,4,5,7,14,15,17
<i>Clermont Envtl. Reclamation Co. v. Wiederhold</i> 2 Ohio St.3d 44, 442 N.E.2d 1278 (1982).....	17
<i>Cleveland Trust Co. v. Eaton</i> 21 Ohio St.2d 129, 256 N.E.2d 198, (1970).....	11
<i>DIRECTV, Inc. v. Levin</i> 181 Ohio App.3d 92, 2009-Ohio-636, 907 N.E.2d 1242.....	12
<i>Fondessy Enters., Inc. v. City of Oregon</i> 23 Ohio St.3d 213, 492 N.E.2d 797 (1986).....	2,3,4,7,18,19
<i>Gerijo v. City of Fairfield</i> 70 Ohio St.3d 223, 638 N.E.2d 533 (1994).....	9
<i>Ignazio v. Clear Channel Broad., Inc.</i> 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18.....	15
<i>Lang v. Dir., Ohio Dep't of Job & Family Servs.</i> 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636.....	15
<i>Meeks v. Papadopoulos</i> 62 Ohio St.2d 187, 404 N.E.2d 159, (1980).....	12
<i>Midwest Retailer Associated, Ltd. v. City of Toledo</i> 563 F. Supp.2d 796, (N.D. Ohio 2008).....	6
<i>N. Ohio Patrolmen's Benev. Assn v. City of Parma</i> 61 Ohio St.2d 375, 402 N.E.2d 519 (1980).....	20
<i>Ohioans for Concealed Carry, Inc. v. Clyde</i> 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967.....	3
<i>Ridgley, Inc. v. Wadsworth Bd. of Zoning Appeals</i> 28 Ohio St.3d 357, 503 N.E.2d 1036 (1986).....	5

Tex-1, Inc. v. Dayton Bd. of Zoning Appeals
143 Ohio App.3d 636, 758 N.E.2d 768, (2d Dist.2001).....6

United States v. Missouri Pacific R. Co.
278 U.S. 269, 49 S.Ct. 133, 73 L.Ed. 322 (1929).....11

Vill. of Euclid, Ohio v. Ambler Realty Co.
272 U.S. 365, 388, 47 S. Ct. 114 (1926)9

Vill. of Struthers v. Sokol
108 Ohio St. 263, 140 N.E. 519 (1923).....3

Westlake v. Mascot Petroleum Co.
61 Ohio St.3d 161, 573 N.E.2d 1068 (1991).....5,6,7

Statutes, Ordinances and Rules

Section 3, Article XVIII of the Ohio Constitution.....3

R.C. §519.2114

R.C. §1506.02.....17

R.C. §1506.07.....17

R.C. §1509.03.....9,10

R.C. §1509.06.....10

R.C. §1509.07.....19

R.C. §1509.23.....10,11,12

R.C. §1509.39 (2003 ver.).....13

R.C. §1533.40.....6

R.C. §3734.05.....4,17,18,19

R.C. §3772.264

R.C. §3781.184.....15

R.C. §4171.02.....6

R.C. §4303.26 (1987 ver.).....5

R.C. §5103.0318	4
R.C. §5104.054	4
R.C. §5123.19.....	4
Ohio Adm.Code 3773-1-05	6-7
Munroe Falls Ordinance 1163.02	1,2,4,9,19
Munroe Falls Ordinance 1329.03	19
Munroe Falls Ordinance 1329.04	19
Munroe Falls Ordinance 1329.05	19
Munroe Falls Ordinance 1329.06	19

Scholarly works

Russell & Krummen, <i>Ohio's Experience With Preempting Local Regulation of Oil and Gas Development</i> , 19 Tex. Wesleyan L. Rev. 37, (2012).....	12
--	----

12290.54 supreme court reply tables.doc

III. Reorientation.

Beck Energy and its cadre of Oil and Gas industry associates have made plain their desire to expand Ohio law such to such a degree that anyone holding a drilling permit would be exempt from any local regulations which even tangentially touch upon their industry. Under their conception of the law, the holder of drilling permit holds a magic wand, capable of waving away any inconvenient local ordinances, zoning or otherwise, which any other business owner in the State must comply with. This effort to make Ohio a driller's utopia, unchecked by the local controls common to leading oil and gas producing states such as Texas, California, Oklahoma, and Colorado, has raised a number of side issues which have muddled the matters for decision by the Court. As a result, Munroe Falls finds it necessary to briefly refocus the discussion to the matters actually before the Court for decision.

Munroe Falls' first proposition of law is that R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws. Specifically at issue in this proposition of law is Munroe Falls Ordinance 1163.02, which requires anyone putting land to a use in Munroe Falls to obtain a zoning certificate prior to commencing site preparations, so that the City may assure that the use is compatible with the zoning district. Munroe Falls asserts that there is no conflict between R.C. Chapter 1509 and its zoning ordinance, because the state statute regulates oil and gas operations, and its ordinance regulates local land use planning. Because the state statute and the local ordinance regulate two different subject matters, and there is no language in the state statute expressly preempting zoning ordinances, a full preemption analysis is never triggered. And even if a full preemption analysis were triggered, then R.C. Chapter 1509 fails a full preemption analysis because it is not a general law. It operates only upon cities in the Eastern half of the State.

Separate from the first proposition of law, Munroe Falls' second proposition of law is that a city may maintain its own oil and gas ordinances despite Chapter 1509, when those ordinances are not primarily directed at controlling the operations of drillers, but rather collecting information and preparing for any mishaps. Specifically at issue are four statutes in Chapter 1329 of the Munroe Falls Codified Ordinances, which, among other things, requires notice to adjoining landowners, the payment of a fee, and the posting of a bond to support emergency response. Munroe Falls asserts that although these ordinances address the same subject matter as R.C. Chapter 1509, and thus a preemption analysis is triggered, the ordinances survive the preemption analysis as being of the type found to be permissible in *Fondessy Enters., Inc. v. City of Oregon*, 23 Ohio St.3d 213, 492 N.E.2d 797 (1986).

