

**Municipal Authority to Stop Fossil Fuel Expansion in New York**

**Prepared for Stand**

**Pace Energy and Climate Center  
January 21, 2021**

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## **I. Introduction**

Pursuant to Stand's engagement with Pace Energy and Climate Center, this memorandum analyzes municipal authority to stop fossil fuel expansion in the State of New York.

This memorandum proceeds according to the following outline:

- Question Presented
- Scope of Fossil Infrastructure and Legal Authority Considered
- General Jurisdictional Principles of Pre-Emption
  - Federal Pre-Emption under the Commerce Clause
  - Federal Legislation for Natural Gas and Electricity
  - New York State Authority under select federal laws
- New York State Preemption and Resulting Municipal Authority
  - New York State Regulation of Fossil Fuels
  - Municipal Authority to Limit Fossil Fuel Infrastructure Expansion and Consumption
- Sample Municipal Legislation

### **Question Presented**

This memorandum answers the question of what bases of authority do New York municipalities possess to prevent expansion of fossil fuel infrastructure or the continued use of fossil fuels?

In order to answer this question beyond generally applicable legal principles, the breadth of all fossil fuels necessitates selectively analyzing certain fossil fuel systems. Upstream infrastructure and downstream uses are subject to distinct legal treatment, and thus we consider these separately.

Based on preliminary research and in consultation with Stand, we have identified the most promising avenues for advocacy for both upstream and downstream components. For upstream, we focus on natural gas infrastructure. Guided by the law, advocacy is most effectively directed at the state level, concerning both water and carbon emissions. For downstream consumption of fossil fuels, we focus on buildings and transportation systems, at the municipal levels, more broadly predicated on air pollution, aesthetics, land use, and decarbonization.

The following details the scope of this memorandum in relation to the fossil fuel supply chain.

## **A. Scope**

The scope of this memorandum is defined by four metrics: fuels, phase of the value chain, geography, and laws. As noted above, selected representative cases will be analyzed within the scope of these four metrics.

In terms of fuels, fossil fuels encompass gas, oil and coal fuels and related technologies. More particularly, these include:

- Natural gas LNG, CNG, biogas for buildings, industrial and power.
- Oil for transportation, power and industrial applications.
- Coal for power and industrial applications

In terms of phases of the value chain, we consider fossil fuel production, transport, storage, and consumption elements. For example, for oil fuel, phases of the value chain include production wells, processing plants, pipeline and trucking operations, gas station infrastructure, and ultimately consumption in vehicles or boilers.

As a practical matter, our discussion of upstream infrastructure will focus mainly on natural gas as the gas industry is seeking to expand in New York, whereas coal and oil infrastructure have likely peaked.

In terms of geographic scope, this memorandum confines its analysis to New York State municipalities in regards to municipal efforts to limit fossil fuel expansion. Because municipalities are constrained by federal and state laws, it considers these laws to the extent necessary to address the question of municipal authority to regulate fossil fuel infrastructure and consumption. However, the memorandum does consider other state jurisdictions when analyzing constitutional principles surrounding federal preemption.

In terms of laws, this memorandum will consider jurisdictional laws governing the respective authority of the federal government, states and municipalities. In New York State, jurisdiction among municipalities differ depending on the terms of the municipal charter, in particular New York City possesses greater autonomy in certain respects than other municipalities and thus may be considered a special case. The memorandum further considers substantive laws relating to energy, environment, land use and zoning, climate change, and laws to protect public welfare, safety and health.

## **B. Overview of the Value Chain**

Different phases of the value chain (i.e. production, transmission, distribution) are governed by various laws and different governmental authorities. As such, it would be helpful to provide an overview of the value chain starting from production and ending with the consumer before discussing which laws govern the respective segments of the value chain. Because our upstream discussion will focus predominately on natural gas, the overview below will be in the context of the natural gas value chain specifically. However, the electricity value chain is

analogous to natural gas in that electricity is generated by a central source, flows over long distances through a transmission network, and is then distributed to the consumer.<sup>1</sup>

Generally, natural gas travels from wells to end consumers through a series of pipelines. These pipelines consist of flowlines, gathering lines, transmission lines, distribution lines and service lines. Flowlines collect gas from a single well in a producing field and transport the gas to nearby storage tanks, compressor stations, processing plants, or gathering lines.<sup>2</sup> These lines are usually narrow and carry raw gas at a pressure around 250 pounds per square inch (psi).<sup>3</sup> Gathering lines collect gas from multiple flowlines and move it to a centralized point, such as a processing facility.<sup>4</sup> Gathering lines are generally larger than flowlines and operate at a pressure of about 715 psi.<sup>5</sup> After the gas is processed, it is routed into transmission pipelines.

Transmission pipelines carry natural gas across larger distances, both between states and across multiple states, and operate between 200 to 1,200 psi.<sup>6</sup> Next, the gas is transferred to distribution pipelines, which transport gas from the larger transmission lines to the end users at lower pressures.<sup>7</sup> Lastly, service pipelines connect individual customers to the distribution lines.

Additionally, compressor stations are an integral part of the natural gas system. As natural gas moves through a pipeline, pressure is reduced through distance, friction, and differences in elevation.<sup>8</sup> As such, compressor stations are placed strategically within the gathering and transmission pipeline network to maintain the pressure and flow of gas.<sup>9</sup>

Section II will discuss general principals of federal preemption to provide an understanding as to how federal governmental authority limits state and municipal authority to regulate fossil fuels. It will then discuss federal regulation of the interstate electric and gas value chain, as well as the authority retained by the states through express language in federal statutes.

## II. Overview of Federal Preemption

Municipal authority to limit fossil fuel infrastructure expansion is constrained by the respective regulatory powers of the federal and state governments. Although states, and by extension municipalities, retain certain powers to regulate matters within their purview, the federal government preempts state authority in areas implicating interstate commerce and national

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<sup>1</sup> Vineet Kulkarni, *Utilities Overview: How Does the Electricity Supply Chain Work?*, MARKET REALIST, <https://marketrealist.com/2016/11/utilities-overview-electricity-supply-chain-work/> (last visited Sept. 1, 2020).

<sup>2</sup>Wendy Lyons Sunshine, *Know the Natural Gas Lines Before Digging* (Nov. 4, 2018), <https://www.thebalancesmb.com/types-of-natural-gas-pipelines-1182593>

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Understanding Natural Gas Compressor Stations, PENNSTATE EXTENSION (Mar. 26, 2015), <https://extension.psu.edu/understanding-natural-gas-compressor-stations>

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

concern, and states in turn preempt municipalities in matters generally deemed to be of statewide significance or otherwise reserved to state prerogative. In this sense, municipal authority can be conceived as the residual authority not preempted by the federal and state governments.

In this section, we first discuss the general principle of federal preemption of state authority in the contexts of the federal Constitution's Commerce Clause and the specific acts of Congress governing electricity and natural gas. We then discuss state authority to regulate interstate fossil fuel infrastructure notwithstanding federal preemption due to express preservation of states' power to do so in federal statutes.

### **A. Supremacy Clause Reservation of Federal Authority to Regulate Interstate Commerce.**

The Supremacy Clause of the United States Constitution specifies that federal law is supreme to state law. According to this provision, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."<sup>10</sup>

Through the Supremacy Clause, federal law may preempt state and municipal laws in areas reserved to the federal government, either by express reservation of authority in the Constitution, by congressional act, or by implication of the federal government passing legislation that state or municipal regulation would conflict with.

One of the most important reservations of federal authority is the United States Constitution's Commerce Clause, which reserves to Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>11</sup>

Because most economic activities have implications for trade between the states in a complex nationally integrated economy, Congress has relied on the Commerce Clause to expand federal legislative jurisdiction broadly, and the courts have generally upheld the steady expansion of federal power for over 200 years.<sup>12</sup>

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<sup>10</sup> United States Constitution, Article VI, Paragraph 2.

<sup>11</sup> United States Constitution, Article I, Section 8, Clause 3.

<sup>12</sup> In *Gibbons v. Ogden*, 22 U.S. 1 (1824), the first major case testing the limits of federal authority under the Commerce Clause, the Supreme Court unanimously overturned New York's grant of an exclusive license for operating a steamboat line between New York and New Jersey where Congress had passed a law governing licensing of coastal navigation. Significantly, the Court's interpreted the Commerce Clause broadly in favor of federal authority: "[T]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 22 U.S. 196.

The Supreme Court has extended the application of the Commerce Clause to local activity that may have an economic effect on interstate commerce. In *Wickard v. Filburn*, 317 U.S. 111 (1942), "[E]ven if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"<sup>13</sup> Significantly, according to the Supreme Court's broad interpretation, an otherwise isolated activity that may not in itself be a commercial act can come within the scope of the Commerce Clause if its cumulative effect on intrastate markets are substantial.<sup>14</sup>

Through the broad reservation of federal authority contained in the Commerce Clause, states and municipalities are prohibited from adopting laws or taking actions that conflict with federal law,<sup>15</sup> regulate conduct in a field Congress intended to occupy exclusively,<sup>16</sup> or otherwise frustrate Congressional purposes in promoting interstate commerce.<sup>17</sup> Further, under the so-called "dormant" Commerce Clause, even in the absence of federal law, courts may invalidate state actions that discriminate against trade from other states.<sup>18</sup>

While the Supremacy and Commerce Clauses of the Constitution seemingly provide a bright line against which to judge federal versus state authority, as we will see in the context of specific cases of states and municipalities legislating on policing matters presumptively within state purview under Tenth Amendment to the Constitution, reconciling federal and state authority requires a close reading of statute and sometimes a complex balancing of legislative prerogatives.

In absence of a federal legislation, courts will apply the balancing test established in *Pike v. Bruce Church, Inc.* to determine whether a state or local law unduly burdens interstate commerce, and is therefore invalid.<sup>19</sup> Under the *Pike* test, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>20</sup>

Under *Pike*, where states regulate "even-handedly," meaning in a non-protectionist or discriminatory manner to interstate commerce, in order to effectuate a legitimate interest such as safety or environmental protection, "[s]tate laws frequently survive this *Pike* scrutiny ...."<sup>21</sup>

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<sup>13</sup> *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

<sup>14</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005), citing *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), in upholding federal authority to forbid the cultivation and use of marijuana in compliance with California state law.

<sup>15</sup> *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U.S. 409 (1986).

<sup>16</sup> *California v. ARC America Corp.*, 490 U.S. 93 (1989).

<sup>17</sup> *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

<sup>18</sup> See *Gibbons v. Ogden* 22 U.S. 1 (1824).

<sup>19</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>20</sup> *Pike*, 397 U.S. at 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, (1960)).

<sup>21</sup> *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008).



Thus, this balancing of interests in determining authority for regulating environmental matters creates opportunities for environmental advocacy strategy.

The following section will discuss federal statutes passed by Congress to occupy the field of interstate regulation of the electricity and gas value chain, thereby preempting state and municipal authority to do so.

## **B. An Overview of Federal Regulation of the Electric and Gas Value Chain**

In energy markets, federal authority could potentially extend to production/generation, transmission, distribution and consumption if it is deemed to effect interstate commerce. However, notwithstanding federal preemption, state authority may still extend to interstate regulation in areas where Congress has expressly preserved the states' power to do so.

### **1. Federal Electric Regulation**

Electricity markets are regulated by both federal and state agencies based on a complex and evolving set of rules, which are complicated by rapidly advancing distributed energy power generation resources that enable consumers to both use and produce power.

State authorities exercise jurisdiction over power generation siting and operation, and regulating retail rates for customers within each respective state.

Under the Federal Power Act, the federal government, through the Federal Energy Regulatory Commission (FERC), exercises authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce."<sup>22</sup> Energy transmitted in interstate commerce is defined as energy transmitted from a state and consumed at any point outside thereof.

As public utilities have expanded their operations to produce or purchase, interconnect systems, and ultimately sell power across state lines, FERC's jurisdiction has expanded relative to state regulators.<sup>23</sup> Thus, when a utility sells power for resale, that sale is presumed to be directed to interstate power markets and therefore subject to federal jurisdiction unless otherwise specifically exempted by Congress.<sup>24</sup>

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<sup>22</sup> 16 U.S.C. §§ 791a, 824-824h.

<sup>23</sup> See *Federal Power Comm. v. Southern California Edison Co.*, 376 U.S. 205 (1964); See also *Federal Power Comm. v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

<sup>24</sup> *Federal Power Comm. v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (interconnection of Florida Power & Light's lines with those of another Florida utility, which in turn were connected with the lines of a Georgia utility supported the Federal Power Commission's conclusion that Florida Power & Light's electricity had reached Georgia, thus establishing jurisdiction).

The Public Utility Regulatory Policies Act (PURPA) exempts from FERC’s interstate jurisdiction sales of electricity by generators that sell directly to an end user within the state, and any sales by qualifying cogeneration units and power generators of 20 MW or smaller.<sup>25</sup> PURPA requires state regulatory authorities to compel electric utilities to purchase electricity and capacity offered by qualified generators at rates not to exceed the “incremental cost to the electric utility of alternative electric energy” as determined by state authorities.<sup>26</sup> The statute defines “incremental cost” to mean “the cost ... such utility would generate or purchase from another source”<sup>27</sup> – commonly referred to as “avoided cost” as determined by wholesale pricing.

