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## Fracking in Illinois: Implementation of the Hydraulic Fracturing Regulatory Act and Local Government Regulatory Authority

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# Fracking in Illinois: Implementation of the Hydraulic Fracturing Regulatory Act and Local Government Regulatory Authority

JOHN ABENDROTH\*

*High-volume horizontal hydraulic fracturing (Fracking) is a relatively new means of drilling for oil and gas resources. With the knowledge that the oil and gas industry was purchasing land leases in southern Illinois and beginning to introduce fracking activities in the state, and that such activities would not be regulated under existing state law, Illinois legislators collaborated with industry and environmental interests to develop and pass the Hydraulic Fracturing Regulatory Act (HFRA or Act) in 2013. While this legislation has been considered by some to be among one of the most stringent and protective in the nation, many environmental interests and citizens opposed to fracking, nevertheless, remain extremely concerned over the potential public health, environmental and economic harms that result from these activities. In particular, although fracking may provide environmental and economic benefits to the state as a whole and to local communities, the environmental and economic harms will be felt primarily within local communities. The HFRA specifically provides municipalities with the right to regulate fracking by requiring a permit applicant to obtain approval from the municipality, but limits the rights of counties, where the majority of fracking activities will likely occur, to expressing concerns during the public comment period and requesting a public hearing on the permit application.*

*This Comment discusses the potential benefits and harms of fracking to the state and local communities, and then examines the existing rights of both municipalities and counties to exert control over the development of fracking within their local communities through the Home Rule provision of the State Constitution, the HFRA, and other existing laws. After considering the historically negative attitudes about county government, and how such attitudes may have impacted the rights of counties provided in the Act by those drafting the HFRA, the Comment argues that such attitudes are archaic and do not reflect current county government construction and pow-*

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\* Juris Doctor Candidate, May 2016, and Lead Articles Editor of the *Northern Illinois University Law Review*. I would like to thank my family for their patience, support, and encouragement during the process of writing this Comment. I would also like to thank the *NIU Law Review* Editorial Board and staff for their review and editorial critique of this Comment.

ers. The Comment then presents the current extent of local control available through existing zoning authority and, finally, offers several approaches that interested counties might pursue in an attempt to obtain regulatory authority similar to that already provided to local municipalities in Illinois.

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## I. INTRODUCTION

“This new law will unlock the potential for thousands of jobs in Southern Illinois and ensure that our environment is protected” and “is an example of what we can achieve when legislators . . . work together in good faith to get something done for the greater good of the people of Illinois.”<sup>1</sup> With those words, Governor Pat Quinn of Illinois signed into law the Hydraulic Fracturing Regulatory Act (“HFRA”) on June 17, 2013.<sup>2</sup> The law established the rules that oil and gas companies will need to follow in the state of Illinois to carry out high-volume horizontal hydraulic fracturing

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1. ILL. GOV'T NEWS NETWORK, *Governor Quinn Signs Nation's Strongest Regulations on Hydraulic Fracturing: Governor's Key Legislative Priority Will Set National Standards for Environmental Protection While Unlocking Potential for Thousands of Jobs in Southern Illinois* (June 17, 2013), <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=11278> [hereinafter *Governor Quinn Signs Nation's Strongest Regulations on Hydraulic Fracturing*].

2. *Id.*; Hydraulic Fracturing Regulatory Act, Pub. Act 98-22, 2013 Ill. Laws 321.

(“fracking”), a process using mixtures of water, chemicals, and sand or gravel to open cracks in the underground rock to release oil and gas back to the surface.<sup>3</sup> Administrative rules, developed by the Illinois Department of Natural Resources (“IDNR” or “Department”), were approved on November 6, 2014, and companies may now begin the process of applying for permits to begin these activities.<sup>4</sup> Prior to completion of the rule development, drillers had already leased thousands of acres in Southern Illinois in anticipation of the opportunity to begin drilling under the new law.<sup>5</sup> Industry groups warn that continued delays could cause energy companies to move on to other states where regulations are already in place,<sup>6</sup> and the first lawsuits have been filed against the state for failing to issue permits to implement fracking.<sup>7</sup> Meanwhile, concerned citizens and environmental interest groups are continuing to push for a statewide moratorium on fracking and for local governments to adopt ordinances banning fracking in their jurisdictions.<sup>8</sup>

Questions and concerns have been raised over the rights of local governments to regulate fracking activities under the HFRA;<sup>9</sup> however, as the

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3. HUFF POST, *Illinois Gas Drilling Rules: Governor Pat Quinn Signs New Fracking Regulations Into Law* (June 17, 2013, 4:00 PM), [http://www.huffingtonpost.com/2013/06/17/illinois-gas-drilling-rules-fracking\\_n\\_3455668.html](http://www.huffingtonpost.com/2013/06/17/illinois-gas-drilling-rules-fracking_n_3455668.html).

4. ILL. ADMIN. CODE tit. 62, § 245 (2014); Associated Press, *Illinois lawmakers approve fracking rules*, FUEL FIX (Nov. 7, 2014, 7:00 AM), <http://fuelfix.com/blog/2014/11/07/illinois-lawmakers-approve-fracking-rules/> [hereinafter *Illinois lawmakers approve fracking rules*].

5. Associated Press, *Southern Illinois braces for oil rush as “fracking” regulations considered by lawmakers*, FOX NEWS POLITICS (May 6, 2013), <http://www.foxnews.com/politics/2013/05/06/southern-illinois-braces-for-oil-rush-as-fracking-regulations-considered-by/#.VCWZs81N1a8.email>; see David R. Brown, *Fracking Comes to Illinois, Bringing Plenty of Legal Baggage With It*, CHI. DAILY L. BULL. (Apr. 26, 2013), <http://www.chicagolawbulletin.com/Archives/2013/04/26/David-Brown-forum-4-26-13.aspx> (stating land has been leased for shale gas development in at least 10 to 12 counties).

6. Julie Wernau, *Fracking approaches final hurdle in Illinois*, CHI. TRIB. (Aug. 29, 2014, 8:15 PM), <http://www.chicagotribune.com/business/breaking/chi-fracking-rules-illinois-20140829-story.html>.

7. Associated Press, *Fracking delay spurs suit in Wayne County*, ST. J.-REG. (Oct. 16, 2014, 1:45 PM), <http://www.sj-r.com/article/20141016/NEWS/141019605/10511/NEWS>.

8. Will Reynolds, *Illinois Green Groups Push to Stop Fracking With All Eyes on JCAR*, HUFF POST CHI. (Sept. 12, 2014, 2:24 PM), [http://www.huffingtonpost.com/will-reynolds/illinois-green-groups-pus\\_b\\_5805486.html](http://www.huffingtonpost.com/will-reynolds/illinois-green-groups-pus_b_5805486.html); Frack Free Illinois, *Support “Green Dozen” Bills in Illinois to Control/Ban Fracking Abuse*, ILL. COAL. FOR JUSTICE, PEACE & THE ENV’T (May 29, 2014), <http://icjpe.org/actions/Support-Green-Dozen-Bills-in-Illinois-to-Control-Ban-Fracking-Abuse>.

9. See MCDERMOTT WILL & EMORY, *Illinois Set to Regulate Shale Oil and Gas 1*, 7 (July 22, 2013), [http://www.mwe.com/files/Uploads/Documents/Pubs/Illinois\\_set\\_to\\_regulate\\_and\\_tax\\_Shal](http://www.mwe.com/files/Uploads/Documents/Pubs/Illinois_set_to_regulate_and_tax_Shal)

HFRA has not yet been implemented, there is no direct case law on point addressing the questions to be raised and discussed in this Comment. Part II of this Comment will describe the process associated with the development of the HFRA, and provide a background to the activity of fracking, including its purported benefits and harms. Part III will examine the rights of municipalities in Illinois, under the HFRA, the Home Rule doctrine, and the Illinois Municipal Code, to regulate or otherwise control fracking within their respective local jurisdictions. Part IV will then address the lack of similar rights for counties under the HFRA and the Illinois Counties Code, considering the question of why counties were not granted the authority to regulate fracking under the HFRA, and will examine the extent of existing powers that counties have to influence fracking activities in their communities. Finally, this Comment will address why counties should be granted the authority to regulate fracking on par with the rights of municipalities and will propose several means to achieve that objective.

## II. BACKGROUND

### A. WHAT IS GOING ON IN ILLINOIS?

The State of Illinois has been regulating oil and gas removal activities since 1939 and currently regulates general mining activities through the Oil and Gas Act.<sup>10</sup> The oil producing area of Illinois is part of the Illinois Basin, a geological province covering Southern Illinois, Western Kentucky, and Western Indiana.<sup>11</sup> Oil production is important to the economic survival of more rural areas of Illinois,<sup>12</sup> and it contributes significantly to the overall Illinois economy.<sup>13</sup> Illinois still has substantial oil resources, but improved technology and innovation will be required to obtain them because the easi-

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e\_oil\_and\_gas.pdf; D.W. Norris, *County might have fracking regulation authority*, S. ILLINOISAN (May 29, 2012, 7:00 AM), [http://thesouthern.com/news/local/county-might-have-fracking-regulation-authority/article\\_5373269e-a93d-11e1-ab46-001a4bcf887a.html](http://thesouthern.com/news/local/county-might-have-fracking-regulation-authority/article_5373269e-a93d-11e1-ab46-001a4bcf887a.html).

10. ILL. DEP'T OF NATURAL RES., *About Oil and Gas in Illinois*, <http://www.dnr.illinois.gov/oilandgas/pages/aboutoilandgasinillinois.aspx> (last visited Jan. 26, 2015) [hereinafter *About Oil and Gas in Illinois*]; 225 ILL. COMP. STAT. 725/1 to 28.1 (2012).

11. *About Oil and Gas in Illinois*, *supra* note 10.

12. Seth Whitehead, *Shale Development Would Revitalize Illinois' "25 Worst Counties"*, ENERGY IN DEPTH (Aug. 21, 2014, 3:03 PM), <http://energyindepth.org/illinois/shale-development-would-revitalize-illinois-25-worst-counties/>.

13. *Id.*; RCF ECON. & FIN. CONSULTING, INC. & REG'L ECONS. APPLICATIONS LAB., *The Oil & Gas Industry in the Illinois Economy* (Mar. 4, 2009), [http://www.rcfecon.com/site/files/883/89486/324966/492488/Executive\\_Summary\\_I\\_OGA\\_Final\\_Report\\_Mar\\_4\\_09.pdf](http://www.rcfecon.com/site/files/883/89486/324966/492488/Executive_Summary_I_OGA_Final_Report_Mar_4_09.pdf).

er-to-get oil has been removed.<sup>14</sup> Horizontal drilling, including hydraulic fracturing, is one such promising technology.<sup>15</sup>

The Oil and Gas Act, however, does not directly provide regulatory authority over high-volume horizontal hydraulic fracturing operations (“fracking”), a technology that has recently entered into Illinois.<sup>16</sup> How much fracking activity was already underway in the state prior to enactment of the HFRA is unknown, because the law to that point did not require public disclosure of the intent to conduct this activity, but there is no denying that fracking was beginning to occur in Illinois.<sup>17</sup> As a result of drillers beginning to lease property in Southern Illinois for the purpose of fracking, and the lack of regulatory authority over this activity, lawmakers drafted responsive legislation.<sup>18</sup>

Due to concerns about the potential environmental damages and dangers to public health associated with fracking, some members of the Illinois General Assembly attempted, unsuccessfully, to pass a statewide moratorium on fracking while more information about the potential environmental harm resulting from these activities was gathered.<sup>19</sup> Absent a moratorium, and recognizing that current statutes did not provide for regulatory authority over the activity, the Illinois General Assembly passed the HFRA in May 2013.<sup>20</sup>

The HFRA provides for comprehensive regulation of hydraulic fracturing activities within Illinois, allowing for responsible development of the

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14. Whitehead, *supra* note 12.