IV. Regarding Proposition of Law One:

- A. There is no conflict between R.C. Chapter 1509, Ohio's Oil and Gas Statute, and Munroe Falls Ordinance 1163.02, which requires any person seeking to put land to use to obtain a zoning certificate to assure that the use is compatible with Munroe Falls' zoning districts.**
 - 1. No conflict exists between a state statute and a local ordinance unless (1) the state statute and local ordinance regulate the same subject matter or (2) the state statute reaches beyond its subject matter to expressly preempt ordinances of a different subject matter.**

Beck Energy and its Amici advocate for two expansions of law which, taken together, would afford a state permit holder carte blanche to ignore all local ordinances which affect, in any way, the ability of the permit holder to utilize the permit. But this proposed expansion of law would result in manifest absurdity which cannot be endorsed by this Court.

The first expansion asserted by Beck Energy is the adoption of a rule that a conflict exists between a state law and local ordinance "whenever the ordinance prohibits that which the statute permits." (Appellee's Brief at p. 18). That is a gross oversimplification of prior law. Beck

Energy cites three cases in support of this aphorism, but the cases all involve the State and the municipality legislating **on the same subject matter**. In *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, the State permitted concealed-carry firearms, the City of Clyde legislated on the same topic and prohibited them. In *Vill. of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923), both the State and the Village of Struthers prohibited the sale of alcoholic beverages, but with differing penalties. In *Am. Fin. Servs. Ass'n v. Cleveland*, 112 Ohio St.3d 170, 858 N.E.2d 776, the State prohibited certain predatory loans, and the City of Cleveland passed an ordinance classifying loans which were permissible under the State scheme as predatory. In each example, the State and the municipality were legislating on the same subject matter.

But when the State and the local law regulate different subject matter, no conflict exists, and no preemption analysis occurs. As stated by this Court, “[t]he authority conferred by Section 3, Article XVIII of the Ohio Constitution upon municipalities to adopt and enforce police regulations is limited only by general laws in conflict therewith **upon the same subject matter**.” *Fondessy Enters., Inc. v. City of Oregon*, 23 Ohio St.3d 213, syllabus 1, 492 N.E.2d 797 (1986) (emphasis added). If the State and local laws are on a different subject matter – such as oil and gas drilling and land use planning – then no conflict exists unless the State statute reaches outside of the subject matter it is regulating, and expressly purports to preempt a specifically identified type of local ordinance. See *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963 (preemption analysis performed because state mobile home statute expressly sought to supersede municipal zoning). But in the absence of (1) state and local regulation of the same subject matter, or (2) an expressed intent to preempt local ordinances of a different subject matter, there is no conflict and a preemption analysis is never reached.

In its Brief, Munroe Falls pointed out that R.C. Chapter 1509 does not expressly preempt local zoning authority, as several other State statutes do, such as R.C. §3734.05(D)(3) (hazardous waste facilities), R.C. §519.211 (public utilities), R.C. §3772.26 (casinos), R.C. §5103.0318 (foster homes), R.C. §5104.054 (day cares), and R.C. §5123.19(P) (group homes). These statutes reach out beyond the subject matter of their regulation to purport to preempt ordinances of a different subject matter – zoning – and thus invoke a preemption analysis of the type set forth in *Canton v. State, supra*.

Under the conception of Beck Energy and its Amici, the express zoning preemption language of these statutes is “irrelevant” because a conflict is automatically found regardless of the subject matter regulated by the state and local law. (Beck Energy’s Brief at p.13) The American Petroleum Institute provides more detail, arguing “[t]here is no reason to require an ‘express’ statement specifically addressing zoning to find preemption of local zoning laws because the Ohio Constitution prohibits municipalities from enacting zoning laws that are inconsistent with any general law.” (American Petroleum Amicus Brief at p. 22). The flaw in this argument is that it presupposes that a “conflict” between the State and local law exists. As detailed above, because the State oil and gas law and the local zoning ordinance covers two different topics – the technical details of oil and gas drilling and the appropriate land uses within Munroe Falls – there is no conflict unless one is created by express zoning preemption language. Compare *Fondessy, supra* (no conflict unless same subject matter is regulated) with *Canton v. State, supra* (conflict invoked where state statute expressly sought to preempt local zoning).

Because R.C. Chapter 1509 regulates the technical operation of oil and gas drilling, and Munroe Falls Ordinance 1163.02 regulates land use planning, the state and local laws are on a different subject matter, and no preemption analysis is triggered. And R.C. Chapter 1509 does

not contain an express preemption of local zoning power, such that is present in so many other statutes and which was the focal point of *Canton v. State*, so no preemption analysis is triggered in that manner. As such, both R.C. Chapter 1509 and Munroe Falls Ordinance 1163.02 operate independently, and both must be complied with by anyone seeking to drill for oil and gas in Munroe Falls, Ohio.

2. A state-issued permit does not give one the right to ignore any and all local ordinances which may impact the business to be conducted under the permit.

The second expansion of law is advocated primarily by Amicus the State of Ohio, which cites to *Westlake v. Mascot Petroleum Co.*, 61 Ohio St.3d 161, 573 N.E.2d 1068 (1991) for the proposition that local zoning cannot impair the “privileges” that go along with a state permit. (State of Ohio Brief, pp. 24-25). The State of Ohio relates a quotation that suggests that municipalities are powerless to place restrictions on the holders of state liquor permits.