These carveouts exempting small-scale distributed energy resources of 20 MWs or smaller, have allowed states to adopt net metering and other laws governing the sale of power to the grid for these generators. FERC decisions in 2001 and 2009 held that net metering arrangements for small generators did not constitute sales in the wholesale market, but rather an accounting arrangement subject to state authority.<sup>28</sup> These FERC decisions treating net metering as accounting – as opposed to pricing – enabled states to adopt net metering statutes that credit small DER generation at retail rates, much higher than wholesale rates that arguably more closely approximates the “full avoided cost” specified in PURPA. As a result, most states have adopted net metering statutes that credit electricity generated by DERs at the higher retail rates, which has accelerated the adoption of renewable energy.

A 2020 petition filed with FERC by the New England Ratepayers Association demands that FERC declare “exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter” irrespective of PURPA’s 20 MW exemption. The petition argues that the net metering laws are forcing utilities to purchase the power at greater than avoided cost in violation of PURPA, with the effect that state net metering laws are highly regressive for low-income electricity consumers. A declaration of exclusive federal jurisdiction could empower FERC to invalidate net metering statutes that provide more generous retail rates. Such a ruling would render many distributed renewables uneconomic, undermining clean energy, and strengthening fossil generation.

## 2. Federal Gas Regulation

Congress enacted the Natural Gas Act (NGA) to preempt the field of interstate transportation of natural gas, providing FERC with comprehensive and exclusive authority to regulate interstate

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<sup>25</sup> 18 C.F.R. Sec. 292.601

<sup>26</sup> 16 U.S.C. 824a-3(b).

<sup>27</sup> 16 U.S.C. 824a-3(d).

<sup>28</sup> Sun Edison, LLC, 129 FERC ¶ 61146, 61618 (2009) (net metering is lawful when there is no net transfer of electricity from a customer to a utility at the end of a billing period); MidAmerican Energy Co., 94 FERC ¶ 61340, 62261 (2001) (federal law governs when an electricity-producing customer has sold more power to the utility than the customer has purchased from the utility over the course of the billing period).

natural gas facilities.<sup>29</sup> Pursuant to the NGA, FERC regulates the transmission and sale of natural gas for resale in interstate commerce; approves the siting and abandonment of interstate natural gas pipelines and storage facilities; and reviews proposals to build liquified natural gas (LNG) terminals.<sup>30</sup> Additionally, under the Natural Gas Pipeline Safety Act (NGPSA), the Department of Transportation is authorized to regulate the safety aspects of construction and operation of all natural gas facilities.<sup>31</sup> Once natural gas pipeline projects are operating, the Department of Transportation's Pipeline and Hazardous Material Safety Administration (PHMSA) regulates, monitors, and enforces safety.<sup>32</sup>

The following is a list of several cases decided by federal and state courts interpreting the Natural Gas Act and the Pipeline Safety Act to preempt state and municipal governments' attempts to regulate gas infrastructure, demonstrating the challenges states and municipalities face in limiting the expansion of interstate natural gas infrastructure. Importantly, some of these cases interpreted other federal laws under which states possess certain authority over environmental management (as discussed in the next sections), in all cases ruling that state actions are preempted.

- In *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008), the Fourth Circuit held that the Natural Gas Act preempted a county zoning amendment prohibiting LNG facilities from being located in the County's Chesapeake Bay Critical Area, an area regulated by the State of Maryland and its subdivisions under the Coastal Zone Management Act (CZMA). The State had failed to meet the CZMA's requirement that it obtain federal approval for inclusion of the area under the state plan under the CZMA.
- In *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458 (1st Cir. 2009), the First Circuit held that Rhode Island's licensing laws regulating dredging in state waters were preempted by the Natural Gas Act where dredging of a river was part of the development of an LNG terminal development plan approved by Federal Energy Regulatory Commission.
- In *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570 (D. Md. 2013), a federal district court held that the Natural Gas Act preempts a Maryland's municipality's zoning and other laws regulating the proposed siting, construction, and operation of a natural gas compressor station to be located in the town that would serve an interstate pipeline as part of a multi-state project. The court held the municipal laws directly affecting the siting, construction, or operation of the

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<sup>29</sup> Russell Kooistra, *How FERC Confused the Role of State and Local Authorities in Regulating Certified Natural Gas Pipelines*, J. OF ENERGY & ENV. LAW, Winter 2015, at 59, <https://gwjeel.com/wp-content/uploads/2015/07/jeel-vol-6-issue-1-kooistra-article.pdf>.

<sup>30</sup> *What FERC Does*, FERC, <https://www.ferc.gov/about/what-ferc/what-ferc-does> (last visited Sept. 1, 2020).

<sup>31</sup> Jacquelyn Pless, *Making State Gas Pipelines Safe and Reliable: An Assessment of State Policy*, NATIONAL CONFERENCE OF STATE LEGISLATURES (NSCL) (Mar. 2011), <https://www.ncsl.org/research/energy/state-gas-pipelines-federal-and-state-responsibili.aspx>

<sup>32</sup> *Id.*

proposed compressor station are null and void as applied to the plaintiff, except for those laws or regulations enacted pursuant to the State's rights under the Coastal Zone Management Act of 1972 (16 U.S.C. § 1451 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.), or the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.).

- In *Mountain Valley Pipeline, LLC v. Wender*, 337 F. Supp. 3d 656 (S.D.W. Va. 2018), a federal district court held that the Natural Gas Act preempted a county's zoning code regulating siting, construction, and operation of compressor station approved by the FERC.
- In *Colorado Interstate Gas Co. v. Wright*, 707 F. Supp. 2d 1169 (D. Kan. 2010), a federal district court ruled that Kansas statutes regulating gas storage safety that would regulate the facilities of natural gas companies used in transportation of natural gas in interstate commerce are preempted by the Natural Gas Act and the Pipeline Safety Improvement Act.
- In *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), a federal district court ruled that Seattle's attempts to impose additional safety requirements in renewal of a franchise and indemnity agreement for lateral lines feeding a pipeline transporting natural gas between states that had previously exploded causing loss of life and property and environmental damage is preempted by the federal Pipeline Safety Improvement Act. The Pipeline Safety Improvement Act permits states to regulate intrastate pipelines and impose safety requirements in addition to the federal standards only if: 1) the state authority applies and is approved by the Department of Transportation through an annual certification process; and 2) the standards are compatible with the federal standards.

Importantly, the court also held that Seattle may still contractually require the pipeline operator to perform safety tests of the pipeline if the city has acted as a municipal proprietor rather than as a regulator. *Bldg. Constr. Trades Council v. Associated Builders Contractors*, 507 U.S. 218, 227, 229, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993); *Associated Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1182-83 (9th Cir. 1998). To determine whether a government entity is acting in a proprietary or a regulatory capacity, the court considered whether "the challenged action essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances" and whether "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Aeroground, Inc. v. City County of San Francisco*, 170 F.Supp.2d 950, 957 (N.D.Cal. 2001) (quoting *Cardinal Towing Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)). In the present case, the court held that the city's interest was not that of a private market participant that owns a pipeline or

competes in the pipeline market or a related market, but rather in its sovereign capacity as owner of the streets and land under which the Seattle Lateral runs. See *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987) (holding that the City of Santa Monica is not a market participant in the setting of franchise fees for purposes of the dormant Commerce Clause because the City holds the streets, under which the pipeline runs, in its sovereign capacity). Thus, Seattle made the safety demands pursuant to its general duty to protect the public health and safety — a duty grounded in the City's regulatory, police power — rather than in an attempt to protect its role in the real estate market.

Notwithstanding the cases detailed above, states do retain some authority over certain aspects of gas transport and distribution within their territories. However, it is worth noting that this authority does not extend beyond that of which that has been expressly granted, and states must abide by all federal mandates, such as minimum standards or procedural mandates, in carrying out this authority. The following Sections C and D, will discuss congressional grants of authority to states in a series of federal statutes.

### **C. Power Retained by the States to Regulate Interstate Natural Gas Infrastructure**

Pipeline safety statutes allow states to assume safety authority for intrastate pipelines, hazardous liquid pipelines and underground storage through certifications with the Pipeline and Hazardous Materials Safety Administration (PHMSA)<sup>33</sup> However, to participate in PHMSA Programs, states must adopt minimum federal pipeline safety regulations, but may also enact more stringent regulations for pipelines and underground natural gas storage.<sup>34</sup>

Additionally, under the Hinshaw exemption of the NGA, where the interstate gas entering the state will all be consumed within the state, the state Public Service Commission may exert its jurisdiction with respect to pipelines transporting such gas, which would otherwise be regulated by FERC.<sup>35</sup> To qualify for this exemption, a pipeline “must satisfy a three-part test: (1) the pipeline must receive gas within or at the boundary of the state from another person; (2) all the gas received must be consumed within the state; and (3) the pipeline’s rates, facilities, and service must be subject to regulation by the state commission.”<sup>36</sup>

The NGA also expressly carves out states’ rights to exercise their authority under three federal statutes: The Coastal Zone Management Act, the Clean Air Act, and the Federal Water Pollution

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<sup>33</sup> *State Programs Overview*, U.S. DEPT. OF TRANS., (Last visited Apr. 7, 2020) <https://www.phmsa.dot.gov/working-phmsa/state-programs/state-programs-overview>.

<sup>34</sup> *Id.*

<sup>35</sup> Philip Weinberg, et al., *Environmental Law and Regulation in New York* §15:15 (2d ed.9A West’s N.Y. Prac. Series 2009).

<sup>36</sup> *Id.*; 15 U.S.C. §717(c) (2020)

Control Act.<sup>37</sup> The following Section D will discuss the degree of state authority, and resulting influence over interstate natural gas infrastructure, under these three statutes in more detail.

#### **D. Federal Environmental Laws and the State Authority Expressly Granted Thereunder**

Federal environmental laws regulate energy infrastructure, both explicitly delineating jurisdiction between federal and state authorities, and by operation of constitutional principles.

The federal Environmental Protection Agency (EPA) exercises authority under environmental laws to impose regulations for environmental safety and human health that may set minimum requirements for, or preempt, state regulation of fossil fuels for power generation, transportation, building consumption, industrial and other applications. Notwithstanding the supremacy of the federal government in regulating environmental conditions, federal environmental laws preserve varying degrees of state authority, such as allowing states to set more stringent standards than federal regulations, set standards for pollutants that are not regulated under federal regulation, and to delegate certain responsibilities for enforcement to qualifying state agencies (known as primacy) upon application or satisfaction of certain criteria. For our purposes, this section will discuss state authority, and potential avenues by which states may regulate fossil fuel infrastructure, under the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act.

##### **1. Coastal Zone Management Act**

The Coastal Zone Management Act (CZMA) allows coastal states to develop a coastal management program setting out enforceable policies that guide federal actions that impact coastal lands and waters.<sup>38</sup> Once a state's management program is approved, federal projects within the state's coastal areas, or that would affect the state's coastal land or resources, must comply with the state's Coastal Management Program.<sup>39</sup> Notably, New York exercised its authority under the CZMA to reject plans for a FERC- approved LNG plant in the Long Island Sound.<sup>40</sup> The proposed plant was planned to be located 10.5 miles from Branford, CT and would have been the only floating natural gas plant in the U.S., at 1,200 feet long with the capacity to hold 8 billion cubic feet of natural gas.<sup>41</sup> New York objected to the project after finding inconsistencies with enforceable policies of the state's Long Island Sound Coastal Management Program.<sup>42</sup> The owner of the proposed plant, Broadwater Energy LLC, appealed

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<sup>37</sup> 15 U.S.C. § 717(b)(d)(3) (2020)

<sup>38</sup> Jason Bressler, *Blocking Interstate Natural Gas Pipelines: How to Curb Climate Change While Strengthening the Nation's Energy System*, 44 COLUM. J. OF ENV. LAW 137, 145 (2019).

<sup>39</sup> *Id.*

<sup>40</sup> Hashim Rahman, *Plans to Build Natural Gas Plant Off Connecticut Coast Are Rejected*, CT GREEN SCENE (Apr. 22, 2008), [https://ctgreenscene.typepad.com/ct\\_green\\_scene/2008/04/plans-to-build.html](https://ctgreenscene.typepad.com/ct_green_scene/2008/04/plans-to-build.html).

<sup>41</sup> *Id.*

<sup>42</sup> Misty A. Sims, *New York's Objection to Broadwater Energy LNG Project Upheld*, 8:2 SAND BAR 13 (2009), <http://nsglc.olemiss.edu/SandBar/SandBar8/8.2broadwaterlng.htm>.

New York's objection, but the U.S. Secretary of Commerce denied the appeal, and Broadwater ultimately abandoned the plans for the facility.<sup>43</sup>

## 2. Clean Air Act

States have also exercised delegated authority under the Clean Air Act, which can similarly be used to restrict fossil fuel consumption in states and cities. Sections 111<sup>44</sup> and 112<sup>45</sup> allow EPA to transfer primary implementation and enforcement authority for most of the federal standards to state, local, or tribal regulatory agencies.