15. *Id.*

16. See FRACKWIRE.COM, *Illinois Fracking Regulations* (July 29, 2013), <http://frackwire.com/illinois-fracking-regulations/>; see also Associated Press, *Ill. high-volume “fracking” under way*, FUEL FIX (May 29, 2013, 6:44 AM), <http://fuelfix.com/blog/2013/05/29/ill-high-volume-fracking-under-way/> (noting one existing well and indicating that there was no way to know for sure if there were more since companies were not required to tell the Illinois DNR what method they were using to extract oil and gas).

17. Ann Alexander, *Wake-up call: new evidence that fracking is already happening in Illinois*, SWITCHBOARD NATURAL RES. DEF. COUNCIL STAFF BLOG (May 29, 2013), [http://switchboard.nrdc.org/blogs/aalexander/wake-up\\_call\\_new\\_evidence\\_that.html](http://switchboard.nrdc.org/blogs/aalexander/wake-up_call_new_evidence_that.html).

18. Associated Press, *Southern Illinois braces for oil rush as “fracking” regulations considered by lawmakers*, FOX NEWS POLITICS (May 6, 2013), <http://www.foxnews.com/politics/2013/05/06/southern-illinois-braces-for-oil-rush-as-fracking-regulations-considered-by/#.VCWZs81N1a8.email>; Katherine Bagley, *Fracking Bill Triggers Rift Among Illinois Green Groups*, INSIDE CLIMATE NEWS (June 17, 2013), <http://insideclimatenews.org/news/20130617/fracking-bill-triggers-rift-among-illinois-green-groups>. Prior to the HFRA anyone could file an application with the IDNR and receive a permit to frack. *Id.*

19. Transcript of Debates, S.B. 630, Illinois Senate, 98th Gen. Assemb., 1st Sess., May 31, 2013, at 228, <http://www.ilga.gov/senate/transcripts/srans98/09800062.pdf>; S.B. 630, 98th Gen. Assemb., 1st Sess. (Ill. 2013) (amended May 31, 2013).

20. Hydraulic Fracturing Regulatory Act, Pub. Act 98-22, 2013 Ill. Laws 321.

industry and offering certainty for investors,<sup>21</sup> while providing for strong environmental protections, process transparency, and public participation.<sup>22</sup> Local governments are provided several opportunities to be involved in the permitting process including: the right to comment and request a public hearing during the permit application process,<sup>23</sup> the right to sue for violations of the HFRA,<sup>24</sup> and the requirement for permit applicants to obtain consent from municipalities, villages, and towns within whose boundaries well drilling projects are proposed.<sup>25</sup> The IDNR is the agency authorized to administer the provisions of the HFRA,<sup>26</sup> and the Department has adopted the administrative rules to implement the HFRA, which were finalized November 15, 2014.<sup>27</sup> The HFRA and the provisions of the HFRA administrative rule supplement the provisions of the Oil and Gas Act and rules adopted under that Act. Where there is a conflict between them, the provisions of the HFRA and rules adopted to implement the HFRA prevail.<sup>28</sup> While environmental groups were active participants in the development of the HFRA, many activists were discouraged by the process for finalizing the administrative rules.<sup>29</sup>

Fracking has many supporters in Illinois, who see the individual and statewide economic benefit that will likely result from the activity, as well as many detractors, who are concerned about the potential public health and environmental harm that may result.<sup>30</sup> These opponents, including many

21. *Governor Quinn Signs Nation's Strongest Regulations on Hydraulic Fracturing*, *supra* note 1.

22. ENVTL. LAW & POLICY CTR., *Illinois Legislative Update: Wins and Draws in Spring 2013* (June 3, 2013), <http://elpc.org/tag/fracking/>.

23. 225 ILL. COMP. STAT. 732/1-50 (2012 & Supp. 2013).

24. 225 ILL. COMP. STAT. 732/1-102 (2012 & Supp. 2013).

25. 225 ILL. COMP. STAT. 732/1-35(c) (2012 & Supp. 2013).

26. 225 ILL. COMP. STAT. 732/1-15 (2012 & Supp. 2013).

27. Julie Wernau, *Fracking Rules Cemented for Illinois, Set for Release*, CHI. TRIB., Aug. 28, 2014, at 2-1; *Illinois lawmakers approve fracking rules*, *supra* note 4.

28. 225 ILL. COMP. STAT. 732/1-20 (2012 & Supp. 2013); DEP'T OF NATURAL RES., ILL. REG., *Illinois Department of Natural Resources Notice of Adopted Rules, Permit Application Requirements 245.210(b)* (Sept. 30, 2013), <http://www.dnr.illinois.gov/OilandGas/Documents/final%20Rules%2062-245.pdf>.

29. Jamey Dunn, *Will fracking restrictions hold up at enforcement time?*, ILL. ISSUES, <http://illinoisissues.uis.edu/archives/2013/12/fracking.html> (last visited Jan. 13, 2015); Katherine Bagley, *Finalized Behind Closed Doors, Illinois Fracking Regs Face Further Challenge*, INSIDE CLIMATE NEWS (Nov. 12, 2014), <http://insideclimatenews.org/news/20141112/finalized-behind-closed-doors-illinois-fracking-regs-face-further-challenge>; Jim Suhr, *Judge denies bid to halt Illinois fracking rules*, THE TELEGRAPH, <http://www.thetelegraph.com/news/news/50741779/Judge-denies-bid-to-halt-Illinois-fracking-rules> (last updated Nov. 23, 2014, 1:16 PM).

30. *See generally* Transcript of Debates, S.B. 1715, Illinois Senate, 98th Gen. Assemb., 1st Sess., May 31, 2013, at 207-30, <http://www.ilga.gov/senate/transcripts/strans98/09800062.pdf>.

individuals, environmental groups, and local communities, continue to pursue bans on fracking at the local level and statewide.<sup>31</sup> Several legislative bills to amend the HFRA and establish a moratorium on fracking were proposed in the previous 98th General Assembly: one would have created a moratorium on fracking in floodplains pending completion of a study on environmental impacts of oil and gas drilling in floodplains,<sup>32</sup> while a second would have established a more general moratorium on fracking in Illinois pending a determination that such activities can be carried out safely.<sup>33</sup> But, both of these bills died in committee when the session ended in January 2015.<sup>34</sup> In order to develop regulations that met the interests and concerns of both groups, members of the oil and gas industry collaborated with environmental interest groups and state legislators over many months to develop the legislative language.<sup>35</sup> This process resulted in passage of what is arguably the strictest fracking regulatory act in the United States.<sup>36</sup>

## B. WHAT IS FRACKING?

### 1. *Description of the Process*

Hydraulic fracturing is a process used to maximize the extraction of underground resources, including oil and gas.<sup>37</sup> The process involves the injection of a mixture of water, sand, and chemicals under high pressure into a bedrock formation via the well, resulting in a fracturing of the rock and forming pathways for the oil and gas to reach the well.<sup>38</sup> The process is

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31. See S. ILLINOISANS AGAINST FRACTURING OUR ENV'T [hereinafter SAFE], <http://www.dontfractureillinois.net> (last visited Jan. 13, 2015); ILL. PEOPLE'S ACTION, <http://www.illinoispeoplesaction.org/hydraulic-fracturing.html> (last visited Jan. 13, 2015).

32. S.B. 3484, 98th Gen. Assemb., 2nd Sess. (Ill. 2014).

33. S.B. 3386, 98th Gen. Assemb., 2nd Sess. (Ill. 2014).

34. S.B. 3484, 98th Gen. Assemb., 2nd Sess. (Ill. 2014); S.B. 3386, 98th Gen. Assemb., 2nd Sess. (Ill. 2014).

35. Transcript of Debates, S.B. 1715, 98th Gen. Assemb., 1st Sess., May 31, 2013, at 207-08, <http://www.ilga.gov/senate/transcripts/strans98/09800062.pdf>; see Julie Wernau, *Illinois Draft Altered Some Fracking Rules*, CHI. TRIB. (Aug. 30, 2014, 6:29 AM) <http://www.chicagotribune.com/business/ct-illinois-fracking-0831-biz-20140829-story.html#page=1> (noting environmental groups negotiated with industry to pass the HFRA because, since a moratorium wasn't politically feasible, they wanted to ensure that if fracking was going to happen it would at least be done as safely as possible).

36. *Governor Quinn Signs Nation's Strongest Regulations on Hydraulic Fracturing*, *supra* note 1.

37. U.S. ENVTL. PROT. AGENCY, *Hydraulic Fracturing Background Information*, [http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells\\_hydrowhat.cfm](http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm) (last visited Sept. 8, 2014) [hereinafter *Hydraulic Fracturing Background Information*].

38. U.S. GEOLOGICAL SURVEY, *Introduction to Hydraulic Fracturing*, [http://www.usgs.gov/hydraulic\\_fracturing/](http://www.usgs.gov/hydraulic_fracturing/) (last visited Aug. 28, 2014).



used to enhance subsurface fracture systems allowing oil or natural gas to move more freely from the rock pores to the production well bringing the oil or gas to the surface.<sup>39</sup> During the well drilling process used in high-volume horizontal fracturing operations, the vertical portion of the well is drilled between five thousand to nine thousand feet deep, with horizontal laterals extending three thousand to as much as ten thousand feet along the shale formation.<sup>40</sup> Once the fractures are created, a sand-like substance (proppant) keeps the fractures from closing once the pumping pressure is released.<sup>41</sup>

While hydraulic fracturing has been a technology applied commercially since the late 1940s,<sup>42</sup> more recently the technique has been combined with horizontal drilling—a process where, after drilling down vertically, the drill bit is turned and moved horizontally through the rock, increasing the area of oil and gas reserves that can be reached.<sup>43</sup> This combination of techniques has expanded enormously the oil and gas reserves in the United States,<sup>44</sup> and it is estimated that over ninety percent of all oil and gas wells are now being drilled using hydraulic fracturing.<sup>45</sup> The HFRA specifically targeted the more recent high-volume horizontal hydraulic fracturing operations not covered by the Oil and Gas Act.<sup>46</sup>

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39. *Hydraulic Fracturing Background Information*, *supra* note 37.

40. U.S. DEP'T OF ENERGY, NAT'L ENERGY TECH. LAB. [hereinafter NETL], *Modern Shale Gas Development in the United States: An Update* 1, 47 (Sept. 2013), <http://www.netl.doe.gov/File%20Library/Research/Oil-Gas/shale-gas-primer-update-2013.pdf>.

41. *Hydraulic Fracturing Background Information*, *supra* note 37.

42. DEP'T OF ENERGY, NETL, *State Oil and Natural Gas Regulations Designed to Protect Water Resources* 1, 21 (May 2009), <http://energyindepth.org/wp-content/uploads/2009/03/oil-and-gas-regulation-report-final-with-cover-5-27-20091.pdf>.

43. Thomas W. Merrill, *Four Questions About Fracking*, 63 CASE W. RES. L. REV. 971, 972 (2013).

44. *Id.* at 973.

45. Matthew McFeeley, *Falling Through the Cracks: Public Information and the Patchwork of Hydraulic Fracturing Disclosure Laws*, 38 VT. L. REV. 849, 851 (2014).