But the quotation that the State of Ohio selected only tells part of the story. The full story is that in 1986, this Court decided *Ridgley, Inc. v. Wadsworth Bd. of Zoning Appeals*, 28 Ohio St.3d 357, 503 N.E.2d 1036 (1986), which held that under R.C. Chapter 4303 as it existed at the time, municipalities were free to enact zoning ordinances that prohibited liquor sales, even if the property owner held a state liquor permit. In response, as detailed by the *Westlake* Court, the legislature amended R.C. Chapter 4303 to specifically identify and limit municipal zoning powers. *Westlake*, 61 Ohio St.3d at 166–67. Among other statutory changes mentioning zoning, R.C. §4303.26, as amended, specifically removed the zoning classification of the permit premises as a basis for objection to the issuance of a permit. *Id.* Only after the legislature specifically identified and limited zoning in the text of the statute was preemption invoked, as determined in *Westlake*. See also *Canton v. State*, *supra*.

Efforts to expand *Westlake* into a broad talisman against all local regulation have not fared well. In *Tex-1, Inc. v. Dayton Bd. of Zoning Appeals*, 143 Ohio App.3d 636, 643–44, 758 N.E.2d 768, 774 (2d Dist.2001), a microbrewery held both an A-1 liquor permit, which authorized the manufacture of beer, and an A-1-A permit, which authorized the sale of beer manufactured by an A-1 permit holder. Local zoning allowed for the sale of beer, but not the manufacture. The microbrewery cited *Westlake* and argued that it was denied the privileges of its A-1-A permit if it were not allowed by local zoning to manufacture beer for sale. The Tenth District rejected this argument, detailing the absurdity that would result from an extension of *Westlake* - “to conclude otherwise would lead to the remarkable proposition that local zoning authorities have no power to regulate the appropriate location, within their jurisdictions, of distilleries or breweries providing for significant shares of the global market for beer and liquor.” *Id.* at 643. See also *Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp.2d 796, 811 (N.D. Ohio 2008) (rejecting contention that Toledo’s licensing of convenience stores limited the privileges of a state liquor permit).

Thus, the fact that the State of Ohio issues a permit does not, by itself, give the holder a right to ignore any local ordinances that limits its business.

3. Endorsing the expansions of law advocated by Beck and its Amici would lead to absurd and unworkable results.

The Ohio Department of Natural Resources issues a bait dealer permit. R.C. §1533.40. Under current law, a bait dealer’s permit does not give its holder the right open a bait shop in violation of local zoning ordinances. The Department of Commerce issues a roller rink permit. R.C. §4171.02. Under current law, the holder of a roller rink permit may not open a roller rink in a residential zone. The Ohio Athletic Commission issues a wrestling permit. Ohio Adm.Code

3773-1-05. Under current law, this permit does not give the holder the right to hold a wrestling exhibition at a time or place prohibited by local ordinances.

The two expansions of law advocated by Beck and its Amici would fundamentally change the interrelationship of State and local law. Beck and its Amici suggest that *Fondessy* be ignored, so that a “conflict” exists regardless of the subject matter of state and local regulation. They also suggest that *Westlake* be expanded so that local authorities are restrained from regulating any topic tangentially related to the “privileges” afforded by a state permit.

Under this conception of the law, a bait dealer could claim the right to stockpile hellgrammites in violation of local animal control ordinances in furtherance of the “privileges” allowed by his or her permit. A roller rink operator could claim to be exempt from local noise ordinances due to his or her state permit, because loud music is necessary to maintain an economically viable roller rink. A wrestling permit holder could defend an assault ordinance violation by arguing that the permit allows him involuntarily wrestle his neighbors if he can find nobody else to wrestle. The absurdity is manifest.

A correct application of the law is that a state permit does not give its holder free reign to ignore local ordinances under an unchecked preemption theory. A preemption analysis is triggered when the state and local regulation concern “the same subject matter” pursuant to *Fondessy*, syllabus I. A preemption analysis is also triggered when the state statute, although regulating a different subject matter, expressly purports to limit municipal zoning power, as in *Canton v. State* and *Westlake*. That is the law and should remain the law, and it compels the outcome of this case. Because R.C. Chapter 1509 neither regulates the same subject matter as Munroe Falls’ zoning ordinance, nor expressly displaces local zoning, the State statute and the local ordinance operate independently of one another.

4. There is no showing that allowing a municipality to restrict drilling to specific zones would have any adverse impact on resource extraction.

Beck Energy's Amici defend the concept that oil and gas wells should be placed wherever the driller dictates by arguing that it would be impossible to extract oil and gas without relief from zoning burdens, because oil and gas does not conform to zoning boundaries and must be extracted where it is found. (American Petroleum Institute Brief, p. 15). But this argument is seriously undercut by the technological development in horizontal well drilling trumpeted by other Amici. As noted by the Ohio Contractor's Association, "[a] horizontal well may extend thousands of feet from the well head." (Ohio Contractor's Association Brief, p. 6, fn. 8). In fact, this horizontal drilling can reach out as much a mile laterally from the point where surface operations take place.¹ The City of Munroe Falls is only approximately two square miles in size. Thus one centrally-located horizontal well could potentially reach all oil and gas below the City.

So the argument that oil and gas must be extracted where it is found, and that wellheads must be directly above the point where the oil and gas is located, regardless of zoning boundaries, is a red herring. This case is not about the ability of the oil and gas industry to extract the resource – the resource may be extracted with a wellhead a mile away on the surface. It is instead an argument about maximizing profit. Continuing the above example, imagine one oil and gas well in the geographic center of Munroe Falls, in a residential zone, with mile-long horizontal branches reaching out in every direction to capture all of the oil and gas under Munroe Falls. If forced by local zoning to place wellheads in appropriate industrial zones somewhere other than the geographic center, then one wellhead may not reach all of the oil and gas under the

¹ Blackmon, *Horizontal Drilling: A Technological Marvel Ignored*
<http://www.forbes.com/sites/davidblackmon/2013/01/28/horizontal-drilling-a-technological-marvel-ignored/> (last visited Nov. 12, 2013).

city. More than one wellhead may have to be built to reach all of the oil and gas under Munroe Falls, at greater cost to the driller.