Two programs of the Clean Air Act could be relevant for purposes of our evaluation: mobile sources and State Implementation Plans. The Clean Air Act mobile source program regulates vehicles, setting federal standards for vehicle air emissions, with a provision allowing the State of California to set their own standards that other states may adopt. The Obama Administration harmonized federal standards to the more rigorous California standards, which the Trump Administration is attempting to reverse. The mobile source program vests authority at the state level and does not allow states to depart from the approved standards, however this may not preclude states and municipalities from mandating adoption of electric vehicles or other modes of transport that would require a shift away from fossil fuels.

State Implementation Plans (SIPs) are air quality control plans that are administered by the states and approved by the EPA, and must meet federal minimum standards for ambient air quality. Federal standards set a floor (minimum standards), which states may exceed (enact stricter standards). SIPs details how the state or local agencies will attain, maintain, and enforce federal air quality standards. Additionally, under the CAA, new or modified sources of air pollution must obtain both federal and state permits.<sup>46</sup> As such, states can use the CAA permitting power to halt construction of interstate natural gas pipelines by denying permits for compressor stations that are necessary for pipelines to function.<sup>47</sup>

A state or municipality could also potentially adopt measures, such as requiring electrification of home appliances or prohibiting the burning of highly polluting fuels, that help the state meet or exceed the SIP requirements, consistent with the CAA. While actions could be challenged on federal preemption grounds under the Commerce Clause or other basis, the Clean Air Act itself does not appear to bar such state or municipal actions provided there are independent grounds of authority to do so.

## 3. Clean Water Act

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<sup>43</sup> *Id.*

<sup>44</sup> 42 U.S.C. § 7411

<sup>45</sup> 42 U.S.C. § 7412

<sup>46</sup> Bressler, *supra* note 38, at 145.

<sup>47</sup> *Id.* (“States have been reluctant to utilize this option, despite encouragement from natural gas components”).

The Clean Water Act (CWA) authorizes the approval of state programs in lieu of federal administration and sets forth the underlying authorities that states possess in regulating water pollution under the Act. These include the authority to issue pollution discharge permits in conformance with (or stricter than) federal requirements (minimum technology based and water quality-based controls), authority to provide for public participation in the permit issuance process, authority to develop a pretreatment program to regulate indirect discharges of pollutants into municipal treatments works, and the authority to adopt state water quality standards.<sup>48</sup> Additionally, the CWA, allows states to “veto” a federal permit or license by refusing to certify, under Section 401, that the construction and operation of the permitted projects would not violate the state’s water quality standards.<sup>49</sup>

Section 401(a) of the Clean Water Act reads as follows:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.<sup>50</sup>

Notably, CWA Section 401’s reference to “federal license or permit” is broad and includes a certificate authorizing the construction of a pipeline project under Section 7 of the NGA that

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<sup>48</sup> Colburn T. Cherney & Karen M. Wardzinski, *State and federal Roles Under the Clean Water Act*, NAT. RESOURCES & ENV. 19 (1986).

<sup>49</sup> Bressler, *supra* note 38, at 140.

<sup>50</sup> 33 U.S.C. § 1341(a) (2020); 15 U.S.C. § 717(f) (2020).



may result in a discharge into navigable waters.<sup>51</sup> As such, states have successfully blocked gas pipelines by denying water quality certificates for failure to meet applicable water quality standards. Importantly, for purpose of this memorandum, it is worth noting that this authority is reserved to and exercised by states, not municipalities.

The New York Department of Environmental Conservation (“NYSDEC”), which administers the state’s environmental laws, has denied the water quality certification permits in three cases summarized below concerning the Millennium, Constitution and Transcontinental pipelines.

**Constitution.** In its *Constitution Pipeline 2016* ruling, NYSDEC denied Constitution Pipeline’s application for an application for issuance of a certificate of water quality as required under Section 401 of the Clean Water Act, on the grounds that the company had provided insufficient information to demonstrate that its proposal complies with the State’s water quality standards. Specifically, the company failed to provide information requested by NYSDEC as to alternative construction methods, routes, and designs, and safety and other measures that would mitigate the potential impacts of the project. When challenged on appeal, the Second Circuit upheld the NYSDEC’s denial, finding that it had not acted arbitrarily or capriciously by requiring information concerning alternatives. Importantly, the decision affirmed New York State’s rights under the Clean Water Act, reconciling federal supremacy with delegated rights to states in the context of natural gas pipelines:

*We note also that while the Natural Gas Act generally preempts state laws, it states that “[e]xcept as specifically provided[,] nothing” in the NGA “affects the rights of States under the [CWA] (33 U.S.C. § 1251 et seq.),” 15 U.S.C. § 717b(d). CWA § 511, in turn, preserves the states’ authority to determine issues of a planned project’s effect on water quality.*<sup>52</sup>

**Millennium.** In its *Millennium Pipeline 2017* ruling, the NYSDEC denied Millennium Pipeline Company, LLC’s permit application for issuance of a certificate of water quality as required under Section 401 of the Clean Water Act in order to construct an interstate natural gas pipeline “on the grounds that FERC’s environmental review of the project was ‘inadequate and deficient’ because the FERC’s environmental assessment failed to consider downstream greenhouse gas (GHG) emissions from Millennium’s electric generator shipper.”<sup>53</sup> NYSDEC cited recent changes in the law as a result of the *Sierra Club et al. v. FERC* decision, requiring the FERC to consider the upstream and downstream impacts of natural gas pipeline approval

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<sup>51</sup> Steven A. Weiler & Marcia A. Stanford, *New York’s Denial of Water Quality Certification for Three FERC-Authorized Pipelines: Flagrant Fiat or Valid Veto?*, 39 ENERGY LAW J. 503, 510 (2018), [https://www.ebanet.org/assets/1/6/21-503-540-Weiler\\_%5bFINAL%5d.pdf](https://www.ebanet.org/assets/1/6/21-503-540-Weiler_%5bFINAL%5d.pdf).

<sup>52</sup> *Constitution Pipeline v. N.Y. State Dep’t of Env’tl. Conservation*, 868 F.3d 87 (2nd Cir. 2017).

<sup>53</sup> Thomas Berkman, N.Y. State Dep’t of Env’tl. Conservation, Valley Lateral Project Notice of Decision (August 30, 2017). Available at: <https://www.dec.ny.gov/permits/110485.html> (Accessed August 2, 2020). See also, S. Scott Gaille, *How Political Risk Associated with Climate Change Is Impacting Pipeline Construction Agreements*, 40 Energy LJ 111, 119 (2019).

decisions, in particular environmental impacts, including greenhouse gas emissions.<sup>54</sup> On this basis, NYSDEC determined Millennium’s application was incomplete due to lack of a complete environmental assessment quantifying the resulting greenhouse gas emissions, and denied the application.

On appeal, the Second Circuit ruled that NYSDEC’s failure to act on the permit application waived the requirement under Section 401 of the Clean water Act. Section 401 of the Clean Water Act provides that “[i]f the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived with respect to such Federal application.” The Second Circuit further ruled that, although the subject pipeline is located entirely within New York and will deliver gas only in New York, the FERC possesses exclusive jurisdiction over the pipeline because it will receive out-of-state gas from the Millennium mainline.<sup>55</sup>

***Transcontinental.*** In its 2020 Transcontinental ruling, NYSDEC denied the Transcontinental Gas Pipe Line Company (“Transco”) a permit to build a twenty-six inch gas pipeline as part of its Northeast Supply Enhancement (“NESE”) Project.<sup>56</sup> The final denial was issued after a series of denials without prejudice to enable Transco to refile a complete application, and then provide additional information.<sup>57</sup> The pipeline was intended to transport natural gas from Pennsylvania, through New Jersey, and running underwater through New York terminating the Rockaway Peninsula in Queens, NY.<sup>58</sup> NYSDEC’s review concerned the New York part of the pipeline, known as the Raritan Loop. As in the prior cases described, Transco applied to NYSDEC for a water quality certification under New York State water quality standards, which Transco is obligated to obtain as a condition of FERC’s approval of the project, pursuant to Section 401 of the Clean Water Act. NYSDEC ultimately denied the permit on the grounds that Transco had failed to demonstrate compliance with State water quality standards. Specifically, NYSDEC found that Transco’s burying the pipeline only 4 feet below the seabed rather than the minimum six feet standard adopted for wind and other projects, and Transco’s adoption of a

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<sup>54</sup> *Sierra Club et al. v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

<sup>55</sup> *In re N.Y. State Dep’t of Env’tl. Conserv. v. FERC*, 884 F.3d 450 (2nd Cir. 2018)

<sup>56</sup> Daniel Whitehead, N.Y. State Dep’t of Env’tl. Conservation, Northeast Supply Enhancement Project Notice of Denial of Water Quality Certification (May 15, 2020). Available at: *Northeast Supply Enhancement (NESE) Project*, NYSDEC (Last visited Mar. 17, 2020), <https://www.dec.ny.gov/permits/115980.html>.

<sup>57</sup> On June 30, 2017, Transco originally submitted a Joint Application for Permits for the NESE Project. NYSDEC denied the original June 30, 2017 WQC application without prejudice on April 20, 2018, due to incomplete information and an ongoing environmental review by FERC. On May 16, 2018, Transco submitted a new WQC application to NYSDEC, which was supplemented on multiple occasions with further additional information, including in response to requests from NYSDEC. A public comment period and public statement hearings were held in early 2019 and NYSDEC subsequently denied the 2018 WQC application (PDF) without prejudice on May 15, 2019. On May 17, 2019, Transco submitted a new WQC application to NYSDEC for the NESE Project, which is the subject of the final denial. See *Northeast Supply Enhancement (NESE) Project*, NYSDEC (Last visited Mar. 17, 2020), and N.Y.S. DEPT. OF ENV. CONSERVATION, DEC ID 2-9902-00109/00004, NOTICE OF DENIAL OF WATER QUALITY CERTIFICATION TO TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC (May 15, 2019).

<sup>58</sup> *Northeast Supply Enhancement (NESE) Project*, NYSDEC (Last visited Mar. 17, 2020) <https://www.dec.ny.gov/permits/115980.html>.

default 500-foot mixing zone for modelling would not provide adequate protection of the environment and the shellfish resources from sediment contamination from mercury and copper as well as arsenic, silver, nickel, lead, zinc, PCB and dioxin/furan pollutants during construction and operation. Finally, NYSDEC expressed concern that the project could interfere with the future siting of offshore wind projects, that the greenhouse gas emission produced by the project would be inconsistent with or interfere with CLCPA mandates to reduce greenhouse gas emissions and require increased use renewables and ultimately decarbonize the electricity sector, and that alternatives to the project should be considered.

Taken together, these cases suggest that NYSDEC has authority to block pipelines based on denial of a water certification, provided it acts within the statutorily mandated one-year period in order to prevent waiver of the state's certification under Section 401 of the Clean Water Act.<sup>59</sup> However, the State of Washington has denied a water permit under Section 401 of the Clean Water Act to a proposed port terminal to export coal from six interior states to markets in Asia. The denial was based on the likely impacts of the project on water quality, as well as air pollution, rail safety and vehicle traffic. The coal states have petitioned the U.S. Supreme Court to invalidate Washington's decision, exercising its "original jurisdiction" in resolving disputes between states. If the Supreme Court elects to decide the case, the decision could shape the jurisprudence regarding state authority and federal preemption in environmental cases.

In the previous sections, we discussed federal preemption and the resulting limitations imposed on state and local governments to limit interstate fossil fuel expansion. However, we also discussed the preservation of state authority under the NGA with respect to various environment laws that delegate authority to states to regulate environmental matters, and how this authority has been used to halt natural gas infrastructure.

Next, we will discuss the New York State preemption doctrine by which the state government constrains municipal authority. Then, we will explain New York State regulation of the electric and gas value chain, and the accompanying statutory limitations imposed on local governments. We will then focus on state and local government efforts to limit greenhouse gas emissions, thereby decreasing consumption and hindering fossil fuel infrastructure expansion.

### **III. Overview of New York State Preemption and Sources of Municipal Authority**

New York State law has its own doctrine of preemption that defines the respective jurisdiction of the state relative to local governments. The division of authority between the state and local governments have been the subject of debate and litigation for many years, the critical

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<sup>59</sup> In relation to this line of cases, the D.C. Circuit in *Hoopa Valley Tribe v. FERC*, 913 F. 3d 1099 (2019) ruled that the one-year period to rule is absolute, and that the practice of withdrawing and resubmitting applications to renew the one-year review period are impermissible and will trigger waiver of the state right to review.

challenge is to balance the preservation of local authority with the need to enable the state to address issues of state-wide concern that transcend local boundaries.<sup>60</sup>

### **A. Division of Authority Under New York State Constitution and Home Rule Law**

Municipal authority flows from the state.<sup>61</sup> The New York State Constitution provides that the legislature shall define municipal government powers.<sup>62</sup> Article 32 of the New York State Constitution prescribes certain powers of local governments, specifying that they will maintain their own legislatures and have certain authority to raise taxes, issue debt within proscribed limits, and maintain their own staff. For purposes of this memorandum concerning energy infrastructure, the following powers specifically belonging to local governments are particularly important:

- The acquisition, care, management and use of its highways, roads, streets, avenues and property.
- The acquisition of its transit facilities and the ownership and operation thereof.
- The government, protection, order, conduct, safety, health and well-being of persons or property therein.<sup>63</sup>

The powers of local government are further supplemented by Article 10 of the New York State Home Rule Law, which reiterates these powers and endows local government with an additional important grant of authority:

- The protection and enhancement of its physical and visual environment.<sup>64</sup>

Together, these provisions place the environment, transportation, public property and traditional police powers, including those associated with health, safety and property, within the purview of local government. Yet, local government authority remains subject to the limitation that their actions are “not inconsistent with the provisions of the constitution or not inconsistent with any general law.”<sup>65</sup> Thus, notwithstanding the power of local government to legislate on specific issues, the State retains the right to pass “general” laws concerning matters

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<sup>60</sup> New York State Bar Association Committee on the New York State Constitution, Report and Recommendations Concerning Constitutional Home Rule, 2016.