46. 225 ILL. COMP. STAT. 732/1-20 (2012 & Supp. 2013); THE S. ILLINOISAN, *But Voice of the Southern: Fracking: A Second Look* (Aug. 10, 2014, 1:00 AM), [http://thesouthern.com/news/voice-of-the-southern-fracking-a-second-look/article\\_951dda5a-8a3e-521c-8d72-024452c25243.html](http://thesouthern.com/news/voice-of-the-southern-fracking-a-second-look/article_951dda5a-8a3e-521c-8d72-024452c25243.html) (expressing concern that many drillers will use fewer than the three hundred thousand gallons of fracking fluid and thus fall outside the requirements of HFRA); Julie Wernau, *Illinois Fracking Law Has Big Loophole, Environmentalists Say*, CHI. TRIB. (Jan. 26, 2014), [http://articles.chicagotribune.com/2014-01-26/site/ct-fracking-without-water-0126-biz-20140126\\_1\\_fracking-rules-fracking-law-illinois-oil](http://articles.chicagotribune.com/2014-01-26/site/ct-fracking-without-water-0126-biz-20140126_1_fracking-rules-fracking-law-illinois-oil). Many energy firms will use gas, foam, mist, or gel rather than water and could be exempt from the new rules. *Id.*

## 2. *Economic and Environmental Benefits and Harms from Fracking*

In order to understand the interest and concerns over local regulatory authority regarding fracking, it is important to examine the benefits and harms, both real and perceived, associated with the practice. Modern high-volume horizontal hydraulic fracturing has opened up many oil and gas reserves that were previously not economically viable and has facilitated the discovery of new reserves.<sup>47</sup> As a result of the regulatory certainty provided by the HFRA, the oil and gas industry is now more likely to make large investments in Illinois.<sup>48</sup> It is expected that money brought into local communities will increase tax revenues locally and promote job growth.<sup>49</sup> As Governor Quinn noted when he signed the HFRA, “This legislation will open the door for thousands of jobs and significant economic development in Southern Illinois. It could be a shot in the arm for many communities.”<sup>50</sup> According to a report produced for the Illinois Chamber of Commerce, the opening of the Southern Illinois shale play for hydraulic fracturing could result in a minimum of one thousand jobs with the potential of forty-seven thousand jobs created or supported each year and up to \$9.5 billion of economic impact.<sup>51</sup> By some estimates, fracking activities could spread to at least seventeen counties throughout Southern Illinois.<sup>52</sup> Fracking has also had an overall positive economic benefit at the national level, because new supplies of natural gas have reduced the price of this clean fuel, helped to

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47. Kevin A. Hassett & Aparna Mathur, *Benefits of Hydraulic Fracking*, AM. ENTERPRISE INST. (Apr. 4, 2013), <http://www.aei.org/article/economics/benefits-of-hydraulic-fracking/>.

48. Dave Bieneman, *The Fracking Industry and Its Potential Impact on the Illinois Economy*, ILL. DEP'T OF EMP'T SEC. 1, 4 (July 2013), <http://www.ides.illinois.gov/LMI/ILMR/Fracking.pdf>.

49. See generally *id.*; MOODY'S ANALYTICS ET AL., *State of Illinois Economic Forecast* (Jan. 2015), <http://cgfa.ilga.gov/Upload/2015MoodyEconomyILforecast.pdf>.

50. ILL. GOV'T NEWS NETWORK, *Governor Quinn Praises Senate Passage of Hydraulic Fracturing Legislation* (May 31, 2013), <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=11245>.

51. David G. Loomis, *The Potential Economic Impact of New Albany Gas on the Illinois Economy* 1, 1 (Dec. 2012), <http://ilchamber.org/wp-content/uploads/2012/05/Illinois-Chamber-Foundation-New-Albany-Shale-Jobs-Study-low-res.pdf>.

52. Jim Shur, *S. Illinois counties seeing first of fracking rush*, AP THE BIG STORY (Apr. 5, 2013, 4:49 PM), <http://bigstory.ap.org/article/s-illinois-counties-seeing-first-fracking-rush>. Many elected officials in these counties are eager for fracking to begin. As one county board chairman stated, “It would change the county, and it'd never be the same—but in a positive way. Bring it on, and the sooner the better.” *Id.*

reduce U.S. manufacturing costs, and led to a revival of the U.S. as an energy producer.<sup>53</sup>

Fracking also has some environmental benefits. Since the size of the area drained by a hydraulically fracked well is larger than that of a conventionally drilled well, fewer wells need to be drilled if fracking is used.<sup>54</sup> Additionally, an increased use of natural gas may lead to an increased use of alternative power producers such as solar and a decrease in the use of coal-fired electricity.<sup>55</sup> The natural gas from fracking is a key component of the U.S. Environmental Protection Agency's ("USEPA") Clean Power Plan<sup>56</sup> and this reduced reliance on coal will aid in the effort to reduce greenhouse gases.<sup>57</sup>

On the other side of the argument, many people are concerned about the economic and environmental harm that may result from fracking and "fear the effects of drilling on their health, land and quality of life."<sup>58</sup> The documentary film *Gasland* fueled these concerns with images of burning tap water revealing methane contamination of drinking water supplies.<sup>59</sup>

Fracking may undermine local economies by reducing the value of nearby properties through actual pollution, the stigma associated with proximity to industrial operations, and the potential for future impacts.<sup>60</sup> Additionally, properties located on or near where fracking is occurring can be

53. Charles A. Patrizia, *State Ban on Hydraulic Fracturing: Free Riders and Federal Policy*, 52 INFRASTRUCTURE, Winter 2015, at 1, 11.

54. INDEP. PETROLEUM ASS'N OF AM., *Hydraulic Fracturing: Effects on Energy Supply, the Economy, and the Environment* (Apr. 2008), <http://energyindepth.org/docs/pdf/Hydraulic-Fracturing-3-E%27s.pdf>.

55. Joseph P. Tomain, *Shale Gas and Clean Energy Policy*, 63 CASE W. RES. L. REV. 1187, 1203 (2013); *contra* Merrill, *supra* note 43 (noting that cheap gas will lead to continuing government subsidies to sustain the solar power and wind power industries).

56. David Biello, *Fracking Threatens to Crack Politics*, SCI. AM. (Nov. 3, 2014), <http://www.scientificamerican.com/article/fracking-threatens-to-crack-politics/>.

57. Merrill, *supra* note 43; *contra* David B. Spence, *Responsible Shale Gas Production: Moral Outrage vs. Cool Analysis*, 25 FORDHAM ENVTL. L. REV. 141, 163 (2013) (noting that opponents to fracking have begun to challenge the contention that transitioning from coal to gas will have climate benefits).

58. NATURAL RES. DEF. COUNCIL, *Don't Get Fracked!*, <http://www.nrdc.org/health/drilling/> (last visited Jan. 13, 2015).

59. See Bryan Walsh, *A Documentary on Natural Gas Drilling Ignites an Oscar Controversy*, TIME (Feb. 26, 2011), <http://science.time.com/2011/02/26/a-documentary-on-natural-gas-drilling-ignites-an-oscar-controversy/>; *but see* Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 819, 823 (2014). The industry responded with its own film, *Truthland*. *Id.*

60. Tony Dutzik et al., *The Costs of Fracking*, ENV'T ILL. RES. & EDUC. CTR. 1, 30 (2012), <http://www.environmentillinois.org/sites/environment/files/The%20Costs%20of%20Fracking%20vIL.pdf>.

more difficult to finance or insure.<sup>61</sup> Fracking also imposes both immediate and long-term financial burdens on local communities through its heavy use of public infrastructure and demand for public services.<sup>62</sup> Moreover, fracking typically occurs in more rural areas and may have an impact on agriculture by directly harming livestock, impeding livestock reproduction and production, and reducing farmers' abilities to market their livestock.<sup>63</sup> Finally, any downturn in farming resulting from the effects of fracking would likely have an associated negative impact on local supporting industries, further damaging a community's economic base.<sup>64</sup>

From an environmental perspective, high-volume horizontal hydraulic fracturing, the method of natural gas extraction now most commonly used,<sup>65</sup> is suspected in contaminated drinking water,<sup>66</sup> public health impacts including upper-respiratory and skin problems,<sup>67</sup> increased earthquake activity,<sup>68</sup> air pollution,<sup>69</sup> damages to natural resources,<sup>70</sup> and general community disruption.<sup>71</sup> There has been little research completed on the potential adverse health effects of fracking, though the results to date show "evidence of risk to human health ranging from the comparatively benign to the more serious."<sup>72</sup> More research on public health effects is urgently needed to clarify and verify the potential risks to human health.<sup>73</sup>

One recent study conducted in the Marcellus Shale region of Pennsylvania reported that "[p]eople living near natural gas wells were more than twice as likely to report upper-respiratory and skin problems than those farther away," but also suggested that these results did not prove that the

61. *Id.*

62. *Id.* at 24.

63. *Id.* at 30-31.

64. *Id.* at 31.

65. NATURAL RES. DEF. COUNCIL, *Hydraulic Fracturing Can Potentially Contaminate Drinking Water Sources*, <http://www.nrdc.org/water/fracking-drinking-water.asp> (last visited Jan. 13, 2015).

66. *Id.*

67. Wendy Koch, *People near "fracking" wells report health woes*, USA TODAY (Sept. 10, 2014), <http://www.usatoday.com/story/money/business/2014/09/10/people-near-fracking-wells-health-symptoms/15337797/>.

68. Emily Schmall & Justin Juozapavicius, *States With Fracking See Surge in Earthquake Activity*, HUFF POST GREEN (July 14, 2014, 5:16 PM), [http://www.huffingtonpost.com/2014/07/14/fracking-earthquake\\_n\\_5585892.html](http://www.huffingtonpost.com/2014/07/14/fracking-earthquake_n_5585892.html).

69. Tomain, *supra* note 55.

70. Dutzik, *supra* note 60.

71. Tomain, *supra* note 55.

72. Madelion L. Finkel & Adam Law, *The Rush to Drill for Natural Gas: A Public Health Cautionary Tale*, 101 AM. J. PUB. HEALTH 784, 785 (2011).

73. Jamie Smith Hopkins, *5-State Study Finds Unsafe Levels of Airborne Chemicals Near Oil and Gas Sites*, INSIDE CLIMATE NEWS (Oct. 30, 2014), <http://insideclimateneeds.org/news/20141030/5-state-study-finds-unsafe-levels-airborne-chemicals-near-oil-and-gas-sites>.

wells were the cause of their symptoms.<sup>74</sup> Several studies have produced reports and media stories in 2014 reflecting on fracking's potential impacts on air quality.<sup>75</sup> In 2010, the USEPA began a detailed study to examine the potential environmental and health impacts of hydraulic fracking on drinking water resources,<sup>76</sup> with the final report expected to be released in 2016.<sup>77</sup> Contamination of ground water has always been a problem in traditional vertical well drilling operations, primarily from faulty cementing of the well casings. The difference now with horizontal drilling is the large increase in water needed for the process along with the increase in chemicals being used.<sup>78</sup>

Some involved in the gas mining industry are willing to acknowledge that the practice of drilling wells and producing oil and gas from shale formations carries some risks, including possible water contamination and leaks of natural gas into the atmosphere,<sup>79</sup> but others continue to uphold the safety of industry standards and practices.<sup>80</sup> Supporters refer to a 2004 study from the USEPA, which found no confirmed evidence of contamination of drinking water wells by injection of hydraulic fracturing fluids into coal-bed methane wells.<sup>81</sup> This finding has been supported by a recent study

74. Koch, *supra* note 67.

75. Lisa Song, *Attention Turns to Fracking's Impact on Air Quality*, INSIDE CLIMATE NEWS (Dec. 30, 2014), [http://insideclimatenews.org/news/20141230/attention-turns-frackings-impact-air-quality?utm\\_source=Inside+Climate+News&utm\\_campaign=bc20dc5a0e-InsideClimate\\_News12\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_29c928ffb5-bc20dc5a0e-327746733](http://insideclimatenews.org/news/20141230/attention-turns-frackings-impact-air-quality?utm_source=Inside+Climate+News&utm_campaign=bc20dc5a0e-InsideClimate_News12_10_2014&utm_medium=email&utm_term=0_29c928ffb5-bc20dc5a0e-327746733); David Hasemyer, *Fracking Fumes: Where There's a Well, All is Not Well*, INSIDE CLIMATE NEWS (Dec. 22, 2014), [http://insideclimatenews.org/news/20141222/fracking-fumes-where-theres-well-all-not-well?utm\\_source=Inside+Climate+News&utm\\_campaign=2fee720a14-InsideClimate\\_News12\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_29c928ffb5-2fee720a14-327746733](http://insideclimatenews.org/news/20141222/fracking-fumes-where-theres-well-all-not-well?utm_source=Inside+Climate+News&utm_campaign=2fee720a14-InsideClimate_News12_10_2014&utm_medium=email&utm_term=0_29c928ffb5-2fee720a14-327746733).

76. U.S. ENVTL. PROT. AGENCY, *Questions and Answers About EPA's Hydraulic Fracturing Study*, <http://www2.epa.gov/hfstudy/questions-and-answers-about-epas-hydraulic-fracturing-study> (last visited Jan. 13, 2015).