Oil and gas drillers want to maximize their investment, and that interest is understandable. But zoning regularly balances the desire of one to put land to maximum economic use against the discomfort that that use would cause to neighbors. Zoning may permissibly restrict the highest and best use of the land. *Gerijo v. City of Fairfield*, 70 Ohio St.3d 223, 228, 638 N.E.2d 533 (1994). As such, the traditional zoning classifications of Munroe Falls should be respected. Landowners wishing to put their land to a use must comply with Ordinance 1163.02 and obtain a zoning certificate prior to commencing site preparations, so that the City may assure that the use is compatible with the zoning district. Oil and gas drillers who obtain a leasehold interest in land to conduct oil and gas drilling should be treated no differently.

5. Regulations empowering the ODNR to require fences around drill sites is not a substitute for zoning.

In its Brief, Munroe Falls noted that the Ohio Legislature did not empower the Chief of the Mineral Resources Management Division of the Ohio Department of Natural Resources to promulgate rules considering the existing uses of land, and appropriate future uses, in order to protect the expectations and property values of neighbors, and to maintain neighborhood aesthetics. Beck Energy and its Amici counter by pointing to the site-safety, parking and fencing regulations compelled by R.C. §1509.03. (Beck Energy's Brief at pp. 16-17, State of Ohio Amicus Brief at p. 23). These requirements, the State of Ohio suggests, "grants the Ohio Department of Natural Resources, not local authorities, the authority to determine whether the location of a particular well makes it the metaphorical 'pig in the parlor instead of the barnyard.'" *citing Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114 (1926). (State of Ohio Amicus Brief at p. 23).

But the ODNR does not have the power to prevent a pig in the parlor. Under the terms of R.C. §1509.06(F), the Chief of the Mineral Resources Management Division must issue a requested drilling permit unless he or she finds a “substantial risk” that the drilling operation will “present an imminent danger to public health or safety or damage to the environment” that cannot be addressed by placing conditions on the drilling permit. The Chief is not committed with the discretion to deny a requested wellhead location based upon the uses of the surrounding land, nuisance to neighbors, aesthetic concerns or any other criteria other than the “imminent danger” standard. Not only does the Chief not have the power to deny a permit based upon the proposed location of the well, the ODNR does not even collect the information necessary to make a judgment on whether well fits within any particular zoning classification – it does not collect any zoning information as part of the permit application process. R.C. §1509.06(A).

And while the Chief can promulgate regulations to address issues such as noise, parking, site restoration and fencing under the authority of R.C. §1509.03, those are not traditional zoning restrictions. Those provisions are in the nature of site-safety regulations, rather than regulations which consider whether a proposed use is appropriate in the first place. Dressing up an industrial site placed in an inappropriate zone is not the same as prohibiting the incongruous use in the first place. So the proper zoological analogy is not a pig but rather a buffalo – the reader should not be buffaloes into believing that the ODNR is performing zoning functions. It is not.

6. The ODNR’s power to determine “location and spacing” of wells only operates outside of zoning districts with incompatible uses.

The American Petroleum Institute argues that R.C. Chapter 1509 “authorizes ODNR to consider existing zoning districts and to promulgate rules regarding where wells may be located in relation to them.” *citing* R.C. §1509.23(A)(2). (American Petroleum Institute Brief at p. 19). But that is not what the statute says. What it says is that the ODNR is empowered create rules

“including specification of . . . [m]inimum distances that wells and other excavations, structures, and equipment shall be located **from** . . . zoning districts...” R.C. §1509.23(A)(2) (emphasis added). The use of the word “from” in the statute indicates that drilling operations should be conducted outside and away from locally-created zoning districts containing incompatible uses. The word “from” is “used as a function word to indicate physical separation or an act or condition of removal, abstention, exclusion, release, subtraction, or differentiation.”² Here, the ODNR is authorized to specify distances of drilling operations “from,” not within, zoning districts, indicating that drilling operations should be physically separate from zoning districts. Within zoning districts, cities’ classifications of appropriate uses control.

This is a clear indication that R.C. Chapter 1509 was not intended to supplant local zoning, but rather instructs the ODNR to respect local zoning. The ODNR, however, has not lived up to that mandate. There is not a word about zoning in Ohio Administrative Code Chapter 1501:9, where the ODNR’s oil and gas well rules are located. And the ODNR has approved countless permits within municipalities without consideration of the municipalities’ zoning codes, comprehensive plans, or other issues relevant to local zoning.

7. The only properly considered legislative history supports Munroe Falls’ view.

In reviewing a statute, “the words employed are to be taken as the final expression of the meaning intended” unless there is an absurd result. *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 138, 256 N.E.2d 198, 204 (1970), quoting *United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322 (1929). Here, because the legislature did not choose to expressly preempt local zoning, it is not preempted, and that is as far as the inquiry

² “From.” Merriam-Webster.com. Merriam-Webster, n.d. Web. 12 Nov. 2013. <<http://www.merriam-webster.com/dictionary/from>>

need go. This is bolstered by R.C. §1509.23(A)(2), which clearly contemplates that zoning districts would continue to exist despite the 2004 revision to R.C. Chapter 1509, and states that the ODNR should issue rules separating drilling operations “from” these zoning districts.