<sup>61</sup> *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (“In general, towns have only the lawmaking powers the Legislature confers on them . . . Without legislative grant, an attempt to exercise such authority is ultra vires and void.”).

<sup>62</sup> New York State Constitution, Article IX, § 2(b)(1) (“Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.”)

<sup>63</sup> New York State Constitution, Article 32 (c)(6), (7) and (10).

<sup>64</sup> New York Home Rule Law, Article 2, Section 10(ii)(a)(11).

<sup>65</sup> New York Home Rule Law, Article 2, Section 10(i).

otherwise reserved to municipalities where the legislation regulates matters common to local governments generally.<sup>66</sup>

The State's power to enact general laws is further supplemented by the power to adopt "special" laws that may apply to some or even a single local government if procedural conditions are satisfied, specifically requiring a super-majority of the legislature, request of the local government plus majority of the State legislature or Governor's declaration of emergency.<sup>67</sup> These provisions giving the State legislature broad authority to pass general and special laws are contained in Section 2(b)(2) of Article IX:

[T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a "general law" that "in its terms and in effect applies to all counties . . . [,] all cities, all towns or all villages."

The New York State legislature regularly passes general laws regulating matters within the jurisdiction of local governments, tipping the balance in favor of state authority relative to municipal home rule.<sup>68</sup>

## **B. New York Judicial Preemption and State Concern Doctrines**

State powers to legislate have been further expanded to the detriment of municipal authority through the two judicial doctrines – the "preemption" and "State concern" doctrines.

Like its federal counterpart, New York's preemption doctrine limits the power of local governments to act in conflict with a State statute, to act in areas in which the State has acted comprehensively such as by the adoption of detailed state regulation, or there is evidence it intends to occupy the area, either express or implied. *See Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983). For example, in *Consolidated Edison Co. v. Town of Red Hook*, the court invalidated a municipal law determining whether to permit a site study for a proposed steam electric generation plant on

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<sup>66</sup> New York Home Rule Law, [Section 2(b)(2) of Article IX].

<sup>67</sup> New York Home Rule Law, [Section 2(b)(2) of Article IX].

<sup>68</sup> New York State Bar Association Committee on the New York State Constitution, Report and Recommendations Concerning Constitutional Home Rule, 2016.

the grounds that it was preempted by New York State's Public Service Law that vests siting decisions for power plants in a state authority.

Closely related to preemption doctrine, the judicial "State concern" doctrine similarly enables the State legislature to regulate areas otherwise reserved to municipal government when the issue is of sufficient state concern. Established in *Adler v. Deegan* 251 N.Y. 467, 167 N.E. 705 (1929), the New York Court of Appeals upheld the State's Multiple Dwelling Law, which established minimum standards for fire-prevention, light, air and sanitation for private housing. Although ostensibly a law of general application, it de facto applied only to New York City, without complying with statutory requirements for special legislation. The Court upheld the State legislature's intrusion into local government matters on the grounds that the Multiple Dwelling Law addressed a "state concern."

Significantly, the state interest doctrine is regularly used to supersede local government home rule principles in the traditionally local domains of zoning, land use and environment.<sup>69</sup>

In the following section we will discuss state regulation of fossil fuel infrastructure at the production, transmission, and distribution phases of the value chain, as well as the accompanying limitations imposed on local governments, and the authority retained by local governments under the Home Rule Law and zoning authority throughout the value chain.

## **IV. New York State Regulation of the Electric and Gas Value Chain**

### **A. State Regulation at the Production Phase**

The NGA does not apply to "any other transportation or sale of natural gas, or to the local distribution of natural gas or to the facilities use for such distribution, or to the production or gathering on natural gas."<sup>70</sup> Consequently, at the production stage, wells, gathering lines and processing facilities are regulated by the state in which they are located.<sup>71</sup>

In New York, the Oil, Gas and Solution Mining Law (OGSML) grants authority to the NYSDEC to regulate the state's oil, gas, and mining industry to foster the development of New York's natural resources, prevent waste, and to protect the rights of private landowners and the public.<sup>72</sup> Pursuant to the OGSML, the NYSDEC has the exclusive authority to issue a permit to drill and to require, and to set standards for, the drilling, operating, casing, plugging and re-

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<sup>69</sup> See John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. LAW REV. 497 (1993).

<sup>70</sup> 15 U.S.C. § 717(c) (2020).

<sup>71</sup> E. Allison & B. Mandler, *U.S. Regulation of Oil and Gas Operations*, AMERICAN GEOSCIENCES INSTITUTE (2018), [https://www.americangeosciences.org/sites/default/files/AGI\\_PE\\_Regulations\\_web\\_final.pdf](https://www.americangeosciences.org/sites/default/files/AGI_PE_Regulations_web_final.pdf).

<sup>72</sup> Thomas Hooker, *Zoning Out Fracking: Zoning Authority Under New York State's Oil, Gas and Solution Mining Law*, 40 FORDHAM URB. L.J. 869, 880 (2012).

plugging of wells, as well as the power to specify required distances between wells.<sup>73</sup> Furthermore the OGSML provides: "[T]he provisions of [the OGSML] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."<sup>74</sup>

Although the provision appears to grant complete authority to NYSDEC to override all local laws that relate to gas production, the Court of Appeals has adopted a much more narrowly tailored construction of the provision. In *Matter of Wallach v. Town of Dryden*, the Court of Appeals upheld amendments to the Town of Dryden's zoning ordinance, which banned all activities related to the exploration for, and the production or storage of, natural gas and petroleum, as valid because the amendments were not preempted by the OGSML. The Court noted that while the OGMSL preempted local laws that purport to regulate the actual operations of oil and gas activities, the zoning ordinance did not seek to regulate the details or procedures of those industries, and instead, the ordinances establish permissible and prohibited land uses within the town for the purpose of regulating land generally.<sup>75</sup> Though the town's regulation would have an incidental effect on the oil, gas, and solution mining industries, the ordinances were not the type of regulatory provision that the legislature intended to preempt.<sup>76</sup>

Importantly, the Court emphasized that the state legislature enacted the Municipal Home Rule Law, to empower local governments to pass laws both for the "protection and enhancement of [their] physical and visual environment."<sup>77</sup> The legislature likewise authorized towns to enact zoning laws for the purpose of fostering "the health, safety, morals, or the general welfare of the community."<sup>78</sup> As such, a "municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests on the community as a whole."<sup>79</sup>

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<sup>73</sup> *Id.* In particular, the DEC is empowered to: "[r]equire the drilling, casing, operation, plugging and replugging of wells and reclamation of surrounding land in accordance with the rules and regulations of the department; enter and plug or re-plug abandoned wells when the owner has violated Department regulations; compel operators to furnish the Department with a bond to ensure compliance; order the immediate suspension of drilling operations that are in violation of Department regulations; require operators to file well logs and samples with the Department; grant well permits for oil and gas drilling; issue orders governing the appropriate spacing between oil and gas wells to promote efficient drilling and prevent waste; oversee the integration of oil and gas fields to prevent waste; execute leases on behalf of the State for oil and gas exploration and production; and issue permits for underground storage reservoirs." *Matter of Wallach v. Town of Dryden*, 16 N.E. 3d 1188, 1199 (N.Y. 2014) (*internal citations omitted*).

<sup>74</sup> N.Y. Env't Conserv. Law § 23-0303(2) (2020)

<sup>75</sup> *Matter of Wallach*, 16 N.E. 3d at 1197.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1194.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (*citing* *Matter of Gernatt Asphalt Prods v. Town of Sardinia*, 664 N.E.2d 1226 (N.Y. 1996)).

## B. State Regulation at the Generation Phase

Major electric generating facilities larger than 25MW, and not subject to review by the Office of Renewable Energy Siting<sup>80</sup>, are sited in accordance with Article 10 of New York's Public Service Law. Pursuant to Article 10, the Board on Electric Generating Siting and the Environment ("Siting Board"), which consists of five members from state agencies and two ad-hoc members from the locality in which the proposed facility is to be located, has the authority to issue all state and municipal approvals for a proposed Major Electric Generating Facility.<sup>81</sup>

Importantly, the extent to which Article 10 preempts municipal law is broad and as such, the law preempts the issuance of most state and local permits that would otherwise be applicable to the proposed facility, with the exception of air, water, and resource recovery permits typically issued by NYSDEC and certain local approvals such as subdivision approval, local grant of property rights, or an approval to withdraw water from a municipal system.<sup>82</sup> Pursuant to Section 172, "...no state agency, municipality or any agency thereof may, except as expressly authorized under this article by the board, require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility with respect to which an application for a certificate hereunder has been filed..."<sup>83</sup> Additionally, although the law mandates that the Siting Board must determine that the proposed facility is designed to operate in compliance with applicable state and local laws before issuing a certificate approving the project, the Siting Board may refuse to apply any local laws applicable to the proposed facility if it finds "as applied to the proposed facility, such is unreasonably burdensome in view of existing technology or the needs of or costs to rate payers whether located inside or outside of such municipality."<sup>84</sup> Similarly, to the OGSML, these two provisions have been interpreted to preempt local procedural laws, such as a local ordinance requiring additional public hearings, but only preempts local substantive laws, such as setback requirement in a zoning law, if the Siting Board decides that the local law is "unreasonably burdensome."<sup>85</sup> Importantly, however, "[T]he board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder."<sup>86</sup>

Notwithstanding its broad preemptive powers, Article 10 provides for an extensive public participation process. During the pre-application phase of the siting process, an applicant must develop a "Public Involvement Program Plan" summarizing actions that will be taken by the

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<sup>80</sup> The Office of Renewable Energy Siting (the Siting Office), created by the Accelerated Renewable Energy Growth and Community Benefit Act (the Act), is the central forum for siting and permitting new large-scale renewable energy facilities, equal to or larger than 25 MW, in New York State.

<sup>81</sup> Sam Laniado, *Siting Renewable and Other Electric Generation Under Article 10 of the New York Public Service Law*, NYSBA The New York Environmental Lawyer (2016).

<sup>82</sup> *Id.*

<sup>83</sup> Pub. Serv. § 172.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



applicant to educate, inform and involve the public.<sup>87</sup> Additionally, the applicant must pay a fee to fund a pre-application intervenor account, equal to three hundred and fifty dollars for each thousand kilowatts of generating capacity and up to two hundred thousand dollars.<sup>88</sup> Eligible municipal and local parties may be able to obtain some of the intervenor funding to participate in the pre-application scoping process and in the proceeding before the Siting Board to consider the Article 10 application.<sup>89</sup>

### C. State Regulation at the Transmission Phase

States also have the authority to regulate intrastate electric and gas transmission. In New York, “Major Utility Transmission Facilities” are subject to the siting jurisdiction of the New York Public Service Commission (PSC) pursuant to Article VII of the Public Service Law.<sup>90</sup> Major electric transmission facilities are lines with a design capacity of 100 kilovolts (kV) or more extending for at least 10 miles, or 125 kV and over, extending a distance of one mile or more.<sup>91</sup> Major gas transmission facilities are natural gas pipelines extending at least one thousand feet long and operating at 125 psi or more.<sup>92</sup>

Before any such facility may be constructed, Article VII requires the issuance of a Certificate of Environmental Compatibility and Public Need (CECPN).<sup>93</sup> Notably for our purposes, one of the required findings the PSC must make before issuing the CECPN is that “the location of the facility as proposed conforms to applicable state and local laws”.<sup>94</sup> The statute also provides that all local laws and associated regulations, which would include local zoning ordinances of any local jurisdictions through which the proposed project would pass, are binding on the PSC.<sup>95</sup> However, the PSC is given the authority to “refuse to apply any local ordinance, law, resolution, or other action, or any regulation issued thereunder, or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of needs of consumers whether located inside or outside of such municipality.”<sup>96</sup> Additionally, Section 130 of Article VII strips municipalities’ ability to require any further

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<sup>87</sup> Peter Manning, *Article 10 – A Revised Process for Siting of Major Electric Generating Facilities in New York State*, OCCA Discussion Paper (May 2013).

<sup>88</sup> Pub. Serv. § 163(4)(a).