77. Roger Drouin, *Fracking Unfocus: How the EPA's Long-Awaited Hydraulic Fracturing Study Could Miss the Mark*, TRUTHOUT (Nov. 18, 2013, 9:09 AM), <http://truthout.org/news/item/20039-fracking-unfocus-how-the-epas-long-awaited-hydraulic-fracturing-study-could-miss-the-mark>.

78. Chris Mooney, *The Truth About Fracking*, SCI. AM., Nov. 2011, at 80, 84.

79. Associated Press, *Exxon fracking report responds to shareholders*, FUEL FIX (Sept. 30, 2014, 5:57 PM), <http://fuelfix.com/blog/2014/09/30/exxon-fracking-report-responds-to-shareholders/>.

80. See generally AM. PETROLEUM INST., *Hydraulic Fracturing: Unlocking America's Natural Gas Resources* (July 2014), [http://www.api.org/~media/Files/Policy/Exploration/HYDRAULIC\\_FRACTURING\\_PRIMER.ashx](http://www.api.org/~media/Files/Policy/Exploration/HYDRAULIC_FRACTURING_PRIMER.ashx).

81. U.S. ENVTL. PROT. AGENCY, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs 7-1, 7-6* (June

released by the United States Department of Energy, which reported no evidence of upward migration of gas or fluids from the hydraulically fractured shale formation.<sup>82</sup> Although there have been environmental damages associated with the overall modern gas mining process, which includes fracking, “definitive evidence of damages *due to fracturing* and not the result of other accidents associated with the development process has been difficult to obtain.”<sup>83</sup> Another recent report concluded that elevated levels of methane in contaminated drinking-water wells near hydraulic fracturing activities was caused, not by the drilling or fracturing activities themselves, but by faulty well casings and cementing of the vertical wells.<sup>84</sup>

The controversy and concerns over the impacts from fracking are likely to continue as opponents to the activity continue to assert the dangers of fracking and concerns that the activity cannot be regulated well enough to protect public health and the environment.<sup>85</sup> They are also dismissive of the academic studies because of the financial support provided by the oil and gas industry.<sup>86</sup> Even if fracking can be done safely, it must be done careful-

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2004), [http://www.epa.gov/ogwdw/uic/pdfs/cbmstudy\\_attach\\_uic\\_ch07\\_conclusions.pdf](http://www.epa.gov/ogwdw/uic/pdfs/cbmstudy_attach_uic_ch07_conclusions.pdf); Alfred R. Light, *Fracturing Moratoria Under the Dormant Commerce Clause: The Need to Shape Rather Than Resist the Shale Gale*, 44 ENVTL. L. REP. 10035, 10038 (2014). The results of the 2004 EPA study finding that injection of fracking fluids into coal-bed methane wells posed no threat to underground sources of drinking water was significant because coal-bed methane fracturing occurs much closer to the surface than most hydraulic fracturing and “would seem more likely to threaten drinking water supplies.” *Id.*

82. Richard W. Hammack et al., *An Evaluation of Fracture Growth and Gas/Fluid Migration as Horizontal Marcellus Shale Gas Wells are Hydraulically Fractured in Greene County, Pennsylvania*, U.S. DEP’T OF ENERGY, NETL 1, 1 (Sept. 15, 2014), [http://www.netl.doe.gov/File%20Library/Research/onsite%20research/publications/NETL-TRS-3-2014\\_Greene-County-Site\\_20140915\\_1\\_1.pdf](http://www.netl.doe.gov/File%20Library/Research/onsite%20research/publications/NETL-TRS-3-2014_Greene-County-Site_20140915_1_1.pdf).

83. Timothy Fitzgerald, *Frackonomics: Some Economics of Hydraulic Fracturing*, 63 CASE W. RES. L. REV. 1337, 1356 (2013).

84. Ohio State University, *Fracking: Gas Leaks From Faulty Wells Linked to Contamination in Some Groundwater*, SCIENCEDAILY (Sept. 15, 2014), <http://www.sciencedaily.com/releases/2014/09/140915095851.htm>; Light, *supra* note 81.

85. Reynolds, *supra* note 8; Bagley, *supra* note 18; but see Katherine Bagley, *Frack-Free Leaders in Illinois, Hedging Their Bets Shelve Calls for Ban*, INSIDE CLIMATE NEWS (Sept. 4, 2014), <http://insideclimatenews.org/news/20140904/frack-free-leaders-illinois-hedging-their-bets-shelve-calls-ban-now>. Some grassroots environmental organizations agree that with companies already beginning to drill, the best option at this time is to push for strong regulations. *Id.*

86. Steve Horn, *Frackademia: The People and Money Behind the EDF Methane Emissions Study*, TRUTHOUT (Sept. 18, 2013, 12:32 PM), <http://truthout.org/news/item/18915>; Lynne Peoples, *Fracking Industry Distorts Science to Deceive Public and Policymakers, Says Watchdog Group*, HUFF POST GREEN, [http://www.huffingtonpost.com/2015/02/21/fracking-research-deceive\\_n\\_6724162.html](http://www.huffingtonpost.com/2015/02/21/fracking-research-deceive_n_6724162.html) (last updated Feb. 21, 2015, 10:59 AM).

ly,<sup>87</sup> and concerned local governments may seek to advance their own regulatory controls over the activity to protect the well-being of citizens and communities.

### III. MUNICIPAL REGULATORY AUTHORITY OVER FRACKING IN ILLINOIS

#### A. AUTHORITY TO PROVIDE OR WITHHOLD CONSENT TO SPECIFIC PERMIT APPLICANTS

Opponents of fracking desire statewide bans or moratoria on fracking, but many local groups have joined with national environmental organizations in pushing for strong regulations because otherwise the industry might get to move forward with little oversight.<sup>88</sup> These opponents further suggest that, at a minimum, states should allow local governments to enact local bans and restrictions to protect their own citizens.<sup>89</sup> Local governments across the country have adopted fracking bans or limiting regulations, although with varying success.<sup>90</sup> Along with temporary or permanent prohibitions, local actions have included zoning ordinances regulating where or how fracking can occur.<sup>91</sup>

The Illinois Constitution, adopted in 1970, provides a Home Rule provision allowing home rule units to “exercise any power and perform any function pertaining to its government and affairs including . . . the power to regulate for the protection of the public health, safety, morals and welfare.”<sup>92</sup> Under this provision, counties with a chief executive form of gov-

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87. NIU NEWSROOM, *Drilling into complexities of fracking in Illinois* (Jan. 28, 2015), <http://newsroom.niu.edu/2015/01/28/drilling-into-complexities-of-fracking-in-illinois/>.

88. Bagley, *supra* note 85.

89. Elizabeth Ridlington & John Rumpler, *Fracking by the Numbers: Key Impacts of Dirty Drilling at the State and National Level*, ENV'T AM. RES. & POLICY CTR. 1, 27 (Oct. 2013), [http://www.environmentamerica.org/sites/environment/files/reports/EA\\_FrackingNumbers\\_scrn.pdf](http://www.environmentamerica.org/sites/environment/files/reports/EA_FrackingNumbers_scrn.pdf).

90. These limits have been upheld in New York, *Matter of Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014), and Pennsylvania, *Robinson Twp., Washington Cnty. v. Pennsylvania*, 83 A.3d 901 (Pa. 2013), but rejected in Colorado, *see Emily Pincow, Colorado Takes On the Issue of Preemption of Local Fracking Ban*, PROD. LIAB. MONITOR (Aug. 5, 2014), <http://product-liability.weil.com/hydraulic-fracturing/colorado-takes-on-the-issue-of-preemption-of-local-fracking-ban/>.

91. Rachel A. Kitze, Note, *Moving Past Preemption: Enhancing the Power of Local Governments Over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 392 (2013).

92. ILL. CONST. art. VII, § 6(a).

ernment (currently only Cook County)<sup>93</sup> and municipalities with populations greater than twenty-five thousand are automatically considered home rule units, and other municipalities may attain home rule status by referendum.<sup>94</sup> Municipalities are defined as “cities, villages and incorporated towns.”<sup>95</sup> Non-home rule municipalities, on the other hand, are limited in their powers to those that are granted by the state.<sup>96</sup> Unless expressly authorized, non-home rule units in Illinois are bound by Dillon’s Rule,<sup>97</sup> which “states that non-home-rule units possess only those powers specifically conveyed by the constitution or by statute; thus, such a unit may regulate in a field occupied by state legislation only when the constitution or a statute specifically conveys such authority.”<sup>98</sup>

An Illinois home rule unit, then, may govern itself except as limited by the Illinois Constitution or by the General Assembly acting “in certain constitutionally specified ways, the most important of which is ‘preemption’”<sup>99</sup> and the power and function of home rule units are to be construed liberally.<sup>100</sup> Therefore, unless the HFRA explicitly declared the state’s authority to be exclusive, home rule units could regulate fracking concurrently with the state, but non-home rule units may not do so unless given that authority through the statute itself. Two questions must be answered to determine whether a regulatory authority lies within home rule unit’s authority: (1) does the regulation address only a local matter, and (2) has the state acted to regulate in this area?<sup>101</sup> If it is a local issue not preempted by the state, then the home rule unit likely has the authority to develop a regulation on that issue.<sup>102</sup>

In *Palm v. 2800 Lake Shore Drive Condo Ass’n*, the Illinois Supreme Court ruled that a home rule municipality may even enact local ordinances regulating activities that are concurrently covered by state statutes, unless the Illinois General Assembly expressly acts to limit the home rule authori-

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93. CITIZEN ADVOCACY CTR., *Home Rule and You*, 1, 1 (2004), <http://www.citizenadvocacycenter.org/uploads/8/8/4/0/8840743/homerulebrochure.pdf> [hereinafter CITIZEN ADVOCACY CTR.].

94. *Id.*

95. ILL. CONST. art. VII, § 1.

96. ILL. CONST. art. VII, § 7.

97. See NAT’L ASS’N OF COUNTIES, *County Authority: A State by State Report* 1, 204 (Dec. 2010), <http://www.naco.org/newsroom/pubs/Documents/County%20Management%20and%20Structure/County%20Authority%20a%20State%20by%20State%20Report.pdf> [hereinafter NAT’L ASS’N OF COUNTIES].

98. *Janis v. Graham*, 946 N.E.2d 983, 987 (Ill. App. Ct. 2d Dist. 2011).

99. Stephanie Cole, *Home Rule in Illinois: No. 1. The Constitutional Provisions*, 1 ILL. ISSUES 104, 105 (1975), available at <http://www.lib.niu.edu/1975/ii7504104.html>.

100. ILL. CONST. art. VII, § 6(m).

101. CITIZEN ADVOCACY CTR., *supra* note 93.

102. *Id.*



ty.<sup>103</sup> The court reasoned that “[h]ome rule is based on the assumption that municipalities should be allowed to address problems with solutions tailored to their local needs,”<sup>104</sup> and noted that courts have only interfered with local ordinances in rare cases involving environmental regulations based on specific constitutional provisions establishing state supremacy in that field.<sup>105</sup> This exception is based on the language in Article XI of the Illinois Constitution which states that “[t]he public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations” and “[t]he General Assembly shall provide by law for the implementation and enforcement of this public policy.”<sup>106</sup> In *County of Cook v. John Sexton Contractors Co.*, the Illinois Supreme Court held that while the local home rule government may exercise its power by imposing zoning restrictions and by approving or denying a permit, the home rule unit must adhere to the uniform regulatory standards established by the state.<sup>107</sup> But, the court revised its position limiting local environmental regulation in *Village of Carpentersville v. Pollution Control Board*, where it held that such local regulations were allowable because the Environmental Control Act (“ECA”) had been amended to make it clear that the ECA no longer preempted local zoning ordinances.<sup>108</sup> Further, the court held that “if the General Assembly determines that local zoning ordinances should play a role in Illinois’s coordinated pollution control plan, even though such ordinances may conflict in certain instances with uniform, statewide standards, then the General Assembly can constitutionally do so.”<sup>109</sup>

Although the HFRA establishes statewide regulation of hydraulic fracking, the law did not declare the state’s authority to be exclusive.<sup>110</sup> Therefore, home rule units in the state retain the authority to exercise concurrent regulation of this activity.<sup>111</sup> Additionally, in conformance with the line of cases beginning with *Nollan v. California Coastal Comm’n*, relating to land use regulations, a local government which has the authority to deny a permit in furtherance of a legitimate police power purpose may also pro-

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103. *Palm v. 2800 Lake Shore Drive Condo Ass’n*, 988 N.E.2d 75, 81 (Ill. 2013).