In an effort to change the clear import of the statute, Beck Energy’s Amici have cited to a collection of sources which they claim captures the legislative intent of the 2004 revisions to the statute. These sources include law review articles authored by Beck Energy’s lawyers³ and news reports about Ohio Legislative hearings where Beck Energy’s lawyers testified.⁴ Since a prerequisite to consideration of any legislative history source is that it be “objective,” the majority of these sources can be disregarded. *Meeks v. Papadopoulos*, 62 Ohio St.2d 187, 191, 404 N.E.2d 159, 162 (1980). Further, to the extent that Amici cite to the individual statements of legislators, those are not properly considered as expressions of legislative intent. *DIRECTV, Inc. v. Levin*, 181 Ohio App.3d 92, 2009-Ohio-636, 907 N.E.2d 1242, ¶33.

The only item of legislative history submitted by Amici that may qualify for consideration is the Legislative Service Commission’s Bill Analysis for H.B. 278 as introduced, attached to the American Petroleum Institute’s Brief at A-34 and A-35. This item of legislative history entirely supports Munroe Falls’ view. The LSC expresses that the bill “repeals all statutory authority of local governments to regulate oil and gas exploration.” It does not say that

³ The Ohio Contractor’s Association cites Russell & Krummen, *Ohio’s Experience With Preempting Local Regulation of Oil and Gas Development*, 19 Tex. Wesleyan L. Rev. 37, (2012) on pages 8, 9, and 11 of its Brief, alleging that the purpose of the 2004 revisions to R.C. Chapter 1509 included “further centraliz(ing) regulatory authority over oil and gas activity in the state government” and addressing “localized opposition to development.” One of the authors of this article is Robert J. Krummen, who represented Beck Energy in this matter in the trial court and Ninth District.

⁴ A news report attached to the American Petroleum Institute’s Brief, p. A-38, describes the testimony of Beck Energy’s attorney, John K. Keller, in a legislative hearing. He testified that 2004 Sub. H.B. 278 would be constitutional, but curiously asserted that “local governments will not lose control from a legal or practical perspective with the passage of the bill.”

the bill revokes all municipal zoning authority. Instead, it repeats twice that the ODNR will be charged with the power to specify “minimum distances that oil and gas wells must be located from . . . zoning districts,” and other land uses. (Emphasis added). As detailed above, this contemplates the ODNR controlling well spacing outside municipal zoning districts. Clearly, the legislature contemplated that local zoning power would continue following this amendment.

8. The 2004 repeal of R.C. §1509.39 further supports Munroe Falls’ view.

Prior to its repeal as part of the 2004 amendment of Chapter 1509, R.C. §1509.39 expressly defined the overlap between state-wide oil and gas drilling law and municipal power. Under R.C. §1509.39, municipalities were permitted to enact more restrictive “health and safety standards for the drilling and exploration for oil and gas.” The remainder of the statute referenced counties and townships only, not municipal corporations, and prohibited counties and townships from, among other things, putting into effect spacing requirements or charging additional licensing fees. But those provisions said nothing about municipal powers.

Some of Beck Energy’s Amici point to the repeal of R.C. §1509.39 by Sub. H.B 278 as evidence of the legislature’s intent to preempt municipal zoning. *E.g.* Ohio Contractor’s Association Brief at p. 8. It appears in so arguing, Amici confused the different statuses of home-rule municipalities versus counties and townships. Municipalities have direct, home-rule authority to zone under the Ohio constitution, while townships and counties have a different status, which is why they were treated differently under R.C. §1509.39. Thus, Amici’s effort to treat all political subdivisions the same under the language of that former provision is misplaced.

The 2004 changes to Chapter 1509 repealed R.C. §1509.39. That means, as to cities, the legislature only intended to revoke the permission it granted to municipal corporations to enact more restrictive health and safety standards for the drilling of wells. That is exactly what

Munroe Falls has been arguing all along – that Sub. H.B. 278 sought to preempt the patchwork of more-restrictive local ordinances on the technical details of well construction. Sub. H.B. 278 presented a state-wide scheme of well construction standards that would be the same regardless of location. But the express language of Sub. H.B. 278 did not supplant local zoning – that is a different subject matter altogether and required express language in the statute to achieve that result. Because the bill did not expressly preempt municipal zoning, it survived the 2004 change.

B. Even if a full preemption analysis is performed upon Munroe Falls' zoning ordinance, it survives because 2004 Sub. H.B. 278 is not a general law.

It is interesting to note that while Beck Energy and its Amici repeatedly cite the *Canton v. State* test for preemption, they do not discuss the outcome of the case. As detailed above, the *Canton v. State* test is not reached in this matter because the state and local law do not regulate the same subject matter, and there is no express language preempting local zoning power found in the state law itself. But even if a full preemption analysis is performed in this matter, the 2004 changes to R.C. Chapter 1509 still fail to preempt Munroe Falls' zoning ordinance because 2004 Sub. H.B. 278 is not a general law under the *Canton v. State* preemption test.

In *Canton v. State, supra*, this court considered R.C. §3781.184, a statute concerning the regulation of manufactured homes. Unlike R.C. Chapter 1509, R.C. §3781.184 reached beyond its subject matter to purportedly preempt local zoning to permit manufactured homes in areas which local zoning prohibited them, except where private landowners incorporated restrictive covenants in deeds to prohibit the inclusion of manufactured homes within subdivisions.

Only general laws may preempt local ordinances. At paragraph 21 of the decision, this Court stated that general laws must “apply to all parts of the state alike and operate uniformly throughout the state... and prescribe a rule of conduct upon citizens generally.” *Id.* This Court found that the State’s prohibition against mobile home zoning was not a general law, because it

did not apply uniformly to all citizens due to the restrictive covenant exception. Due to the exception, the practical effect of the statute was to “apply only in older areas of the state, i.e., cities where residential areas no longer have effective deed restrictions or no longer have active homeowner associations.” *Id.* at ¶ 30. As such, it did not apply uniformly to all citizens, and was not a general law.