<sup>89</sup> *Id.*

<sup>90</sup> N.Y. Pub. Serv. Law §§ 120-135 (2020)

<sup>91</sup> New York State Public Service Commission, *The Certification Review Process for Major Electricity and Fuel Gas Transmission Facilities 1*, [https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/a021e67e05b99ead85257687006f393b/\\$FILE/19336071.pdf/Article%20VII%20Guide%20Web%2011-17%20Final.pdf](https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/a021e67e05b99ead85257687006f393b/$FILE/19336071.pdf/Article%20VII%20Guide%20Web%2011-17%20Final.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> Konstantin Podolny, *Gas Transmission Facilities: The Limits on Home Rule*, 77 ALB. L. REV. 705, 713 (2013).

<sup>94</sup> Pub. Serv. § 126(1)(g).

<sup>95</sup> Podolny, *supra* note 93, at 714.

<sup>96</sup> Pub. Serv. § 126(1)(g).

approvals for projects for which a CECPN has been issued by providing that “notwithstanding any provision of law, no... municipality... may require any approval, consent, permit, certificate or other condition for the construction or operation of a major facility with respect to an application for a certificate hereunder.”<sup>97</sup>

It has been held that the combination of these two sections make local substantive requirements applicable, unless unreasonably restrictive, and local procedural requirements inapplicable in all cases. In a Decision for an Application filed by Niagara Mohawk for a CECPN for the construction of 28 miles of transmission facilities, the PSC stated “[T]he local laws inapplicable under PSL § 130 are those imposing "procedural" requirements, while those applicable but subject to waiver under PSL § 126(1)(f) impose "substantive" requirements consisting of specific standards or prohibitions.”<sup>98</sup> As such, local laws that require approvals, consents, permits, certificates or other conditions for the construction or operation of a utility facility are inapplicable under Section 130.<sup>99</sup> However, local laws that contain substantive requirements such as those that would affect location of the facility, or prohibitions relative to the facility, are applicable under Section 126 unless the PSC finds the local law unreasonably restrictive.<sup>100</sup>

While the inclusion of Section 126(1)(f) insures that broad state goals are not frustrated by local laws, municipalities are not fully without recourse. Article VII provides opportunities for individuals and group stakeholders, including municipalities, interested in the proposed project to participate in the review of an application. Issues such as the proposed location, cost, appearance, cost, and need for the facility are all subject to review.

Additionally, outside an Article VII proceeding, in issuing a CECPN, the PSC must “determine that the proposed project is needed.” As such, municipalities can limit the expansion of transmission infrastructure by limiting consumption at the consumer lever, thereby decreasing the demand for gas and electricity.

#### **D. State Regulation at the Distribution Phase**

Downstream, local gas distribution utilities are regulated by state public service commissions, which set the rates utilities can charge their customers and establish service standards for utilities. However, the Supreme Court has expanded federal jurisdiction over wellhead prices of interstate natural gas sales.<sup>101</sup>

Generally, there are two types of utilities, investor-owned utilities which provide stocks to investors and sell bonds, and public utilities, which include government or municipally owned

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<sup>97</sup> § 130.

<sup>98</sup> Niagara Mohawk Power Corp., 1993 N.Y. PUC LEXIS 25 (N.Y. Pub. Serv. Comm'n Aug. 20, 1993).

<sup>99</sup> *Id.*

<sup>100</sup> Podolny, *supra* note 93, at 715.

<sup>101</sup> Phillips Petroleum v. Wisconsin, 347 U.S. 672 (1954).

utilities.<sup>102</sup> New York is served by six large investor owned utilities, one large municipal utility, and many other small utilities.<sup>103</sup>

The PSC is responsible for ensuring that the investor-owned utilities, and many municipally owned utilities, provide safe and adequate service at just and reasonable rates.<sup>104</sup> PSC jurisdiction applies to approximately 75 percent of New York State energy sales.<sup>105</sup> The PSC oversees the operations of the distribution systems and monitors these utilities to ensure that they operate in accordance with PSC and statutory requirements.

As part of its responsibilities, the PSC reviews and approves utility companies' applications for potential mergers and acquisitions, rate cases, and other agreements.<sup>106</sup> Often, approval of these applications is based on conditions, such as pledges to replace or upgrade infrastructure, provide access to services to outlying areas, or enhance quality of service.<sup>107</sup> In rate cases specifically, the PSC can condition proposed utility rate increases on additional investments in energy efficiency technology, reducing gas expansion, and supporting renewable energy.<sup>108</sup> Importantly, New York municipalities can intervene in these proceedings so long as "the intervention is likely to contribute to the development of a complete record or is otherwise fair and in the public interest."<sup>109</sup> However, the PSC makes the final determination surrounding utility rate cases.

The following section will focus on state and municipal efforts to decrease greenhouse gas emissions, thereby decreasing consumption and demand, and hindering fossil fuel infrastructure expansion. First, we will detail the ambitious state-wide greenhouse gas emission reduction goals. Then, we will explain the authority of municipalities in limiting fossil fuel consumption, and provide examples of current efforts of New York municipalities, as well as the actions that have been taken by New York City to do so.

## V. State and Municipal Actions to Reduce Greenhouse Gas Emissions

New York State and some of its municipalities have taken aggressive action to regulate air quality and greenhouse gas emissions, with the effect of reversing the growth of fossil fuel

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<sup>102</sup> *Energy Policy in New York*, BALLOTPEdia, [https://ballotpedia.org/Energy\\_policy\\_in\\_New\\_York](https://ballotpedia.org/Energy_policy_in_New_York) (last visited Sept. 1, 2020).

<sup>103</sup> *Utilities in New York*, POWER 2 SWITCH, <https://power2switch.com/NY/index.html> (last visited Sept. 1, 2020).

<sup>104</sup> NEW YORK STATE ENERGY PLANNING BOARD, NEW YORK STATE TRANSMISSION AND DISTRIBUTION SYSTEMS RELIABILITY STUDY AND REPORT 20 (2012), <http://nyssmartgrid.com/wp-content/uploads/2012/09/reliability-study.pdf>

<sup>105</sup> *Id.*

<sup>106</sup> *Energy Policy in New York*, BALLOTPEdia, [https://ballotpedia.org/Energy\\_policy\\_in\\_New\\_York](https://ballotpedia.org/Energy_policy_in_New_York) (last visited Sept. 1, 2020).

<sup>107</sup> THOMAS P. DINAPOLI, ENFORCEMENT OF COMMISSION ORDERS AND OTHER AGREEMENTS, OFFICE OF THE N.Y. STATE COMPTROLLER 1 (2018), <https://www.osc.state.ny.us/sites/default/files/state-audits/documents/pdf/2020-03/sga-2020-18s27.pdf>.

<sup>108</sup> *See Rate Case Intervention for Affordable Energy Bills and Clean Energy*, AGREE NEW YORK, <http://allianceforagreenecconomy.org/rate-cases> (last visited Sept. 1, 2020).

<sup>109</sup> 16 N.Y.C.R.R. § 4.3(c)(1).

consumption. These efforts often focus on consumption, as opposed to upstream or downstream infrastructure.

## **A. New York State Action to Limit Greenhouse Gas Emissions**

### **1. Climate Leadership and Protection Act**

In January 2020, New York’s ambitious Climate Leadership and Protection Act (“CLCPA”) took effect, requiring an economy-wide emissions reduction of 40 percent from 1990 levels by 2030, and 85 percent reductions by 2050.<sup>110</sup> Additionally, 70 percent of electricity generation must be derived from renewable energy by 2030,<sup>111</sup> and 100 percent of the state’s electricity must be emission free by 2040.<sup>112</sup> Although the CLCPA does not specifically limit the greenhouse emissions of the gas distribution utility and buildings sectors, the law’s 85 percent economy-wide emissions reduction mandate applies to these sectors, making gas decarbonization essential to meet the economy-wide target.

As described above in the Millennium (2017) and Transcontinental (2020) decisions, the NYSDEC has denied applications for approval based both on water quality requirements as well as failure to adequately assess greenhouse gas emissions of the proposed pipeline. In the Transcontinental decision, the only pipeline decision since enactment of the CLCPA, NYSDEC specifically rejected the application on the grounds that the pipeline would be inconsistent with CLCPA mandates that require reducing greenhouse gas emissions and increasing the use of renewables, and ultimately decarbonizing the electricity sector, and that alternatives to the project should be considered.<sup>113</sup>

### **2. Amending York Public Service Law to Conform to CLCPA**

The New York Public Service Commission has yet to render decisions limiting fossil fuel expansion based on the CLCPA. In the first rate case decided shortly after the CLCPA was adopted, the Public Service Commission’s 2020 Consolidated Edison rate case ruling failed to address CLCPA issues that environmental advocates raised in the case.

The New York PSC appears constrained in acting on the CLCPA as New York law requires utilities to offer universal gas service. In New York, Section 30 of the New York Public Service Law requires utilities to offer gas, electricity and steam services. The obligation to provide service is further elaborated in the so-called 100-foot rule, requiring a utility to provide any customer gas service within 100 feet of a gas main.<sup>114</sup>

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<sup>110</sup> 2019 N.Y. Laws 106, 2019 N.Y. SB 6599, §1(12)(a).

<sup>111</sup> 2019 N.Y. Laws 106, 2019 N.Y. SB 6599, §1(12)(d).

<sup>112</sup> 2019 N.Y. Laws 106, 2019 N.Y. SB 6599, §1(12)(d).

<sup>113</sup> Daniel Whitehead, N.Y. State Dep’t of Env’tl. Conservation, Northeast Supply Enhancement Project Notice of Denial of Water Quality Certification (May 15, 2020). Available at: *Northeast Supply Enhancement (NESE) Project*, NYSDEC (Last visited Mar. 17, 2020), <https://www.dec.ny.gov/permits/115980.html>.

<sup>114</sup> 16 NYCRR § 230.2(d).

Until New York State amends the law and provides specific guidance requiring the New York PSC to implement the CLCPA, this particular agency is unlikely to take aggressive action on limiting fossil fuels, although advocates are attempting to influence them to do so.<sup>115</sup>

One proposal is to amend Section 30 to require the provision of energy and heat services, thereby enabling substitution of renewable thermal services, such as geo-thermal, for natural gas.<sup>116</sup>

“Duty to serve” laws have similarly blocked municipalities in Massachusetts from prohibiting gas hookups.<sup>117</sup>

## **B. Municipal Efforts to Limit Greenhouse Gas Emissions**

### **1. Municipal Authority to Limit Greenhouse Gas Emissions**

As previously explained, local governments derive their authority to adopt laws that protect the environment from land use enabling statutes, Home Rule laws, and special laws directly aimed at environmental protection. In New York, specific authority has been delegated to municipalities to adopt comprehensive plans and zoning laws, and to adopt subdivision and site plan regulations under the Village, Town, and General City Law.<sup>118</sup> General authority to legislate with regard to the public health, safety and welfare and the physical environment is delegated under the Municipal Home Rule Law, which is the source of authority often relied on to adopt natural resource protection regulations.<sup>119</sup> Notably, the Court of Appeals has held that the regulation of land use through the adoption of zoning ordinances is one of the core powers of the local government.<sup>120</sup> “Without question. municipalities may ‘enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community]’.”<sup>121</sup>

Through this authority, municipalities can act to regulate greenhouse gas emissions, which in turn have the effect of limiting fossil fuel expansion through decreased consumption at the

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<sup>115</sup> See, e.g. Valova, Hart, Bourgeois and O’Brien-Applegate, Zero Net Gas: A Framework for Managing Gas Demand Reduction as a Pathway to Decarbonizing the Buildings Sector, White Plains: Pace Energy and Climate Center, 2020.

<sup>116</sup> J. Gundlach and E. Stein, New York Urgently Needs to Harmonize Its Energy Utility Regulation Framework with Its New Climate Law, draft dated June 22, 2020.

<sup>117</sup> See Emily Pontecorvo, Does your state want to cut carbon emissions? These old laws could be standing in the way, Grist, August 20, 2020. Available at: <https://grist.org/energy/does-your-state-want-to-cut-carbon-emissions-these-old-laws-could-be-standing-in-the-way-buildings-heat-pumps/> (Accessed August 20, 2020).

<sup>118</sup> John R. Nolon, In Praise of Parochialism: The Advent of Local Environmental Law, 26 HARV. ENVTL. L. REV. 365, 379 (2002).

<sup>119</sup> Beginner’s Guide to Land Use Law, Land Use Law Center, Pace University School of Law at 4, <https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf>

<sup>120</sup> *Nolon, supra* note 118, at 379.

<sup>121</sup> *Id.*; *Matter of Wallach v. Town of Dryden*, 16 N.E. 3d 1188 (N.Y. 2014) (citing *Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council*, 690 N.E. 2d 862 (N.Y. 1997)).

consumer level. Municipalities have the ability to control where renewable energy is allowed through zoning and local permitting, can create their own energy to be used on-site from renewable sources, and can mandate energy efficiency measures in buildings through energy codes.<sup>122</sup> The following section will detail initiatives taken by local governments to achieve one or more of the following goals: enacting comprehensive commitment to sustainability, increasing energy efficiency, and increasing renewable power generation.