104. *Id.* at 80.

105. *Id.*

106. ILL. CONST. art. XI, § 1; *Cnty. of Cook v. John Sexton Contractors Co.*, 389 N.E.2d 553, 559 (Ill. 1979) (stating that because of the policy identified in the Constitution, the State would provide the leadership in protecting the environment).

107. *John Sexton Contractors Co.*, 389 N.E.2d at 560-61.

108. *Vill. of Carpentersville v. Pollution Control Bd.*, 553 N.E.2d 362, 364 (Ill. 1990).

109. *Id.* at 366.

110. *Palm*, 988 N.E.2d at 81 (holding that home rule units may regulate concurrently with the State unless the General Assembly has expressly preempted this right).

111. ILL. CONST. art. VII, § 6(i).

vide consent with a permit condition that serves the same purpose as an alternative to that prohibition.<sup>112</sup> This would include the ability for the local governmental unit to permit with stricter standards than those imposed by the state.

The Illinois General Assembly has gone further by expanding the rights of even non-home rule units to regulate fracking, by specifying in section 1-35(c) of the HFRA that the state will not issue a permit unless the applicant provides certification of consent to the activity by the local city, village, or incorporated town.<sup>113</sup> This provision is subsequently captured in section 245.210(b) of the adopted rules developed by the IDNR.<sup>114</sup> Thus, even non-home rule municipalities have been granted explicit authority to regulate fracking in their jurisdictions. Moreover, this right is further supported by section 11-56-1 of the Illinois Municipal Code, which provides authority to municipalities to grant permits to mine oil or gas.<sup>115</sup>

How the application of this regulatory authority for non-home rule units under the HFRA will likely stand up to a challenge can be considered by looking at the Oil and Gas Act, which contains a similar provision to that found in section 1-35 of the HFRA.<sup>116</sup> In the one case directly addressing the local regulatory authority of a non-home rule unit provided by this provision under the Oil and Gas Act, *Tri-Power Res., Inc. v. City of Carlyle*, the provision was held to provide the statutory authority for non-home

112. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836-37 (1987).

113. 225 ILL. COMP. STAT. 732/1-35(c) (2012 & Supp. 2013).

Where an application is made to conduct high volume horizontal fracturing operations at a well site located within the limits of any city, village, or incorporated town, the application shall state the name of the city, village, or incorporated town and be accompanied with a certified copy of the official consent for the hydraulic fracturing operations to occur from the municipal authorities where the well site is proposed to be located. No permit shall be issued unless consent is secured and filed with the permit application.

*Id.*

114. Hydraulic Fracturing Regulatory Act, 38 Ill. Reg. 22,067, 22,105 (Dec. 1, 2014) (to be codified at 62 Ill. Adm. Code 245.210(c)), available at [http://www.cyberdriveillinois.com/departments/index/register/register\\_volume38\\_issue48.pdf](http://www.cyberdriveillinois.com/departments/index/register/register_volume38_issue48.pdf).

115. 65 ILL. COMP. STAT. 5/11-56-1 (2012).

116. 225 ILL. COMP. STAT. 725/13 (2012).

Where an application is made to drill or deepen an oil or gas well within the limits of any city, village or incorporated town, the application shall so state, and be accompanied with a certified copy of the official consent of the municipal authorities for said well to be drilled, and no permit shall be issued unless consent is secured and filed with the application.

*Id.*

rule municipalities to both approve or deny oil and gas removal activities within their jurisdictional boundaries.<sup>117</sup> The court ruled that the Municipal Code granted the authority to municipalities to permit oil and gas mining and the Oil and Gas Act required official consent of the municipality for the well drilling and, accordingly, the power to give permission necessitates the converse power to deny.<sup>118</sup> To hold otherwise, the court determined, would ignore the plain language of the statute.<sup>119</sup>

As supported by the holding in *Tri-Power*, the similar provision of section 1-35 of the HFRA will likewise likely be held to provide the authorization for any city, village, or incorporated town within Illinois, whether home rule units or not, to permit or deny a fracking permit application within their jurisdictional boundaries. While the HFRA and the Oil and Gas Act provide local authority to regulate in this field, neither of these statutes nor the proposed agency fracking regulations establish any requirements or provide any guidance to municipalities regarding any process they must follow in considering consent. Legislation was introduced to amend section 1-35 of the HFRA to provide such guidance as to the process local governments should follow in considering whether to provide consent; however, the bill died when the session ended in January 2015.<sup>120</sup> A similar bill should be reintroduced for consideration because establishing a standard process for all local governments to follow would provide a means to ensure the compatibility between any concurrent state and local regulations.

There are limits, however, to a non-home rule unit's ability to regulate in a field occupied by state legislation. An ordinance that conflicts with the spirit or purpose of a state law is preempted by the statute.<sup>121</sup> But, in *Carpentersville*, the Illinois Supreme Court maintained that the "zoning power of local governmental units, both home rule and non-home-rule, should be broader than the minimum powers to share concurrent jurisdiction with the State."<sup>122</sup> Further, "[n]othing in the constitution or our prior case law prohibits the General Assembly from making and implementing such a determination."<sup>123</sup> Thus, provided that a non-home rule governmental unit does not act in conflict with the spirit or purpose of the HFRA, the local government may regulate fracking in its community through permit conditions

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117. *Tri-Power Res., Inc. v. City of Carlyle*, 967 N.E.2d 811, 816 (Ill. App. Ct. 5th Dist. 2012) (landowner challenging the prohibition on mining within an area recently annexed by the city on which the landowner held the mineral lease and permits to develop).

118. *Id.*

119. *Id.*

120. S.B. 3326, 98th Gen. Assemb., 2nd Sess. (Ill. 2014).

121. *Janis v. Graham*, 946 N.E.2d 983, 988 (Ill. App. Ct. 2d Dist. 2011).

122. *Vill. of Carpentersville v. Pollution Control Bd.*, 553 N.E.2d 362, 367 (Ill. 1990).

123. *Id.*

and zoning regulations that may exceed the requirements imposed by the state.

Along with the specific authority granted under the home rule provision and through section 1-35 of the HFRA, municipalities have additional control over fracking in their jurisdictions through section 1-120 of the HFRA, which provides that “[c]ompliance with this Act does not relieve responsibility for compliance with the Illinois Oil and Gas Act, the Illinois Environmental Protection Act, and other applicable federal, State, and local laws.”<sup>124</sup> In particular, municipalities have the right to enact ordinances to promote the “public health, safety, comfort, morals, and welfare” of their communities and residents.<sup>125</sup> Such rights include the power to establish set-back lines,<sup>126</sup> restrict the location of industries,<sup>127</sup> and divide the municipality into districts and specify the uses of land allowed—including the intensity of such uses—or prohibited in each district.<sup>128</sup>

## B. CAN MUNICIPALITIES BAN FRACKING ENTIRELY?

The remaining question to be considered with regard to municipal authority to regulate fracking is whether the municipalities could take the further step on banning fracking completely within their boundaries. While municipalities in Illinois have been granted the authority to regulate fracking within their jurisdictions, through either their home rule powers or the authority granted through the HFRA, some communities have continued to express concerns about the environmental and public health issues associated with the activity and have passed ordinances supporting a statewide moratorium on fracking.<sup>129</sup> The Village of Alto Pass is the only municipality to date that has passed a local ordinance banning the activity.<sup>130</sup>

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124. 225 ILL. COMP. STAT. 732/1-120 (2012 & Supp. 2013).

125. 65 ILL. COMP. STAT. 5/11-13-1 (2012).

126. 65 ILL. COMP. STAT. 5/11-13-1(1) (2012).

127. 65 ILL. COMP. STAT. 5/11-13-1(4) (2012).

128. 65 ILL. COMP. STAT. 5/11-13-1(5) (2012).

129. See Letter from the Mayor and Anna City Council to Michael J. Madigan, Speaker of the House, Ill. Gen. Assemb. (Oct. 1, 2012), available at [http://documents.foodandwaterwatch.org/doc/Frack\\_Actions\\_AnnaIL.pdf#\\_ga=1.175870306.1311911460.1431735533](http://documents.foodandwaterwatch.org/doc/Frack_Actions_AnnaIL.pdf#_ga=1.175870306.1311911460.1431735533); City Council of the City of Murphysboro, Ill. Res. 2013-01 (Mar. 12, 2013), available at [http://documents.foodandwaterwatch.org/doc/Frack\\_Actions\\_MurphysboroIL.pdf#\\_ga=1.219207769.1311911460.1431735533](http://documents.foodandwaterwatch.org/doc/Frack_Actions_MurphysboroIL.pdf#_ga=1.219207769.1311911460.1431735533); Bruce Ratain, *Carbondale Votes Unanimously to Support Statewide Fracking Moratorium*, ENV'T ILL. (Nov. 14, 2012), <http://www.environmentillinois.org/news/ile/carbondale-votes-unanimously-support-statewide-fracking-moratorium>.

130. Village of Alto Pass, Ill., Ordinance 2012-1211 (Dec. 11, 2012), available at [http://documents.foodandwaterwatch.org/doc/Frack\\_Actions\\_AltoPassIL.pdf](http://documents.foodandwaterwatch.org/doc/Frack_Actions_AltoPassIL.pdf).

Whether municipalities are authorized to prohibit a legitimate land use, such as fracking, in the entirety of their jurisdictions is disputed in Illinois case law. Under *People ex rel. Trust Co. of Chicago v. Village of Skokie*, the Illinois Supreme Court held that municipalities may adopt zoning ordinances as a result of their police powers that may “impose a reasonable restraint upon the use of private property” provided that the ordinances “have a real, substantial relation to the public health, safety, morals or general welfare.”<sup>131</sup> But, the court indirectly acknowledged that municipalities do not have the power to wholly prohibit a lawful business within their boundaries, noting that “[i]t was aptly stated by the trial judge that, in the powers conferred upon municipal authorities, nowhere does the legislature grant to municipalities the power to wholly restrict a lawful business from their boundaries.”<sup>132</sup> In *Builders Supply & Lumber Co. v. City of Northlake*, the Illinois Supreme Court directly acknowledged its ruling in *Skokie* that a zoning ordinance may not exclude a legitimate land use, but stipulated that the desired use must be a legitimate use.<sup>133</sup> The court reaffirmed this holding in *Suburban Ready-Mix Corp. v. Village of Wheeling*,<sup>134</sup> and it has been followed by subsequent lower court rulings in *Oak Forest Mobile Home Park, Inc. v. City of Oak Forest*<sup>135</sup> and *Hawthorne v. Village of Olympia Fields*.<sup>136</sup>

On the other hand, the Illinois Third District Court of Appeals took a more limited position in *Village of Bourbonnais v. Herbert*, stating that while other courts have broadly interpreted the language from *Skokie* that municipalities were not granted the power to wholly restrict otherwise lawful uses within their boundaries, this court felt that these expressions from *Skokie* could not be read separate from the facts of that case.<sup>137</sup> Specifically,

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131. *People ex rel. Trust Co. of Chicago v. Vill. of Skokie*, 97 N.E.2d 310, 313 (Ill. 1951) (quoting *Quilici v. Vill. of Mt. Prospect*, 78 N.E.2d 240, 243 (Ill. 1948) (noting that the amended zoning ordinance in question was “unreasonable, arbitrary and had no firm basis in, or relation to, the public health, morals, safety or public welfare”).

132. *Id.*

133. *Builders Supply & Lumber Co. v. City of Northlake*, 170 N.E.2d 597, 599 (Ill. 1960).

134. *Suburban Ready-Mix Corp. v. Vill. of Wheeling*, 185 N.E.2d 665, 667 (Ill. 1962) (ruling an ordinance prohibiting concrete mixing plants and equipment from all districts in the Village was invalid).