The result here is the same, because if Beck Energy and the State of Ohio are correct in their assertion that the 2004 changes to R.C. Chapter 1509 wiped out all local controls for oil and gas drilling, the change effectively only impacts the cities and citizens in the Eastern half of the State, which is more heavily developed and which sits atop the shale formations that have led to an explosion in “fracking.”⁵

Beck Energy and its Amici make three arguments against this position. First, they claim that the question of whether R.C. Chapter 1509 is a general law was waived because it was not pursued by Munroe Falls on appeal. (Beck Energy Brief at pp. 10-11). This is incorrect. Munroe Falls specifically challenged the status of R.C. Chapter 1509 as a general law at pages 17-20 of its brief in the Ninth District. Even if this challenge was not otherwise specific enough to preserve the issue, issues of statutory construction are matters of law that are determined de novo on appeal. *Lang v. Dir., Ohio Dep't of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶12. In performing de novo reviews of matters of law, this Court does not apply the waiver doctrine. *Ignazio v. Clear Channel Broad., Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, ¶19.

⁵ Erenpreiss, M.S., Wickstrom, L.H., Perry C.J., Riley, R.A., Martin, D.R., and others, 2011, *Areas of Utica and Marcellus potential in Ohio*: ODNR, Division of Geological Survey, available <http://www.ohiodnr.com/LinkClick.aspx?fileticket=c070Q7UtUyo%3d&tabid=23014>

Second, Beck Energy's Amici argue that oil and gas drilling truly does occur in the Western half of the State, arguing that the 2011 ODNR "wells completed" map referenced by Munroe Falls was "anomalous." (American Petroleum Institute Brief at p.29). The American Petroleum Institute points to and attaches the ODNR's "wells completed" map for 2005 and 2010 as evidence of this purported anomaly. But these maps completely support Munroe Falls' contention. Again, the Eastern side of the State is heavily drilled, and the Western side of the State is, by and large, unaffected. If one reviews all of the ODNR's Summary of Ohio Oil and Gas Activities documents from 2005-2011,⁶ one can see 20 counties⁷ where no wells were completed over this six year period. And the wells in the Western half of the State, pointed to by the American Petroleum Institute from the 2005 and 2010 "wells completed" maps, total 10 scattered wells over those two years, which is around half of the wells completed in a single typical year in Summit County. Thus the cities of Cincinnati and Columbus, and the citizens residing in those cities, are completely unaffected by the 2004 revisions to Chapter 1509, while the residents in the Eastern half of the state are significantly affected.

Third, Amicus the State of Ohio makes a straw man argument, alleging that Munroe Falls has proposed a "geographically disparate impact test" for uniformity that would invalidate state laws concerning, among other things, coastal management, railroads, highways and rivers. (State of Ohio Brief at p. 18-19). Beck Energy raises essentially the same argument on pages 12-

⁶ These studies are available here: <http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas05.pdf>;
<http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas06.pdf>;
<http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas07.pdf>;
<http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas08.pdf>;
<http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas09.pdf>;
<http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas10.pdf>;
<http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas11.pdf>.

⁷ Darke, Preble, Butler, Hamilton, Shelby, Miami, Montgomery, Warren, Clermont, Logan, Champaign, Clark, Clinton, Brown, Fayette, Highland, Adams, Ross, Scioto and Franklin.

13 of its Brief, with its extended discussion of *Clermont Envtl. Reclamation Co. v. Wiederhold*, 2 Ohio St.3d 44, 442 N.E.2d 1278 (1982). But Munroe Falls proposed no such geography-based test. Any concerns regarding geography are incidental to the effect of uniformity upon the State's citizens. Just as in *Canton v. State*, geography is an incidental step in the analysis of whether the state law applies uniformly to all citizens. In *Canton v. State*, the geographic consideration was directed to citizens living in older, already-developed areas versus areas being newly developed, and in this case, the consideration is those who live in municipalities where drilling takes place, and those who do not. This consideration is merely a step in the process in determining whether there is a uniform effect on citizens. And the primary example cited by the State in support of this argument – coastal management – is not a good one, in that R.C. §1506.02(C)(7) provides grants to support local zoning of coastal concerns and R.C. §1506.07(B)(1) requires any new construction to be made within the framework of local zoning. No lack of uniformity is indicated. So the State's straw man argument does not survive scrutiny.

And Beck Energy's discussion of *Clermont* to make the same point is unavailing for the same reason. The question is whether the law applies uniformly to people, not geography. Under the revisions to R.C. 1509, all persons who bought houses in residential zones in the Eastern half of the State are now subject to a law which could disrupt their investment-based expectations and unexpectedly devalue their property if an oil rig goes in next door. People in the Western half of the State do not suffer the effects of that law. In contrast, under R.C. §3734.05(D)(3), the statute at issue in *Clermont*, all citizens of the State are subject to a law which could disrupt their expectations if a hazardous waste facility is erected next door. The fact that the State's siting board may reject a particular proposed site based upon site conditions does not change the fact that the risk is shared equally by all of the citizens of Ohio.

V. Regarding Proposition of Law Two: a city may maintain its own oil and gas ordinances despite R.C. Chapter 1509, when those ordinances are not primarily directed at controlling the operations of drillers, but rather collecting information and preparing for any mishaps.

In addition to Munroe Falls' zoning ordinance, which does not regulate the same subject matter as R.C. Chapter 1509, Munroe Falls also has a chapter of ordinances related to Oil and Gas drilling, which were enacted prior to the 2004 change to R.C. Chapter 1509. Because these ordinances are directed at the same subject matter as R.C. Chapter 1509, these ordinances admittedly trigger a preemption review. But these ordinances survive a preemption review because of their similarity to ordinances found by this Court in *Fondessy* to survive preemption under a similar statute related to hazardous waste facilities.