### **a. Comprehensive Commitment to Sustainability**

At the most fundamental level, some counties, cities, towns, and villages have made formal commitments to looking at energy and environmental issues more comprehensively.<sup>123</sup> Others, have established plans that detail near-and long-term initiatives intended to reduce electrical consumption and reliance on traditional energy sources, as well as to promote environmental stewardship.<sup>124</sup> By way of example, in 2014, East Hampton, New York Town Board passed a resolution in support of clean energy, making it the first municipality on the East Coast to commit to 100% renewable energy (including transportation and heating) by 2030.<sup>125</sup> Then in 2015, East Hampton released its Climate Action Plan as part of the town's participation in the New York State Climate Smart Communities program.<sup>126</sup> The plan notes that the East Hampton government "has direct control of the policies that impact community emissions, including zoning authority [and] control over land use. This level of authority allows the Town to pursue emissions reductions for the built environment and transportation sector."<sup>127</sup> The Plan includes data on greenhouse gas emissions and reduction targets; a description of past, current, and future efforts to decarbonize municipal facilities (including buildings retrofits, renewable energy installation, exterior lighting upgrades, fleet electrification and solid water and waste water management); and past, current and future actions for community wide initiatives (including initiatives to promote renewable energy, initiatives to facilitate energy efficiency in residential, commercial, and industrial buildings, educational initiatives, and land management).<sup>128</sup>

### **b. Increased Energy Efficiency**

State and local governments can mandate energy efficiency measure through energy codes. Notably, New York allows local jurisdictions to adopt building energy codes that are more

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<sup>122</sup> OFFICE OF THE NEW YORK COMPTROLLER, DIVISION OF LOCAL GOVERNMENT AND SCHOOL ACCOUNTABILITY, GREEN BEST PRACTICES: HOW LOCAL GOVERNMENTS CAN REDUCE ENERGY COST AND MINIMIZE IMPACT ON GLOBAL CLIMATE CHANGE 2, [https://www.osc.state.ny.us/sites/default/files/local-government/documents/pdf/2019-02/researchbrief\\_green.pdf](https://www.osc.state.ny.us/sites/default/files/local-government/documents/pdf/2019-02/researchbrief_green.pdf).

<sup>123</sup> *Id.* at 8.

<sup>124</sup> *Id.*

<sup>125</sup> SIERRA CLUB, NEW YORK MUNICIPALITIES MOVING TOWARD CLEAN, RENEWABLE ENERGY 2 (2019), <https://atlantic2.sierraclub.org/sites/newyork.sierraclub.org/files/documents/2019/04/2019%20Case%20Studies-NYS%20Municipalities.pdf>.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> TOWN OF EAST HAMPTON, CLIMATE ACTION PLAN 6 (2015), <https://www.ehamptonny.gov/DocumentCenter/View/1740/Final-Climate-Action-Plan-October-2015-PDF?bidId=>

<sup>128</sup> *Id.*

stringent than the New York State 2020 Energy Conservation Construction Code (NYSECC). As such, local governments are not prohibited from enacting their own bans on allowing gas service for new construction.<sup>129</sup> Demonstrably, Ithaca adopted a building policy that will require all new buildings to be constructed in a way that will produce 40% fewer greenhouse gas emissions than the New York State code requires, and will require that new construction be net-zero by 2030.<sup>130</sup> The Ithaca Energy Code will put a point system in place for new construction projects in Ithaca, and will award points for efficient electrification, affordability improvements, renewable energy and other things like walkability and adaptive reuse.<sup>131</sup> New buildings — both residential and commercial — will need to achieve six points to be approved.

Additionally, Brookhaven, New York adopted the Long Island Power Authority (LIPA) N.Y. Energy State Labeled Homes Program, which is a voluntary, third party, certified program that provides more stringent energy efficiency requirements than the base energy code.<sup>132</sup> Specifically, the Brookhaven code requires that new single-family and multiple family homes, planned retirement communities, and planned retirement congregate housing communities comply with the program.<sup>133</sup> Compliance requirements of the program include 500-kWh of electricity savings per dwelling unit and automatically controlled mechanical ventilation. Projects must pass a compliance test to obtain a certificate of occupancy, and building permits are issued only after certified compliance with the program through proof of various energy benchmarks.<sup>134</sup>

Regarding existing non-energy efficient buildings, local governments can adopt laws that require or incentivize energy retrofits in existing buildings.<sup>135</sup> They can also lead by example and retrofit municipally owned buildings. These retrofits can include: the installation and use of energy-efficient appliances; programmable thermostats; alternative energy sources; more efficient technology for lighting, heating upgrades, and insulation; and lighting retrofits.<sup>136</sup>

The Lockport Housing Authority (LHA) of Lockport, NY, which provides services to over 500 limited income families and seniors through direct housing, as well as Section 8 vouchers, won the New York Geothermal Organization's GeoStar Top Job competition in 2017 for converting all 72 apartments of its Autumn Gardens Housing complex to geothermal energy.<sup>137</sup> The LHA

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<sup>129</sup> 2020 Energy Conservation Construction Code of New York State §§ C102.2.2, R102.2.2, <https://www.dos.ny.gov/DCEA/pdf/pdf/2020%20ECCCNYS%20November%202019.pdf>.

<sup>130</sup> Kelsey O' Connor, *Weigh in on Ithaca's planned code changes for new construction, aimed at reducing carbon footprint*, The Ithaca Voice (Sept. 6, 2019), <https://ithacavoicedotcom/2019/09/weigh-in-on-ithacas-planned-code-changes-for-new-construction-aimed-at-reducing-carbon-footprint/>

<sup>131</sup> Ithaca Green Building Code Supplement, Draft (Aug. 8, 2019), <http://www.ithacagreenbuilding.com>

<sup>132</sup> Sierra Club, *supra* note 125, at

<sup>133</sup> Margaret E. Byerly, *A Report to the IPCC on Research Connecting Human Settlements, Infrastructure, and Climate Change*, 20 PACE ENVTL. L. REV. 936, 958 (2011)

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 959.

<sup>136</sup> *Id.*

<sup>137</sup> SIERRA CLUB, *supra* note 125, at 9-10.

also converted its office building to geothermal the year before the housing complex.<sup>138</sup> Originally, the LHA wanted to explore solar and wind options to address concerns surrounding energy costs for the electric heating and hot water systems in their buildings, but found that these options were not feasible due to technical and cost limitations.<sup>139</sup> As such, they explored the feasibility of installing geothermal energy and found that because of the large amount of land surrounding their main office building, they could install a low-cost parallel geothermal system which involved relatively shallow excavation.<sup>140</sup> They also found that they could install a deeper geothermal system in the housing complex for almost the same cost as natural gas.<sup>141</sup> The LHA is expecting to save 50-75 % in costs of electricity, and a 40% reduction in energy consumption.<sup>142</sup>

### **c. Promoting Renewable Power**

Siting approval of proposed new electric generating facilities in New York less than 25 megawatts (“MWs”) is the responsibility of local zoning and building permit agencies, normally of towns, cities or villages, where proposed new facilities would be constructed.<sup>143</sup> Consequently, local governments have the authority to permit individual and small-scale renewable energy generation systems through zoning ordinances.

A strong means of promoting renewable energy systems is through a municipality’s comprehensive plan, in which a municipality sets goals for community development that may include environmental values.<sup>144</sup> In the plan, municipalities may insert express language outlining future renewable energy plans, which will then serve as a guide for enacting local zoning laws.<sup>145</sup> Notably, under New York law, all local zoning regulations that are enacted must be in accordance with the local comprehensive plan.<sup>146</sup> As such, zoning laws are the means to accomplish an end vision provided by the plan.<sup>147</sup>

Local governments can encourage solar energy systems through land use regulations by including solar energy usage in the purpose and definition sections; eliminating height and setback restrictions for solar energy systems; including solar energy usage in their site plan and subdivision approval regulations; allowing solar energy systems through special permits or accessory use standards; creating solar access requirements; regulating trees to avoid

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Philip Weinberg, et al., *Environmental Law and Regulation in New York* §15:15 (2d ed.9A West’s N.Y. Prac. Series 2009).

<sup>144</sup> CHARLES GOTTLIEB & EMILY EKLAND, SITING SOLAR PANELS UNDER THE ZONING LAWS OF NEW YORK STATE 16 (2012)

<sup>145</sup> JOHN R. NOLON & PATRICIA SALKIN, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT LAW 199-200 (2011)

<sup>146</sup> N.Y. Town Law § 263.

<sup>147</sup> GOTTLIEB & EKLAND, *supra* note 144, at 17.



interference with solar energy systems; and providing exemptions and waivers for these systems.<sup>148</sup>

In 2014, Delaware, New York resident, Rich Winter, approached the town Planning Board with a proposal to build a community solar array.<sup>149</sup> Community based solar projects increase access to solar in areas where residents may or may not own property, or have room to install solar panels at their location, by enabling them to subscribe to a local community solar project.<sup>150</sup> Once households or businesses subscribe, their energy is still delivered though their regular electric provider, but the power produced from the solar array is fed directly back into the grid.<sup>151</sup> As such, the grid is supplied with clean, renewable energy while subscribers receive credit on their electric bills.<sup>152</sup> Following the proposal, the Planning Board crafted a new Commercial Solar Law and issued a special use permit for the construction of the solar farm. The developer received nearly 1.3 million in funding through the NY-Sun initiative Program, and Town residents benefit from income derived from a Payment in Lieu of Taxes (PILOT) program, which allows a town to derive financial benefit based on a project's revenue rather than a property tax assessment, as well as from a 10% community solar contract saving that applies to all subscribers. The 2MW project will reduce emissions by 1670 metric tons annually.<sup>153</sup>

Municipalities can also utilize other tools to encourage solar energy system installations, including exemptions from permitting fees and providing property tax rebates.<sup>154</sup> For example, Amherst, New York waives fees for permits for home solar installations. Amherst was also designated as a Clean Energy Community and received a NYSERDA grant for additional clean energy after the Town completed four of ten High Impact Actions to “implement clean energy actions, save energy costs, create jobs, and improve the environment.”<sup>155</sup> Amherst installed a charging station, purchased the first electric vehicle for the town fleet, trained employees on energy code enforcement, adopted a solar policy and instituted the Solarize Amherst Campaign.<sup>156</sup> By doing so, Amherst received a \$250,000 NYSERDA grant which will fund solar panels for a large recreation center and an additional EV charging station, as well as fund the implementation of the Solarize Amherst Campaign.<sup>157</sup> As part of the campaign, several Town Board resolutions were passed, including a unified solar permit and a resolution waiving building permit fees for home solar installations.<sup>158</sup> The NYSERDA grant required 10 home

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<sup>148</sup> Byerly, *supra* note 133, at 961.

<sup>149</sup> SIERRA CLUB, *supra* note 125, at 23.

<sup>150</sup> *Governor Cuomo Announces Completion of Largest Community Solar Project in New York State*, Press Release (Mar. 13, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-completion-largest-community-solar-project-new-york-state>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> SIERRA CLUB, *supra* note 125, at 23.

<sup>154</sup> Byerly, *supra* note 133, at 961.

<sup>155</sup> SIERRA CLUB, *supra* note 125, at 23.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

contracts, however 80 were signed during the campaign. The Town is currently considering how geothermal heat pumps might be a part of the town's clean energy transition.<sup>159</sup>

Municipalities can also encourage wind generation by purchasing wind farm electricity, allowing large scale wind farms, or by facilitating wind generation by town residents through permitting the installation of individual wind energy conversion systems.<sup>160</sup> Regarding large scale wind farms, local governments can encourage wind farm development through comprehensive plan language, amendments to the zoning code that permit wind farms as of right or by special use permits, issuance of licenses to operate, and creation of overlay or incentive zoning.<sup>161</sup>

The Town of Vernon, New York addressed wind generating facilities within its comprehensive plan to encourage the town to pursue wind energy development in appropriate areas of town that benefits local and regional residents without disrupting farming activities.<sup>162</sup> During the site plan review of proposed wind projects, the town must consider noise levels associated with generators and turbine blades, setbacks and operations, potential loss of farmland, effects on natural resources and wildlife, interference with broadcast transmission and municipal boundaries.<sup>163</sup> The town's zoning code also permits private wind energy conversion systems through special use permits which must meet applicable standards for special use permits in general, as well as additional requirements in the code.<sup>164</sup>

### **C. Aggressive Actions Taken by New York City to Stop Fossil Fuel Expansion**

#### **1. New York City's Orders Banning Fossil Fuel and Requiring Electrification**

In early 2020, New York City's Mayor issued two executive orders addressing climate change by halting expansion of fossil fuel infrastructure, and electrification of the city's vehicle fleet:

- Executive Order 52 commits the City to withdrawing support for additions of fossil fuel-related infrastructure via pipelines or terminals for the transfer of fossil fuels or fossil-fuel electric generation, a comprehensive review of further fossil fuel-related projects, and agency cooperation to implement the policy to mitigate economic impacts and disruption of fuel supply.<sup>165</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> Byerly, *supra* note 116, at 963.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 986.

<sup>163</sup> Town of Vernon General Code §139-125 Wind power generating facilities, <https://www.ecode360.com/16064595?highlight=wind&searchId=22935360550836702#16064595>.

<sup>164</sup> *Id.*

<sup>165</sup> The City of New York, Office of the Mayor, Executive Order No. 52: Statement of Administration Policy Against Addition of Infrastructure That Expands The Supply of Fossil Fuels in New York City, February 6, 2020.