135. *Oak Forest Mobile Home Park, Inc. v. City of Oak Forest*, 326 N.E.2d 473, 485 (Ill. App. Ct. 1st Dist. 1975) (ruling an ordinance prohibiting establishment of a trailer park anywhere within the City, without exception, was beyond the power of the municipality).

136. *Hawthorne v. Vill. of Olympia Fields*, 765 N.E.2d 475, 483 (Ill. App. Ct. 1st Dist. 2002) (holding that operating a day care home was a lawful and legitimate activity not *per se* adverse to the public health, safety, or welfare and therefore an ordinance that completely excluded day care homes was improper).

137. *Vill. of Bourbonnais v. Herbert*, 229 N.E.2d 574, 577 (Ill. App. Ct. 3d Dist. 1967).

the court found that the use in question was clearly compatible with some areas of the municipality and, therefore, total exclusion would be unreasonable.<sup>138</sup> But, the court further held that it “seems repugnant to the purposes of zoning” to require municipalities to accommodate every land use within their boundaries, if some uses are inconsistent with the character of the community.<sup>139</sup> This position was later supported in *High Meadows Park v. City of Aurora*, where the Second District Court of Appeals held that the power to exclude may include all land within the boundaries of a municipality.<sup>140</sup> But, that power “must be exercised in a nondiscriminatory manner and based upon the reasonable exercise of the police power in the public welfare.”<sup>141</sup>

While there remains some debate on this issue, the prevailing opinion at the highest judicial level in Illinois is that a local government cannot wholly exclude a legitimate use within its boundaries, provided the activity is not adverse to the public health, safety, and welfare.<sup>142</sup> By enactment of the HFRA, the Illinois General Assembly has identified horizontal hydraulic fracturing as a legitimate use and the law specifies that the Department will issue a permit “only if the record of decision demonstrates that . . . the proposed hydraulic fracturing operations will be conducted in a manner that will protect the public health and safety and prevent pollution or diminution of any water source.”<sup>143</sup> Therefore, it may be difficult for municipalities to sustain against challenge any zoning ordinances that wholly ban fracking within their jurisdictions, although zoning ordinances would not have to allow such activities in all areas if there are reasonable public health and welfare concerns.

In opposition to that view, the Illinois Supreme Court in *Tri-Power*, as discussed earlier, found that the provisions of the Oil and Gas Act and the Municipal Code clearly gave a non-home rule municipal unit the power to allow or disallow oil and gas drilling operations within its boundaries.<sup>144</sup> It has been argued that the decision in *Tri-Power* allowed for a total prohibition of oil and gas drilling operations by local municipal units.<sup>145</sup> Given the similar statutory language included in section 1-35 of the HFRA, in combination with the same enabling act, an argument can be further extrapolated

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138. *Id.*

139. *Id.*

140. *High Meadows Park v. City of Aurora*, 250 N.E.2d 517, 522 (Ill. App. Ct. 2d Dist. 1969).

141. *Id.* (citing *Suburban Ready-Mix v. Wheeling*, 185 N.E.2d 665, 667 (Ill. 1962)).

142. *See supra* text accompanying notes 131-41.

143. 225 ILL. COMP. STAT. 732/1-53(a)(4) (2012 & Supp. 2013).

144. *Tri-Power Res., Inc. v. City of Carlyle*, 967 N.E.2d 811, 816 (Ill. App. Ct. 5th Dist. 2012).

145. 1-4 BRUCE M. KRAMER & PATRICK H. MARTIN, *THE LAW OF POOLING AND UNITIZATION*, § 4.05(2)(b)(iv) (LexisNexis, Matthew Bender, 3rd ed. 2014).

that the HFRA provides a similar right for local municipalities to totally prohibit fracking within their jurisdictions. If such is the case, if the Illinois General Assembly desires to prohibit such wholesale prohibitions on fracking, it may need to amend the HFRA to expressly state this desire more explicitly.<sup>146</sup>

Zoning is an important tool for local governments to control the use and development of property, but completely zoning out fracking “may frustrate important state interests, particularly if it becomes widespread.”<sup>147</sup> The state has a legitimate interest in promoting its choice of energy sources and a framework for decision-making that provides a role for both local and state agencies is necessary to preserve the rights of all interests.<sup>148</sup> The HFRA provides such a framework, at least for municipalities.

Whether or not municipalities have the power to ban throughout their entire jurisdictional area, they do retain the power to divide the municipality into districts and to prohibit uses incompatible with the character of such districts in order to promote the “public health, safety, comfort, morals, and welfare.”<sup>149</sup> And the provision of section 1-35, while not eliminating debate about fracking in municipal areas, may reduce the need for a jurisdiction-wide ban by allowing “each application to be considered on its own merits.”<sup>150</sup> But, applicants may choose to circumvent any potential difficulty in obtaining municipal consent by turning their attention to well sites in unincorporated areas where that same consent authority has not been granted.<sup>151</sup>

#### IV. COUNTY AUTHORITY TO REGULATE FRACKING

##### A. DO COUNTIES HAVE RIGHTS TO REGULATE FRACKING?

While municipalities in Illinois have the authority to regulate fracking through home rule provisions of the state constitution,<sup>152</sup> specific provisions of HFRA,<sup>153</sup> and the Municipal Code,<sup>154</sup> the IDNR does not believe that

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146. *See id.*

147. John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RESERVE L. REV., 995, 1037 (2013).

148. *Id.*

149. 65 ILL. COMP. STAT. 5/11-13-1 (2012).

150. LAW OFFICES OF CAREY S. ROSEMARIN, P.C., *Fracking in Illinois: No Preemption of Municipalities’ Rights to Ban Fracking* (Sept. 19, 2014), <http://www.rosemarinlaw.com/fracking-in-illinois-no-pre-emption-of-municipalities-rights-to-ban-fracking/>.

151. *Id.*

152. ILL. CONST. art. VII, § 6.

153. 225 ILL. COMP. STAT. 732/1-35(c) (2012).

154. 65 ILL. COMP. STAT. 5/11-56-1 (2012).

same authority has been granted to counties in Illinois.<sup>155</sup> This position is also held by many others throughout the state.<sup>156</sup> As an example, in a meeting of the Jackson County Land Use and Economic Development Committee, which was considering a draft ordinance banning fracking in the county, a Jackson County Assistant State's Attorney told the committee that the county did not have the authority to regulate or prohibit fracking due to a lack of home-rule authority and preemption by state and federal law.<sup>157</sup>

The powers and responsibilities of counties in Illinois are laid out in the state constitution and statutes unless a county has achieved home-rule status by creating a chief executive form of government.<sup>158</sup> Cook County is the only county in the state that has achieved home rule status.<sup>159</sup> As discussed in Part III *supra*, non-home rule units are bound by Dillon's Rule and only possess the powers specifically conveyed by the constitution or by statute.<sup>160</sup> The Illinois Constitution only provides non-home rule units with the powers granted them by law.<sup>161</sup>

Some proponents of county control have argued that the Illinois Counties Code gives counties in Illinois broad powers to regulate for the promotion of health, and that broadly written anti-pollution language in the code provides the legal standing for counties to control fracking.<sup>162</sup> They maintain that numerous county governments have had a long history of involvement in the permitting process related to the drilling industry.<sup>163</sup> These proponents first point to section 5-1052 of the Counties Code, which allows a county board to "do all acts and make all regulations which may be neces-

155. ILL. DEP'T OF NATURAL RESOURCES, *Hydraulic Fracturing Regulatory Act Administrative Rules Response to Public Comments* 1, 81-82, <http://www.dnr.illinois.gov/OilandGas/Documents/IDNR%20Response%20Document.pdf> (last visited Jan. 13, 2015).

156. FRACK FREE ILL., *S.B. 3326 – Allow Consent from All Local Jurisdictions, and Create a Fair Permit Challenge Process*, <http://frackfreeil.wordpress.com/local-control/> (last visited Jan. 13, 2015) [hereinafter FRACK FREE ILL.]; Jacob McClelland, *Can One Southern Illinois County Ban Fracking?*, KRCU (Dec. 18, 2013, 3:59 PM), <http://krcu.org/post/can-one-southern-illinois-county-ban-fracking> (stating the most the HFRA provides for counties is the power to request a hearing and file written objections to specific permit applications); Kari Lyderson, *Rural county to take Illinois fracking debate to the ballot box*, MIDWEST ENERGY NEWS (Jan. 16, 2014), <http://www.midwestenergynews.com/2014/01/16/rural-county-to-take-illinois-fracking-debate-to-the-ballot-box/>; Norris, *supra* note 9. Jackson County State's Attorney, Mike Wepsiec, expressed his opinion that "state and federal governments had the power of regulation, not counties." *Id.*

157. Norris, *supra* note 9.

158. NAT'L ASS'N OF COUNTIES, *supra* note 97.

159. CITIZEN ADVOCACY CTR., *supra* note 93.

160. See NAT'L ASS'N OF COUNTIES, *supra* note 97.

161. ILL. CONST. art. VII, § 7.

162. Norris, *supra* note 9 (reporting on a presentation to the Jackson County land use and economic development committee).

163. FRACK FREE ILL., *supra* note 156.



sary or expedient for the promotion of health . . . .”<sup>164</sup> They argue that there is no case law limiting the scope of this power such that counties would be barred from regulating or banning fracking, and, since they see fracking as a clear danger to public health, counties would have power under this section of the code to regulate or ban the practice.<sup>165</sup> The proponents of county authority further contend that, since fracking “causes the emission of air contaminants” and is an “operation, activity or use causing air contamination,” section 5-1061 of the Counties Code—the air contaminant provision—provides authority to regulate or ban fracking.<sup>166</sup> Finally, they maintain that there is abundant evidence that fracking activities cause pollution to waterbodies<sup>167</sup> and, therefore, county authority to regulate or ban fracking is also supported by section 5-15015 of the Counties Code. This section provides that

The county board shall have the authority to prevent pollution of any stream or any other body of water within the county and to cause any and all parties, persons, firms and corporations to cease any and all pollution of any such streams or body of water within such county.<sup>168</sup>

The Illinois Counties Code does not provide the clear statutory authorization to permit oil and gas mining that is provided to municipalities, and the HFRA does not provide counties with express authority similar to that of municipalities to regulate fracking within their boundaries. In fact, the HFRA may have intended to do the opposite, by limiting county power to the right to request a hearing on a specific permit and file written objections.<sup>169</sup> The Illinois Attorney General’s Office has not addressed the issue of local control of fracking,<sup>170</sup> but the IDNR, the agency tasked with admin-

164. SAFE, *Memorandum of Law: Counties have the power to ban fracking*, <http://www.dontfractureillinois.net/memorandum-of-law-counties-have-the-power-to-ban-fracking/> (last visited Jan. 13, 2015); 55 ILL. COMP. STAT. 5/5-1052 (2012).

165. SAFE, *supra* note 164.

166. *Id.*; 55 ILL. COMP. STAT. 5/5-1061 (2012).

For the purposes of lessening or preventing the discharge of air contaminants, a county board may prescribe by ordinance for the regulation of . . . (3) the conduct or carrying on of uses of land which causes the emission of air contaminants, and (4) the abatement of an operation, activity or use causing air contamination.

*Id.*; see generally Norris, *supra* note 9.