In *Fondessy*, R.C. §3734.05(D)(3) set forth a statement that expressly preempted local zoning and also stated that no municipality could require any "other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility...." 23 Ohio St.3d at 217. The City of Oregon had an ordinance that required hazardous waste facilities to maintain certain records and submit those to the city, and demanded the payment of a fee to fund safety and environmental responses. This Court found that the ordinance was valid, because "nothing in the ordinance which requires [Fondessy] to have taller fences, or more guards or more monitoring wells." *Id.* Because the ordinance did not impact what the State was regulating – the operation of a hazardous waste facility – it did not conflict with the State statute.

Beck Energy rebuts this argument by pointing out the differences between the Munroe Falls oil and gas ordinances and the ordinances under consideration in *Fondessy*. (Beck Energy Brief at p. 23). But the similarities are more striking. Just as the City of Oregon statute requires the submission of records to the city to allow the city and its citizens to remain informed as to the operations of the hazardous waste facility, Munroe Falls requires notice to the public and a

public hearing to collect information regarding proposed oil well operations. Ordinance 1329.05. Just as the City of Oregon collected a fee to fund emergency response in the event of a mishap, so to does Munroe Falls. Ordinance 1329.04. The fact that Munroe Falls does not label this fee an “emergency response fee” as did the City of Oregon is immaterial. The City of Oregon did not have a bond requirement, but the purpose of Munroe Falls’ bond requirement is essentially the same as the fee collected by Oregon – to fund site remediation and restoration if necessary. Ordinance 1329.06. And the requirement to obtain a zoning certificate prior to site preparation found in Ordinance 1329.03 is essentially a duplicate of Munroe Falls’ zoning ordinance, 1163.02, about which the bulk of the briefing has been directed.

Despite statutory language in R.C. §3734.05(D)(3), which purported to eliminate any other “condition” for the operation of a hazardous waste facility, this Court found that Oregon’s ordinances survived as they did not materially affect the operations of the facility. *Fondessy*, 23 Ohio St.3d at 217. “[E]ven if a statute and an ordinance cover the same general subject matter, where an ordinance regulates an issue not addressed by the statute, there is no conflict.” *Traditions Tavern v. Columbus*, 171 Ohio App.3d 383, 2006-Ohio-6655, 870 N.E.2d 1197, ¶18, citing *D.A.B.E., Inc. v. City of Toledo*, 393 F.3d 692, 696-697, (6th Cir.2005); *Mr. Fireworks, Inc. v. Dayton*, 48 Ohio App.3d 161, 548 N.E.2d 984 (1988). Further, “the concept of what constitutes a conflict is strict.” *Id. citing E. Cleveland v. Scales*, 10 Ohio App.3d 25, 26, 460 N.E.2d 1126 (1983).

R.C. Chapter 1509 does not provide for a public hearing for citizens to become informed regarding proposed oil and gas well operations. It does not impose a fee upon drillers to help municipalities fund emergency response services. While R.C. §1509.07(B)(1) requires that a bond be issued in favor of the State to assure well completion, plugging and site restoration, that

bond does not reimburse a city for costs it may incur in responding to an abandoned well or unrestored site. So Munroe Falls' oil and gas drilling ordinances operate in areas left unaddressed by the State statute, and therefore are not in conflict.

VI. CONCLUSION

Preemption of local ordinances by state law is disfavored and the two sources of law should be harmonized if possible. *N. Ohio Patrolmen's Benev. Assn v. City of Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519, 521 (1980). The result in this matter should be a holding that municipalities declare what land within its borders is available for oil and gas drilling, and within those zones, the ODNR sets forth the uniform well construction and safety regulations that are predictable regardless of location. As a result, the February 6, 2013 Decision of the Ninth District Court of Appeals in this matter should be REVERSED insofar as it invalidated Munroe Falls' zoning ordinances and the types of ordinances authorized by *Fondessey, supra*. Insofar as the Ninth District's disposition of Beck Energy's challenge to Munroe Falls' road and traffic ordinances was not appealed to this Court, that portion of the Ninth District's decision should be unaffected.

Respectfully submitted,

AMER CUNNINGHAM CO., LPA

Jack Morrison, Jr. (#0014939)

Thomas R. Houlihan (#0070067)

Thomas M. Saxer (#0055962)

159 South Main Street, Suite 1100

Akron, OH 44308

Phone: (330) 762-2411

Fax: (330) 762-9918

Houlihan@amer-law.com

Attorneys for Plaintiff/Appellant

VII. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular, U.S. Mail this 15th day of November, 2013 upon:

JOHN K. KELLER* (0019957)

*Counsel of Record

VORYS, SATER, SEYMOR & PEASE LLP

525 E. Gay Street, P.O. Box 1008

Columbus, OH 43216

(614) 464-6400

jkkeller@vorys.com

Counsel for Defendants-Appellees Beck Energy Corporation and Joseph Willingham

BARBARA A. TAVAGLIONE* (0063617)

*Counsel of Record

9191 Paulding Street NW

Massillon, OH 44646

(330) 854-0052

bartavaglione@gmail.com

Counsel for Amicus Curiae People's Oil and Gas Collaborative - Ohio

BENJAMIN NORRIS (PHV 4473-2013)

AMERICAN PETROLEUM INSTITUTE

1220 L Street, N.W.

Washington, DC 20005

(202) 682-8000

Counsel for Amicus Curiae American Petroleum Institute

LINDA WOGGON (0059082)

THE OHIO CHAMBER OF COMMERCE

230 E. Town St.

P.O. Box 15159

Columbus, OH 43215

(614) 228-4201

Counsel for Amicus Curiae Ohio Chamber of Commerce

ROGER R. MARTELLA, JR.*

(PHV 4318-2013)