- Executive Order 53 requires New York City’s fleet of on-road vehicles to be fully plug-in electric by 2040. As an interim goal, the order requires 4,000 vehicles be replaced or converted to electric by 2025.<sup>166</sup>

Two cases arising from Portland’s city zoning laws suggest that the New York City law would be upheld if challenged on grounds of federal preemption.

- South Portland ME: *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 270 (D. Me. 2018). A city ordinance regulating traffic in a port designed to ensure safety, protect water and air quality, and the aesthetics of the commercial area that prohibits loading crude oil onto tankers in city harbor and the construction of new structures upheld by the District Court under the Pike balancing test, even though it imposes significant additional cost on trade and affects the economics of an international and interstate pipeline. Under the Pike test, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960)).

Applying *Pike*, the court held that a state or local statute violates the dormant Commerce Clause if it (1) has an impermissible extraterritorial reach, (2) discriminates against interstate or foreign commerce, (3) excessively burdens interstate or foreign commerce, or (4) interferes with the federal government's ability to speak with one voice when regulating commerce with foreign nations. The city ordinance was held not to violate the dormant Commerce Clause on any of these grounds.

- In Portland, OR: *Columbia Pac. Bldg. Trades Council v. City of Portland*, 289 Or. App. 739 (2018), a state court upheld an ordinance amending the city’s zoning code to prohibit new fossil fuel terminals and cap the size of existing terminals to no more than 2 million gallons of capacity, in order to "[l]imit fossil fuel distribution and storage facilities to those necessary to serve the regional market." On the basis of the Pike test, the state court also found the ordinance to not violate the dormant Commerce Clause. In ruling, the court found that the city’s legitimate local public interests included considerations of the potential that fossil fuel demand may plateau and decline, as well as safety, health, livability, and the industry's reluctance to retrofit existing fossil-fuel terminals for earthquake safety.

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<sup>166</sup> The City of New York, Office of the Mayor, Executive Order No. 53: An All-Electric and Safe New York City Fleet, February 6, 2020.

## 2. New York City Local Law 97 of 2019

New York City's Local Law 97 of 2019 requires buildings over 25,000 square feet in ten categories of building classes to reduce greenhouse gas emissions by 40% by 2030, and 80% average reduction by 2050.

For multi-family housing (including cooperatives, condominiums, and rental buildings), the law sets some of the most stringent reduction requirements effective in 2024 with further reductions required in 2029, calculated on an emissions per square foot basis. As a simple rule of thumb, residential buildings of 25-30 units or more will very likely trigger the requirements. Buildings failing to comply face penalties, unless they meet the conditions for exception, and may be required to purchase carbon offsets in yet to be established market at an uncertain price. Almost 26 thousand buildings in NYC are subject to the law.

Local Law 97 builds on prior New York City laws that require buildings to insulate pipes and install energy efficient lighting, and phase out dirtier forms of fuel oil, eventually eliminating all heavy fuel oils by 2030, requiring all new boiler or burner installations utilize natural gas, ultra-low sulfur 2 oil, biodiesel, or steam. Local Law 97's separate requirements effectively further requires the phase out of natural gas or, at very least, penalizes its continued use. This is illustrated in the textbox below providing a real-world residential building compliance example.

*New York City Building Carbon Emissions Caps for Buildings over 25,000 Square Feet*<sup>167</sup>

<b>Building Occupancy Type</b>	<b>2024-2029 Emissions Cap (tCO<sub>2</sub>e per sqft)</b>	<b>2029-2034 Emissions Cap (tCO<sub>2</sub>e per sqft)</b>
<b>Group A: Assembly spaces over 75 people</b>	0.01074	0.00420
<b>Group B: Public and Commercial Offices and Services; Assembly spaces under 75 people</b>	0.00846	0.00453
<b>Group E: Education; Group I-4: Custodial Care</b>	0.00758	0.00344
<b>Group I-1: Supervised or Assisted Living</b>	0.01138	0.00598
<b>Group F: Factory and Industrial Use</b>	0.00574	0.00167
<b>Group B: Emergency Response, Laboratory, and Health Care; Group H: Hospital; Group I-2: Nursing Homes, Child Care, and Inpatient Facility; Group I-3: Correctional Facilities</b>	0.02381	0.01193
<b>Group M: Commercial Retail</b>	0.01181	0.00403
<b>Group R-1: Hotels, Dormitories, and Shelters</b>	0.00987	0.00526
<b>Group R-2: Multifamily Housing</b>	0.00675	0.00407

<sup>167</sup> [Local Laws of the City of New York for the Year 2019 No. 97](#), pp. 9-12.

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**Group S: Storage and Warehouse; Group U:  
Utility, Sheds, Tanks, Towers, Garages and  
Miscellaneous**

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0.00426

0.00110

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Source: O'Brien-Applegate, Bourgeois and Valova (2019)

To illustrate the potential costs of the law and how it is applied, a 48-unit condominium building of 61,200 square feet consumed 454,867 kilowatt-hours of electricity and over 5,600 cubic feet of natural gas for its boiler, hot water, and cooking gas in 2018. Per the building's 2018 benchmarking report, this resulted in annual greenhouse gas emissions of 131 tons for electricity and 290 tons for natural gas, for a total of 421 tons of CO<sub>2</sub>-equivalent emissions. On a per square foot basis, for 2018, the building emitted 0.00689 tons of CO<sub>2</sub>-equivalent emissions per square foot.

Under the law, our example building must either reduce its emissions by 2 percent in 2024, and 41 percent by 2029, both against current levels, or must buy emissions credits at uncertain prices in a market that has yet to be established. Non-compliance triggers penalties of up to \$268 per metric ton of carbon emissions not reduced or offset above the emissions cap. For this building, fines of just under \$3,000 per year starting in 2024 will increase to over \$46,000 per year by 2029. See C. Hart and J. O'Brien-Applegate, *Pace Buildings Solutions Center Helps Building Owners Prepare and Profit from New York City's New Carbon Reduction Requirements*, (February 2, 2020).

## VI. Environmental Review of Agency Actions

So far, we have reviewed the scope of federal, state, and municipal regulation of the fossil fuel value chain, as well as the authority and limitations imposed on state and local governments to stop fossil fuel expansion through various means. However, an integral component to federal, state, and local decision-making, and a potential avenue to challenge fossil fuel infrastructure expansion, is through the environmental review process. The following sections will provide an overview of New York State Environmental Quality Review Act and the National Environmental Policy Act, as well as challenges arising under these respective statutes to governmental decisions surrounding fossil fuel infrastructure. It is important to note that most challenges arising from deficiencies in the environmental review process may only result in project delays, however increased time and money required to adequately re-address and correct the environmental review process may ultimately lead to project abandonment.

### A. New York State Environmental Review

New York's State Environmental Quality Review Act (SEQRA) requires state and local agencies to consider environmental factors in the planning, reviewing, and decision-making processes regarding permits, zoning changes, or government funding, and is triggered by New York projects that require some form of discretionary government approval.<sup>168</sup> The SEQRA review process requires agencies to determine whether actions they directly undertake, fund, or approve may have a "significant impact" on the environment ("a determination of significance"), and if so, to prepare, or require to be prepared, an Environmental Impact

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<sup>168</sup> Matthew Ahrens, et al., *Climate Change Considerations Under SEQRA: DEC's New Policy*, 29 THE N.Y. ENV'T L. LAWYER 34, 34 (Fall 2009), <https://www.lw.com/thoughtLeadership/climate-change-considerations-under-seqra-new-york-policy>.

Statement (EIS) that assesses the potential impacts of the proposed actions, as well as ways to avoid or mitigate those impacts.<sup>169</sup> The lead agency (the agency responsible for authorizing the project) issues a “negative declaration” if it determines that the proposed action will not result in a significant environmental impact. This ends the SEQRA review process and can result in subsequent litigation brought by project opponents.<sup>170</sup> A positive declaration triggers the procedural mandates that lead to the preparation of a Final Environmental Impact Statement (EIS), which will be the basis of the final decision to fund or approve the project.<sup>171</sup>

To reach a determination of significance, the agency must prepare an Environmental Assessment Form (EAF) (either a short EAF or full EAF, depending on the action). Notably for our purposes, the short form EAF, which is used for Unlisted actions, requires the lead agency to consider whether the proposed action would cause “an increase in the use of energy” and whether it “fails to incorporate reasonably available energy conservation or renewable energy opportunities.”<sup>172</sup> The Full EAF also requires applicants for commercial and industrial projects to provide information about the proposed action’s new or additional demand for energy, including information about the anticipated sources of energy.<sup>173</sup>

If the agency issues a positive declaration, the preparation of an EIS is required, which involves the preparation of a Draft Environmental Impact Statement (DEIS) that is then circulated for public review and comment.<sup>174</sup> In addition to “analyzing the significant adverse impacts and evaluating all reasonable alternatives”, the DEIS should include an “assessment of impacts only where relevant and significant” including “impacts of the proposed action on the use and conservation of energy” and “measures to avoid or reduce both an action’s impacts on climate change and associated impacts due to the effects of climate change...”<sup>175</sup>

No judicial decision under SEQRA appears to have addressed the issue of climate change directly, however one early decision upheld the NYSDEC’s decision to impose conditions relating to energy conservation in granting permits for a shopping mall.<sup>176</sup> The condition required the developer to submit an energy conservation plan to the NYSDEC and to the Town. The Court held that the imposition of the condition was valid, and represents the NYSDEC’s attempt to “fulfill its obligations under SEQRA to analyze the project’s effect on ‘the use and conservation of energy resources, where applicable and significant’.”<sup>177</sup> Additionally, in a separate ruling, greenhouse gas emissions were held to be a proper consideration under SEQRA when the Court upheld the Town of Ellicottville Planning Board’s determination that “serious

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<sup>169</sup> *Id.* at 35.

<sup>170</sup> *Id.* at 35.

<sup>171</sup> 6 N.Y.C.R.R. § 617.9 (b)(5)(iii)(e)

<sup>172</sup> 2 Environmental Impact Review in New York § 5.12 (2019)

<sup>173</sup> *Id.*

<sup>174</sup> Mark A Chertok et. al, Environmental Law: Developments in the Law of SEQRA, 96 Syracuse L. Rev. 773, 778 (2019).

<sup>175</sup> 6 N.Y.C.R.R. § 617.9(b)(1).

<sup>176</sup> 2 Environmental Impact Review in New York § 5.12 (2019); *Henrietta v. Department of Environmental Conservation*, 430 N.Y.S.2d 440 (App. Div. 4th Dep’t 1980).

<sup>177</sup> *Henrietta*, 430 N.Y.S.2d at 448.

increases in harmful emissions” from proposed cogeneration plant would result in “unacceptable adverse impacts.”<sup>178</sup>

Challenges under SEQRA have also been brought against natural gas infrastructure. By way of example, the Chenango Valley Central School District petitioned for a judgment to annul, vacate, and void the Town Planning Boards’ negative declaration under SEQRA for the proposed construction in the Town of Fenton of a natural gas compressor facility.<sup>179</sup> The facility would extract natural gas from the Millennium Pipeline, fill specialized trucks with compressed natural gas, and transport the compressed natural gas to customers.<sup>180</sup> The School District Petition alleged that the Planning board failed to comply with the procedural requirements of SEQRA, improperly classified the proposed construction as unlisted, and arbitrarily and capriciously declared a Negative Declaration of significance.<sup>181</sup> The court held 1) the Planning Board failed to classify the project in accordance with SEQRA’s procedural requirements; 2) the Planning Board’s determination that the proposed construction was an Unlisted action was arbitrary and capricious and without substantial evidence; 3) the Planning Board’s lead agency determination and failure to conduct a coordinated review were arbitrary and capricious and without substantial evidence; 4) The planning board failed to take a hard look at traffic issues; and 5) the Planning board failed to take a hard look at potential environmental impacts of the proposed construction.<sup>182</sup> As such, the matter was remanded back to the Planning Board to re-do the SEQRA review process. However, the developer for the project ultimately withdrew their applications to the Planning Board. While this proceeding may not have been the sole cause of the project eventually being abandoned, it was a key factor in battling the project.

Notably, the SEQRA review process does not apply to facilities that are subject to approval pursuant to Article VII or Article X of the PSL.<sup>183</sup> However, before issuing a certificate for the construction of a Major Transmission Facility pursuant to Article VII, the Commission must determine that the “facility represents a minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including, but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed.”<sup>184</sup> Additionally, Article X requires the Siting Board to make an explicit finding regarding the “probable environmental impacts of the construction and operation” of a Major Electric Generation Facility including “the cumulative environmental impacts of the construction and operation of related facilities... on ecology, air ground and surface water, wildlife, and habitat; public health and safety.”<sup>185</sup> Accordingly, the Siting Board may not issue a certificate unless it determines that “the adverse environmental

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<sup>178</sup> *Laidlaw Energy & Environmental, Inc. v. Town of Ellicottville*, 873 N.Y.S.2d 814 (App. Div. 4th Dep’t 2009).

<sup>179</sup> *Chenango Val. Cent. Sch. Dist. v Town of Fenton Planning Bd.*, 2017 N.Y. Misc. LEXIS 3243, at \*8 (August 28, 2017).

<sup>180</sup> *Id.* at 2.

<sup>181</sup> *Id.* at 8.