167. SAFE, *supra* note 164; see generally Norris, *supra* note 9.

168. SAFE, *supra* note 164; 55 ILL. COMP. STAT. 5/5-15015 (2012).

169. McClelland, *supra* note 156.

170. Tim Landis, *Primary Referendum on Fracking Puts Southern Illinois County in National Spotlight*, THE ST. J.-REG. (Mar. 15, 2014, 9:30 PM), <http://www.sjr.com/article/20140315/News/140319541>.

istering the HFRA, does not believe that the statute provided this authority to the counties.<sup>171</sup> Commenters to the draft administrative rules developed by the Agency contended that the rule discriminated against rural residents by granting fewer rights to county governments than to municipal governments, and requested an equal role for county governments.<sup>172</sup> In response, the IDNR suggested that the exclusion was not likely a mistake as the fact that counties are not considered municipal authorities and are distinct from cities, towns, and villages “is a fundamental aspect of Illinois local governmental law, of which the General Assembly can be presumed to have been aware when it passed the HFRA.”<sup>173</sup> Therefore, it does not appear that counties in Illinois have the power to explicitly regulate fracking activities in their boundaries even though the majority of fracturing activities in Illinois are likely to occur outside of municipalities where the county is the local government unit.<sup>174</sup>

If counties in Illinois have not been granted the same authority and power as municipalities to regulate fracking under the HFRA, the question that needs to be asked is, why not? No discussion of this issue appears to have been included in the legislative history of the HFRA, but the answer may have its roots in the historically poor opinion of county government.<sup>175</sup> One of the main perceived weaknesses of county government is the lack of central authority.<sup>176</sup> Typically, the county government consisted of a large county board operating as both a legislative and executive body and often acting at cross-purposes with other independent elected officials.<sup>177</sup> As one author observed in 1977, “the structure of Illinois county government remains today strictly a nineteenth century, small, rural-oriented organizational framework” that has not been modernized to account for population growth, urbanization, or the need for a stronger executive branch.<sup>178</sup> The drafters of the Illinois Constitution of 1970 recognized the need for mod-

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171. ILL. DEP’T OF NATURAL RESOURCES, *supra* note 155.

172. *Id.* at 81.

173. *Id.* at 82.

174. FRACK FREE ILL., *supra* note 156.

175. See generally Laurel Lunt Prussing, *County Government in Downstate Illinois*, in ILLINOIS LOCAL GOV’T 79 (James F. Keane & Gary Koch eds., Southern Illinois University Press 1990) (noting that “[c]ounties are often viewed as the backwater of American politics” and “[t]heir archaic structure makes them ill-equipped to wrestle with the toughest issues of both urban and rural America”).

176. *Id.* at 94. “The lack of central executive authority and responsibility often has contributed to inefficiency, waste, and lack of accountability to taxpayers.” *Id.*

177. *Id.*

178. James M. Banovetz, *County Home Rule in Illinois: A Status Report and Perspective on the Future*, in COUNTY HOME RULE IN ILLINOIS 97 (David R. Beam, Alex Pat-takos & David Tobias eds., Center for Governmental Studies, Northern Illinois University 1977).

ernization in county government when they limited county home rule to those counties with an elected chief executive officer.<sup>179</sup> This tie to home rule—with only the experience of urban Cook County as a reference—has possibly impeded efforts by several counties to change to a county executive form of government.<sup>180</sup> In recognition of this difficulty, the Illinois General Assembly passed a law in 1985 granting counties the option of creating a county executive officer without home rule, and in 1988 Will County became the first, and only county to date, to adopt this option.<sup>181</sup>

Regardless of the rationale behind denying counties the authority to directly regulate fracking under the HFRA, there is no denying that impacts from fracking operation will be felt most strongly at the local level. The rights of county governments to address the concerns of their communities must be considered.

#### B. SHOULD COUNTIES HAVE SIMILAR REGULATORY AUTHORITY AS THAT GRANTED MUNICIPALITIES?

Accepting the position that Illinois counties do not currently possess the authority to regulate fracking under the HFRA or other existing statutes, and considering the possible historical bias against county government, should counties be provided the same authority as municipalities to regulate fracking? This question is pertinent, as much of the future fracking activity in Illinois will more likely occur in unincorporated county areas rather than municipalities.<sup>182</sup>

Contrary to the negative perception of county government expressed previously, the responsibilities of county governments have increased over the past several decades and county governments have become more active and engaged in planning and coordinating local activities.<sup>183</sup> This enhanced recognition of county responsibility can be seen in the authority granted to

179. Stephanie Cole, *Home Rule in Illinois: No. 4. Local Actions*, 1 ILL. ISSUES 243, 244 (1975), available at <http://www.lib.niu.edu/1975/ii7508243.html>.

180. Banovetz, *supra* note 178, at 105.

181. Prussing, *supra* note 175, at 95.

182. FRACK FREE ILL., *supra* note 156; McClelland, *supra* note 156.

183. *Foreword to COUNTY HOME RULE IN ILLINOIS* iii (David R. Beam et al. eds., Northern Illinois Univ. Ctr. for Governmental Studies 1977).

The responsibilities of, and demands on, county government are increasing. No longer is the county a 'residual' body of government, providing for those services or areas not covered by other units. Rather the county is a very active force at the local level in providing for the order and general welfare. Moreover, the county increasingly finds itself in a position where it is the central planning, organizing and coordinating body for intergovernmental efforts.

*Id.*

counties in 2007 to establish standards and regulate the siting of wind turbines within their jurisdiction.<sup>184</sup> Why should counties not have similar authority to regulate fracking operations? It seems unreasonable that a county that might, for example, have passed an ordinance prohibiting a wind turbine from being “erected within 1,400 feet of any building would be required to allow fracking operations within 500 feet . . . from residences, churches and schools.”<sup>185</sup> They claim that, since counties and municipalities similarly tax residents and provide social services and infrastructure, counties should similarly have equal input regarding the permitting of fracking in their jurisdictions.<sup>186</sup> They claim that counties and municipalities similarly tax residents, provide social services and infrastructure, and counties should similarly have equal input regarding the permitting of fracking in their jurisdictions.<sup>187</sup> Moreover, they contend that “[t]he regulatory differentiation between the rights of residents in municipalities vs. counties creates a group of second class citizens” and “[t]hese second class citizens have fewer rights in their ability to participate and ultimately determine the type and quality of energy extraction allowed in their neighborhoods.”<sup>188</sup>

Certainly, preemption limits the abilities of local governments to act to protect the health of their residents and the local environment;<sup>189</sup> yet, the ability of a local government to deal with environmental problems is desirable “because the impact of such problems tends to be highly context-specific (i.e., dependent on climate, demography, topography, and numerous other factors).”<sup>190</sup> This concern for local control of local impacts also extends beyond environmental to economic concerns because, while the economic benefits of fracking extend from the local to the state level, the economic concerns remain at the local scale.<sup>191</sup> As discussed earlier with regard to municipalities, local governments should retain a meaningful level of control over fracking because they have the best understanding of how

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184. 55 ILL. COMP. STAT. 5/5-12020 (2012).

185. Julie Wernau, *Illinois Counties can do Little but Brace for Fracking's Impact*, CHI. TRIB. (Mar. 17, 2013), [http://articles.chicagotribune.com/2013-03-17/business/chicago-illinois-counties-can-do-little-but-brace-for-frackings-impact-20130524\\_1\\_fracking-oil-boom-illinois-counties](http://articles.chicagotribune.com/2013-03-17/business/chicago-illinois-counties-can-do-little-but-brace-for-frackings-impact-20130524_1_fracking-oil-boom-illinois-counties).

186. FRACK FREE ILL., *supra* note 156.

187. *Id.*

188. ILL. DEP'T OF NATURAL RES., *Hydraulic Fracturing Regulatory Act Admin. Rules Written Comments – Document Nos.: 22269-22740*, at 22271, <http://www.dnr.illinois.gov/OilandGas/Documents/PublicComments22269-22740.pdf> (last visited Jan. 25, 2015) [hereinafter *Document Nos.: 22269-22740*].

189. Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 497 (1999).

190. *Id.* at 505.

191. Fitzgerald, *supra* note 83.

this activity will affect their communities.<sup>192</sup> And, if notification and input into the permitting process is important for municipalities,<sup>193</sup> why should the law be silent as to those unincorporated counties where most fracking is likely to occur?

Supporters of county rights maintain that the legislature clearly recognized that local governmental units should have decision-making power over whether fracking should be allowed in their jurisdictions.<sup>194</sup> This recognition should extend to county governments, and county residents should be allowed an important role in that decision-making.<sup>195</sup> Supporters have promoted legislation that would amend section 1-35 of the HFRA to provide counties with the same authorization to provide consent as granted to cities, villages, and incorporated towns and defines requirements to be followed by counties in consideration of a request for consent; however, the bill died in committee when the legislative session ended in January 2015.<sup>196</sup> This bill would also have set out a public process for all counties and municipalities for discussing the approval or disapproval of consent for fracking permits within their jurisdictions.<sup>197</sup> The guidelines that would have been established in the proposed legislation for consideration of consent or denial of a permit application, including the required consultation with state agencies and public notification and input, would help to alleviate concerns with any perceived distrust of county governance. This, or a similar bill, should be reintroduced in the General Assembly because legislation would provide the most direct means to establish county authority to regulate fracking in the state.

If promoters of county authority are unsuccessful in amending the HFRA to expand section 1-35 to provide similar regulatory powers to county governments, one additional option may be available for county officials to pursue. There is a special legislation provision within the Illinois Constitution which provides that “[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.”<sup>198</sup> This provision was addressed by the Illinois Supreme Court in

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192. Kitze, *supra* note 91, at 387.

193. *Document Nos.: 22269-22740*, *supra* note 188, at 22271.

194. FRACK FREE ILL., *supra* note 156.

195. ILL. PEOPLE'S ACTION, *In The Fracking Fight, Whose Side Are You On? We Just Found Out* (Feb. 22, 2013), <http://www.illinoispeoplesaction.org/blog/in-the-fracking-fight-whose-side-are-you-on-we-just-found-out>.

196. S.B. 3326, 98th Gen. Assemb., 2nd Sess. (Ill. 2014); FRACK FREE ILL., *supra* note 156.

197. S.B. 3326, 98th Gen. Assemb., 2nd Sess. (Ill. 2014); FRACK FREE ILL., *supra* note 156.

198. ILL. CONST. art. IV, § 13.

the case of *In re Petition of the Village of Vernon Hills*,<sup>199</sup> where the court invalidated a special classification statute applicable only within counties with populations between 500,000 and 750,000 when similar situations occurred within other counties with differing populations.<sup>200</sup> The court held that the purpose of this provision is to prevent arbitrary legislative classifications and to preclude “the General Assembly from conferring a special benefit or exclusive privilege on a person or group of persons to the exclusion of others similarly situated.”<sup>201</sup> The burden would be on a county challenging the HFRA on this provision to establish the arbitrariness of the distinction between county and municipal authority to regulate fracking.<sup>202</sup> The county’s case would be tenuous because “[c]lassifications drawn by the General Assembly are always presumed to be constitutionally valid, and all doubts will be resolved in favor of upholding them.”<sup>203</sup> Justification might reasonably be made that the classification in the HFRA was done because municipalities had previously existing regulatory authority under the Municipal Code to permit oil and gas mining while similar authority is not included in the Counties Code. A special classification will only survive a challenge where the classification is (1) “founded upon a rational difference of situation or condition existing in the persons or objects upon which the classification rests, and (2) where there is a rational and proper basis for the classification in view of the objects and purposes to be accomplished.”<sup>204</sup> Any county challenging the HFRA classification treating municipalities more favorably than counties would need to provide evidence supporting a contention that it was similarly situated to a municipality as far as impact and ability to regulate. And, even a valid argument against the special legislation may fail if there is a reasonable justification for the classification. For example, the difficulty in challenging a statute on this provision was confirmed in *Elementary Sch. Dist. 159 v. Schiller*,<sup>205</sup> where the court validated a special statute allowing for detachment of property from one school district and annexation to another if certain specified criteria were met, con-

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199. *In re Vill. of Vernon Hills*, 658 N.E.2d 365 (Ill. 1995).

200. *In re Vill. of Vernon Hills*, 658 N.E.2d at 371.

201. *Id.* at 367.

202. *Id.*

203. *Id.* The court additionally concluded that:

If any set of facts can be reasonably conceived that justifies distinguishing the class to which the statute applies from the class to which the statute is inapplicable, then the General Assembly may constitutionally classify persons and objects for the purpose of legislative regulation or control, and may enact laws applicable only to those persons or objects.

*Id.*

204. *In re Vill. of Vernon Hills*, 658 N.E.2d 365, 368 (Ill. 1995).