JOSEPH R. GUERRA (PHV 4317-2013)

SAMUEL B. BOXERMAN (PHV 4316-2013)

LOWELL SCHILLER (PHV 4315-2013)

*Counsel of Record

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

(202) 736-8711 (facsimile)

nnartella@sidley.com

Counsel for Amici Curiae American Petroleum Institute, the Ohio Chamber of Commerce, the Canton Regional Chamber of Commerce, and the Youngstown/Warren Regional Chamber

KATHLEEN M. TRAFFORD (0021753)

PORTER WRIGHT MORRIS &

ARTHUR LLP

41 s. High Street Suites 2800-3200

Columbus, Ohio 43215

(614) 227-1915

(614) 227-2100 (facsimile)

Counsel for Amici Curiae American Petroleum Institute, the Ohio Chamber of Commerce, the Canton Regional Chamber of Commerce, and the Youngstown/Warren Regional Chamber

TRENT A. DOUGHERTY* (0079817)

*Counsel of Record

OHIO ENVIRONMENTAL COUNCIL

1207 Grandview Avenue Suite 201

Columbus, OH 43212

(614) 487-7506

(614) 487-7510 (facsimile)

tdougherty@theoec.org

Counsel for Ohio Local Businesses

TIMOTHY R. FADEL* (0077531)
WULGER FADEL & BEYER
*Counsel of Record
The Brownell Building
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
(216) 781-0621 (facsimile)
tfadel@sfbllaw.com
*Counsel for Amicus International Union of
Operating Engineers, Local 18*

MELEAH GEERTSMA* (PHV 4257-2013)
*Counsel of Record
KATHERINE SINDING (PHV 4256-2013)
PETER PRECARIO (0027080)
NATURAL RESOURCES
DEFENSE COUNCIL
20 N. Wacker Dr., Ste. 1600
Chicago, IL 60606-2600
(312) 663-9900
mgeertsma@nrdc.org
Counsel for Municipal Amici Curiae

PATRICK A. DEVINE (0022919)
ICE MILLER, LLP
250 West Street
Columbus, Ohio 43215
(614) 462-2238
(614) 222-3427 (facsimile)
Patrick.devine@icemiller.com
*Counsel for Amicus Curiae Ohio Contractors
Association*

DAVID C. MORRISON* (0018281)
*Counsel of Record
MORRISON & BINDLEY
987 Professional Parkway
Heath, OH 43056
(740) 323-4888
Counsel for Amicus Curiae City of Heath

RICHARD C. SAHLI* (00007360)
*Counsel of Record
981 Pinewood Lane
Columbus, OH 43230
(614) 428-6068
rsahli@columbus.rr.com
Counsel for Amici Curiae Health Professionals

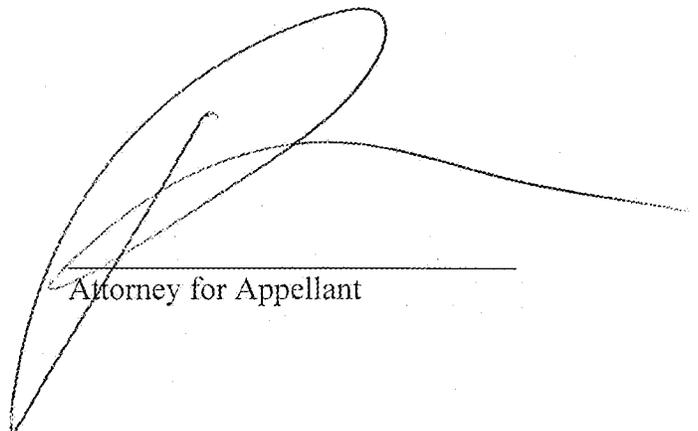
DEBORAH GOLDBERG (PHV 4255-2013)
EARTHJUSTICE
156 William Street, Suite 800
New York, NY 10038
(212) 845-7376
(212) 918-1556 (facsimile)
dgoldberg@earthjustice.org
Counsel for Amici Curiae Health Professionals

ERIC E. MURPHY* (0083284)
State Solicitor
*Counsel of Record
PETER K. GLENN-APPLEGATE (0088708)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087 (facsimile)
eric.murphy@ohioattorneygeneral.gov
Counsel for Amicus Curiae State of Ohio

BRIAN P. BARGER (0018908)
AMANDA L. COYLE (0089482)
BRADY COYLE & SCHMIDT, LTD.
4052 N. Holland-Sylvania Road
Toledo, Ohio 43623-2591
(419) 885-3000
(419) 885-1120 (facsimile)
bpbarger@bcslawyers.com
alcoyle@bcslawyers.com
*Counsel for Amicus Curiae Ohio Aggregates
Association, Ohio Ready Mixed Concrete
Association and Flexible Pavements of Ohio*

WILLIAM J. TAYLOR (0055217)
SCOTT D. EICKELBERGER (0015709)
KINCAID TAYLOR & GEYER
50 North Fourth Street
P.O. Box 1030
Zanesville, Ohio 43701-1030
(740) 454-2591
(740) 454-6975 (facsimile)
wjt@kincaidlaw.com
scott@kincaidlaw.com
*Counsel for Amicus Curiae Ohio Oil and Gas
Association*

BRIAN E. CHORPENNING (0000714)
CHOPRENNING GOOD &
PANDORA CO., LPA
605 South Front Street
Columbus, Ohio 43215-5694
(614) 469-1301
(614) 469-0122 (facsimile)
bec@cgmlpa.com
*Counsel for Amici Curiae Artex Oil Company,
Eclipse Resources I, LP, EnerVest Operating,
LLC, Hess Ohio Developments, LLC, Hilcorp
Energy company, Paloma Resources, LLC,
Sierra Resources, LLC and American Energy
Partners, LP*



Attorney for Appellant