205. *Elementary Sch. Dist. 159 v. Schiller*, 849 N.E.2d 349 (Ill. 2006).

cluding there was an adequate rational basis for the classification in that the property was better served in the new district.<sup>206</sup>

Considering the likelihood that a majority of the fracking activity in Illinois will be directed toward the unincorporated counties, the extent of the public interest and concern in fracking activities in the state, and the still uncertain level of local environmental and economic impact that may result from this process, it is only fair that county governments be provided with the same authority as municipalities to control this process. Amending the HFRA, as proposed by Senate Bill 3326, would provide the most direct and clear means to provide this authority.

### C. CURRENT PROTECTIONS FOR COUNTIES UNDER THE COUNTIES CODES AND THE HFRA

While counties do not have the authority to directly regulate fracking activities within their jurisdictional boundaries, they currently do have other options available to them to influence the location of drilling wells and other aspects of the fracking industry. While courts have routinely invalidated zoning ordinances attempting to regulate activities subject to state environmental regulations, they have preserved the local governments' right to designate particular districts where those activities could be carried out.<sup>207</sup> Normally, local governments protect themselves from the impacts of activities such as fracking through comprehensive planning, zoning, and subdivision and site plan regulations.<sup>208</sup>

Counties may regulate land use within county boundaries<sup>209</sup> and may adopt zoning ordinances as a proper exercise of their police powers, thereby imposing a reasonable restraint on the use of private property.<sup>210</sup> Section 5-12001 of the zoning provision of the Counties Code authorizes counties to restrict the location and use of structures and land for industry and other uses “[f]or the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county,” and “lessening or avoiding congestion in the public streets and

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206. *Elementary Sch. Dist. 159*, 849 N.E.2d at 365.

207. Clifford B. Levine & Shawn N. Gallagher, *State and Local Regulation of Oil and Gas Operations: Drilling the Maze of Preemption, Severed Mineral Estates and Surface Owner Rights*, 29 ENERGY & MIN. L. INST. § 11.02(1)(b) (2008).

208. Jessica A. Bacher & John R. Nolan, *Mitigating the Adverse Impacts of Hydraulic Fracturing: A Role for Local Zoning?* (July 8, 2014), available at [http://www.ulib.niu.edu:4142/sol3/papers.cfm?abstract\\_id=2463717](http://www.ulib.niu.edu:4142/sol3/papers.cfm?abstract_id=2463717) (unpublished manuscript forthcoming in ZONING & PLANNING L. REPORT) (manuscript at 1); Kitze, *supra* note 91, at 391. Traditionally, local governments could control fracking through the zoning power. *Id.*

209. 55 ILL. COMP. STAT. 5/5-12001 (2012).

210. *Galt v. Cook County*, 91 N.E.2d 395, 403 (Ill. 1950).

highways.”<sup>211</sup> Thus, a county may be able to amend its zoning ordinance to exclude fracking from certain areas or limit such activities to specific zones.<sup>212</sup> The zoning ordinance is presumptively valid and the burden of proof is on the party attacking the ordinance to provide clear evidence that it is unreasonable.<sup>213</sup> But, an ordinance that conflicts with the spirit or purpose of state law would be invalid.<sup>214</sup> The Illinois Supreme Court in *La Salle National Bank v. Cnty. of Cook* identified six factors to be considered in determining whether a zoning ordinance is valid:

(1) [t]he existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public, (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, (5) the suitability of the subject property for the zoned purposes . . . , and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property.<sup>215</sup>

Three years later the court, in *Sinclair Pipe Line Co. v. Vill. of Richton Park*, added two more factors to be considered: “the care with which the community has undertaken to plan its land use development, and the evidence or lack of evidence of community need for the use proposed by the plaintiff.”<sup>216</sup>

There is nothing in the HFRA expressly preempting or precluding county zoning ordinances that would restrict fracking activities to specified areas within their boundaries. In fact, section 1-120 of the HFRA specifically provides that “[c]ompliance with this Act does not relieve responsibility

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211. 55 ILL. COMP. STAT. 5/5-12001 (2012).

212. Shaun A. Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, AM. PLANNING ASS’N PLANNING & ENVTL. L., July 2012, at 3, 5, available at <http://blogs.law.harvard.edu/environmentallawprogram/files/2013/03/Municipalities-and-Hydraulic-Fracturing-Trends-in-State-Preemption.pdf>.

213. *Galt*, 91 N.E.2d at 404.

214. Walter G. Wright, *Energy: Ability of an Illinois City to Prohibit Oil and Gas Drilling*, MITCHELL WILLIAMS ENVTL., ENERGY AND WATER BLOG (Mar. 15, 2012), <http://www.mitchellwilliamslaw.com/energy-ability-of-an-illinois-city-to-prohibit-oil-and-gas-drilling>.

215. *LaSalle Nat’l Bank v. Cnty. of Cook*, 145 N.E.2d 65, 69 (Ill. 1957).

216. *Sinclair Pipe Line Co. v. Vill. of Richton Park*, 167 N.E.2d 406, 411 (Ill. 1960).



for compliance with the Illinois Oil and Gas Act, the Illinois Environmental Protection Act, and other applicable federal, State, and local laws.<sup>217</sup> But, as discussed in Section III.B. with regard to municipalities, while counties may be able to restrict the location of fracking operations within their boundaries, their zoning power likely does not extend to completely excluding fracking.

Beyond limiting the location of fracking activities within its boundaries, a county might also use its zoning powers to address potential impacts from fracking by imposing restrictions relating to such concerns as truck traffic, road construction and maintenance, noise levels, odors, visual impacts, and water use and disposal.<sup>218</sup> Such ordinances are more likely to survive challenge, as they address areas of traditional local concern, particularly if they do so in a neutral manner rather than targeting fracking operations.<sup>219</sup>

While this zoning authority can help reign in uncontrolled fracking,<sup>220</sup> counties may face a significant difficulty in using their zoning authority to control fracking operations because the HFRA and the new administrative rules set a swift timeline for processing applications once they are received, and the process to establish zoning ordinances is lengthy.<sup>221</sup> Another concern that may hinder a county government from initiating a zoning ordinance is a cultural bias in many rural areas against government control.<sup>222</sup> Consequently, the easiest, most appropriate, and complete means for counties to achieve local control over fracking operations is state-level legislative action amending the HFRA to include counties in the regulatory provision of section 1-35.

Currently, under the HFRA, opportunities for county governments to be included in the decision-making process for proposed fracking operations are limited. Applicants for fracking permits must provide notice of the permit application to any county in which a well site is proposed to be located, along with specific notice to all landowners within 1,500 feet of the proposed well site, as well as publication of a notice of the permit application within a newspaper published in each such county.<sup>223</sup> Applicants must also provide a county within which fracking operations are proposed with a copy of the applicant's well site safety plan, which addresses safety measures to be taken during the fracking operation for the protection of

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217. 225 ILL. COMP. STAT. 732/1-120 (2012 & Supp. 2013).

218. Goho, *supra* note 212, at 5.

219. *Id.* at 8.

220. Benjamin E. Apple, Note, *Mapping Fracking: An Analysis of Law, Power, and Regional Distribution in the United States*, 38 HARV. ENVTL. L. REV. 217, 229 (2014).

221. Wernau, *supra* note 185.

222. *Id.*

223. 225 ILL. COMP. STAT. 732/1-40(c) (2012 & Supp. 2013).

those persons on site as well as the general public,<sup>224</sup> and traffic management plan, which identifies the anticipated roads to be used for access to and from the well site.<sup>225</sup>

Following receipt of notice of a pending permit application, a county opposed to fracking may express its opposition to fracking and exert influence on the permitting consideration through a provision of the HFRA allowing them to submit written objections and request a public hearing.<sup>226</sup> Specifically, section 1-50(a) provides that:

When a permit application is submitted to conduct high volume horizontal hydraulic fracturing operations for the first time at a particular well site, any person having an interest that is or may be adversely affected, . . . or the county board of a county to be affected under a proposed permit, may file written objections to the permit application and may request a public hearing during the public comment period established under subsection (a) of Section 1-45 of this Act.<sup>227</sup>

The IDNR will then make a determination of whether to issue a permit based upon review of the completed permit application and documents required under section 1-35 of the HFRA, and any comments provided during the public comment period and at any requested public hearing.<sup>228</sup> Following its review of the application, supporting documents, and public comments, the Department will then issue a permit “only if the record of decision demonstrates that: . . . (4) the proposed hydraulic fracturing operations will be conducted in a manner that will protect the public health and safety and prevent pollution or diminution of any water source.”<sup>229</sup>

Current provisions in the HFRA do not provide counties with adequate opportunity to exert local influence into the decision-making process.<sup>230</sup> Counties should have a larger role in the permitting process because the needs of residents in affected counties are better addressed at the local level than at the state level through the IDNR regulatory process.<sup>231</sup>

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224. 225 ILL. COMP. STAT. 732/1-35(b)(12) (2012 & Supp. 2013).

225. 225 ILL. COMP. STAT. 732/1-35(b)(15) (2012 & Supp. 2013).

226. 225 ILL. COMP. STAT. 732/1-50 (2012 & Supp. 2013).

227. 225 ILL. COMP. STAT. 732/1-50(a) (2012 & Supp. 2013).

228. 225 ILL. COMP. STAT. 732/1-53(b) (2012 & Supp. 2013).

229. 225 ILL. COMP. STAT. 732/1-53(a) (2012 & Supp. 2013).

230. McClelland, *supra* note 156.

231. *See Document Nos.: 22269-22740, supra* note 188, at 22271; Kitz, *supra* note 91, at 387.

## V. CONCLUSION

High-volume horizontal hydraulic fracturing, fracking, is an oil and gas mining process that is entering Southern Illinois, and the HFRA was enacted to address this modern mining process and provide regulatory authority over these activities within Illinois.<sup>232</sup> While the law has been considered among the strictest in the country, many fracking opponents remain concerned over the implementation of the law through the adopted administrative rules.<sup>233</sup>

Although there are acknowledged economic benefits to both the state and local communities from fracking operations, evidence of potential harm to local environments and the public health of residents continue to come forward.<sup>234</sup> As a result, fracking opponents continue to pursue a statewide ban in Illinois through the legislative process.

Meanwhile, though the majority of potential harms from fracking will be felt at the local level, existing laws provide an unequal playing field for local control over fracking operations in the state. While municipalities are granted regulatory authority over fracking permits, counties in Illinois, where the majority of fracking activities are likely to occur, are not granted similar authority.<sup>235</sup> County level control over fracking is currently limited to the right to enact local zoning ordinances to limit the location of zoning activities and to address related local impacts from fracking, though these efforts may be hampered by the timeframe needed to move through the zoning process and traditional anti-government control attitudes in rural communities.<sup>236</sup> Otherwise, counties only have the procedural right to file objections and request a public hearing during the permit process.<sup>237</sup> Considering the potential economic, environmental, and public health impacts that may occur at the local level as a result of fracking operations, it is unreasonable for county governments to be excluded from the opportunity to exert more local control and influence over the process. County governments are best qualified to protect the interests of residents within their communities.

The most appropriate means of obtaining local control for counties would be through amendments to the HFRA and the Counties Code explicitly granting counties the same regulatory authority over fracking that is currently provided to municipalities. At the same time, section 1-35 of the HFRA should be further amended to provide guidelines to local govern-

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232. See *supra* notes 10-25 and accompanying text.

233. See *supra* notes 28 and 36 and accompanying text.

234. See *supra* Section II.B.2.

235. See *supra* Section IV.A.

236. See *supra* notes 207-21 and accompanying text.

237. See *supra* notes 223-29 and accompanying text.

ments regarding the process they must follow in granting or denying consent to particular permit applications. Absent legislative change, counties may want to consider challenging their exclusion through the special law provision of the state Constitution, though the likelihood of success of such a challenge is low due to the high burden on the challenging party to overcome the presumption of validity of the current law.

There are potential harms from any form of energy production, ranging from the aesthetic to the environment and public health, and those consequences need to be weighed against the need for energy.<sup>238</sup> The key is to manage natural gas extraction in a way that protects natural resources and public health and safety.<sup>239</sup> While the HFRA may provide a strong starting point for state level control of fracking operations, local concerns and interests must be addressed at the local level, and county governments need to be provided with a stronger voice in regulating this activity.

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238. Fershee, *supra* note 59, at 819, 860-61.

239. *Id.* at 861.