<sup>182</sup> *Id.*

<sup>183</sup> 6 NYCRR § 617.5; Prior to 2011, and after 2003 when previous Article X legislation expired, developers of proposed electric generating facilities had to obtain state and local permits, and undergo review under SEQR.

<sup>184</sup> Pub. Serv. § 126 (1)(c).

<sup>185</sup> Pub. Serv. § 168 (2).

effects of the construction and operation of the facility will be minimized or avoided to the maximum extent possible; and if the Board finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility will be located, the applicant will avoid, offset or minimize the impacted caused by the facility upon the local community...”<sup>186</sup> Additionally, although SEQRA may not be used to challenge certificates issued pursuant Article VII and X, both Articles provide that “any aggrieved party” may apply for a rehearing on the matter, and may seek judicial review thereafter on procedural or substantive grounds.<sup>187</sup>

Overall, SEQRA presents a potential avenue by which local agencies that are designated as lead agency can assess the potential adverse impacts a proposed project will have on the environment, as well as impose conditions, such as energy efficient technology, to mitigate those impacts in approving the project. It also potentially provides project opponents a basis for challenging approval of a project if there were procedural or substantive deficiencies in the SEQRA review process. It is worth noting, however, that standing to bring a challenge under SEQRA is often a point of contention in SEQRA litigation, and the analysis is different for an individual<sup>188</sup>, an organization<sup>189</sup>, and a municipality (that is not the lead agency).<sup>190</sup>

## B. Federal Environmental Review

As previously discussed, construction and operation of interstate natural gas pipelines is subject to FERC’s exclusive jurisdiction under the NGA. The federal preemption of state regulations of such pipelines also extends to the state assessment of environmental matters.<sup>191</sup> As such, FERC undertakes its own environmental analysis pursuant to the National Environmental Policy Act.<sup>192</sup> While this places limits on a state’s authority to block pipelines, or dictate its route, any

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<sup>186</sup> Pub. Serv. § 168 (3).

<sup>187</sup> Pub. Serv. § 170; Pub. Serv. § 128.

<sup>188</sup> An individual must show that the administrative action will in-fact have a harmful effect on the individual (injury in fact) different from that of the public at large, and that the interest asserted is arguably within the zone of interests intended to be protected by the statute. *Mobil Oil Corp. v. Syracuse Industrial Dev. Agency*, 559 N.E.2d 641, 643 (N.Y. 1990); *Dairyalea Cooperative, Inc. v. Walkley*, 339 N.E.2d 865 (N.Y. 1975).

<sup>189</sup> An organization must show that at least one of its members would have standing to sue, that the interests it asserts are germane to its purposes, and that neither the asserted claim, nor the appropriate relief, requires the participation of the individual members. *Soc’y of Plastics Indus. v. County of Suffolk*, 573 N.E.2d 1034, 1041 (N.Y. 1991).

<sup>190</sup> A municipality must show a demonstrated interest in the potential environmental impacts of the administrative action. In doing so, it must show how its personal or property rights, either “personally” or in a representative capacity, will be directly and specifically affected apart from any damage suffered from the public at large, and that it will suffer an injury that is environmental, and not solely economic in nature. *Matter of Village of Canajoharie v. Planning Bd. of Town of Fla.*, 882 N.Y.S.2d 526, 529 (App. Div. 3d Dep’t 2009); *Matter of Saratoga Lake Protection & Improvement Dist. v. Department of Pub. Works of City of Saratoga Springs*, 846 N.Y.S.2d 786, 791—2 (App. Div. 3’d Dept 2007); *Matter of Board of Fire Commr. of the Fairview Fire Dist. v. Town of Poughkeepsie Planning Bd.*, 67 N.Y.S.3d 30, 32 (App. Div. 2d Dep’t 2017).

<sup>191</sup> *Niagara Mohawk Power Corp. v. State Dep’t of Env’tl. Conservation*, 624 N.E.2d 146 (N.Y. 1993).

<sup>192</sup> *Id.*



party “aggrieved” by a FERC order may petition for review by the court of appeals for the circuit in which an interstate natural gas pipeline is proposed to be constructed pursuant to NEPA.<sup>193</sup>

Under NEPA, any federal action that significantly affects the quality of the human environment, such as the construction of an interstate gas pipeline, requires the preparation of an Environmental Impact Statement (EIS).<sup>194</sup> The EIS must include all significant environmental effects associated not only with the proposed action, but also with every reasonable alternative to that action.<sup>195</sup> In accordance with the Administrative Procedure Act, the sufficiency of an EIS may be subject to a citizen’s challenge under NEPA.<sup>196</sup>

Demonstrably, environmental groups and landowners challenged the decision of FERC to approve the construction and operation of three new interstate natural-gas pipelines in the southeastern United States. In its petition, Sierra Club argued that FERC’s environmental impact statement failed to adequately consider the project’s contribution to greenhouse gas emissions and its impact on low income and minority communities.<sup>197</sup> The Circuit Court held that the EIS was deficient because FERC, which had the authority to consider environmental effects including climate change, failed to estimate carbon emissions from power plants.<sup>198</sup> The Court reasoned that the EIS should have either given quantitative estimates of downstream greenhouse gas emissions that would result from burning natural gas that the pipelines will transport, or explained more specifically why it could not have done so.<sup>199</sup> Greenhouse gas emissions are an indirect effect of authorizing a pipeline, which FERC could reasonably foresee and which the agency has legal authority to mitigate.<sup>200</sup> Accordingly, the Court held the EIS should have included a discussion of the “significance” of this indirect effect, as well as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,”<sup>201</sup>

Importantly, while NEPA requires a federal agency to consider and quantify environmental impacts associated with a proposed project, it does not require that agencies modify their behavior based on the findings of their review.<sup>202</sup> In other words, NEPA does not require that agencies take one type of action or another based on the adverse environmental impacts.<sup>203</sup>

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<sup>193</sup> Bressler, *supra* note 34, at 143.

<sup>194</sup> *Id.*

<sup>195</sup> 40 C.F.R. § 1502.14. (2020).

<sup>196</sup> Bressler, *supra* note 34, at 158.

<sup>197</sup> *Id.* at 159.

<sup>198</sup> *Id.*

<sup>199</sup> *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

<sup>200</sup> *Id.* at 1374.

<sup>201</sup> *Id.*

<sup>202</sup> Steven M Siros, et al., Pipeline Projects, *The evolving Role of Greenhouse Gas Emissions Analyses Under NEPA*, 41 ENERGY L. J. 47, 52 (2020).

<sup>203</sup> *Sierra Club* 867 F.3d at 1367.

The following section provides additional resources, visual tools, and examples of municipal laws to assist advocates in developing strategies to limit fossil fuel expansion. It includes a summary of state and municipal advocacy efforts in New York, a chart summarizing advocacy issues and limitation at both the state and local level, an advocacy pathway flow chart, a chart detailing SAFE policies that are supported by New York law, and an appendix comprised of municipal laws enacted to limit fossil fuel infrastructure expansion.

## **VII. Strategic Considerations for Advocates**

The law and court rulings summarized in this memorandum suggests several strategic considerations for advocates:

### **A. Summary of State-Focused Advocacy**

- While the Natural Gas Act generally preempts state laws, it does not affect the rights of states under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. The State of New York is willing to challenge infrastructure and has succeeded in causing project developers to terminate gas pipeline projects using its authority to deny water permits under the CWA and to protect coastal areas under the CZMA.
- Challenges to upstream fossil infrastructure that serves intrastate commerce is unlikely to ultimately succeed in court except where the state authority has been expressly preserved. Even in the absence of a winning legal argument, there are numerous avenues for novel legal challenges that run up the costs of fossil projects. These suits might prevail by driving up the cost. This has worked thus far defeating the Duke and Dominion Atlantic Coast Pipeline (crossing the Appalachia trail in North Carolina and Virginia, July 2020) and the Williams Pipeline (NY and NJ rejected water quality permits, May 2020). Aggrieved parties may also bring a suit under NEPA to challenge deficiencies in the federal environmental review process.
- Advocate New York State legislature and PSC amend the “duty to serve” obligation and provide guidance under CLCPA so that the PSC can hold utilities accountable for reducing greenhouse gas emissions in rate cases and other PSC proceedings.

### **B. Summary of Municipal-focused Advocacy**

- States and municipalities are free to regulate intrastate pipelines and fossil fuel facilities at ports under its policing powers, even where these facilities could affect interstate commerce, provided the regulation can survive the *Pike* Constitutional balancing test: the regulation does not discriminate against interstate markets, regulation produces a legitimate local benefit such as environment, safety, traffic, and quality of life, and the

implications for interstate commerce are incidental.

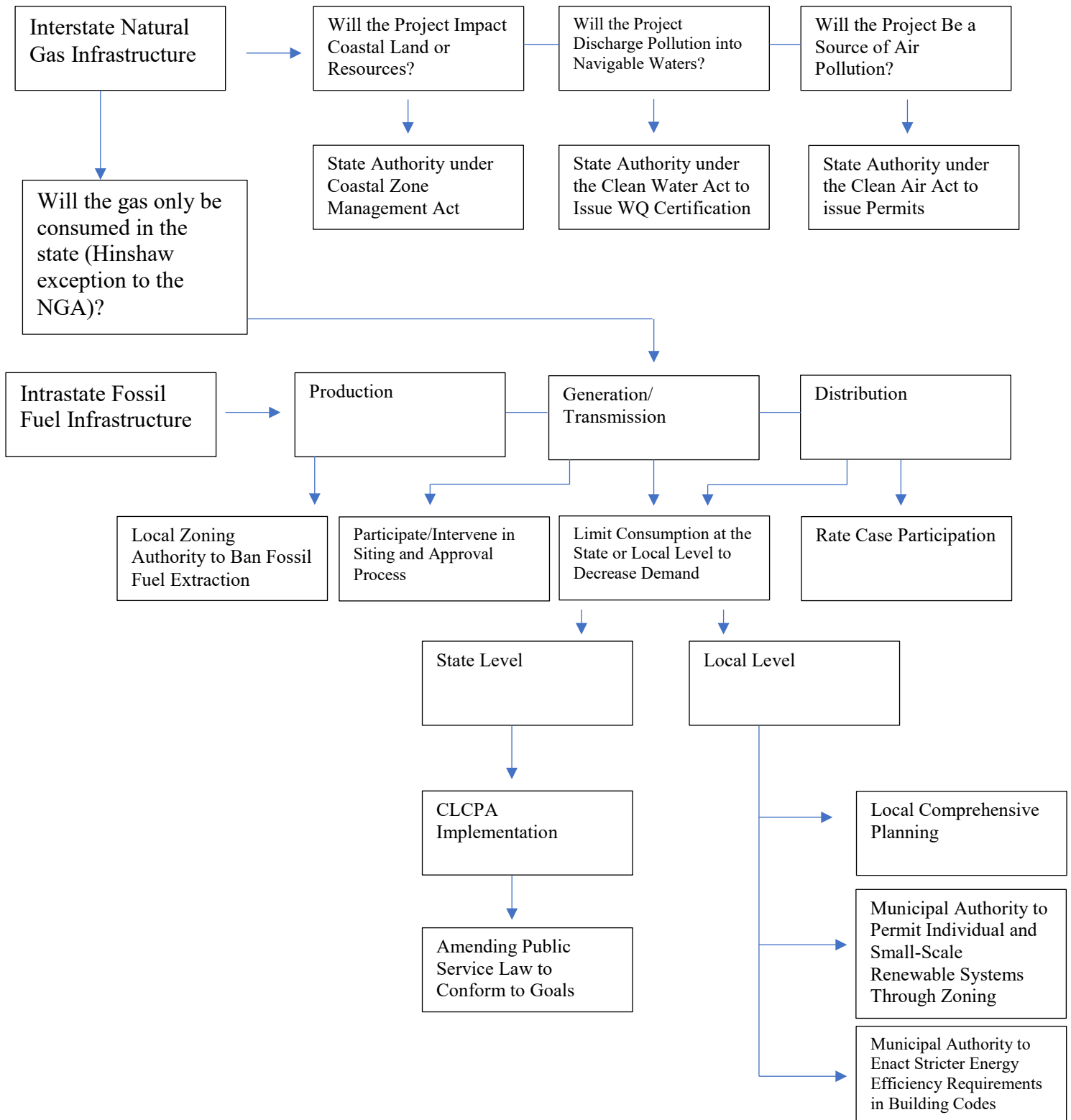
- Municipalities can use their authority from land use enabling statutes, home rule laws, and special laws directly aimed at environmental protection to adopt laws that protect the environment, such as banning fossil fuel production, adopting comprehensive commitment to sustainability, mandating energy efficiency, and permitting renewable power generation.
- There are no court cases yet prohibiting municipalities from restricting downstream consumption activities, such as requiring municipal bus fleets to be all electric, fuel standards for buildings, or requiring electrification of home appliances.

**C. Advocacy Issues at Corresponding Phases of the Supply Chain**

	State	Local
Interstate Gas Infrastructure	<p><b>Federal Pre-emption</b></p> <p>Specific grants of authority in federal statutes (CWA, CMZA, CAA)</p> <p>Look to NEPA</p>	<p><b>Federal Pre-emption</b></p> <p>Look to NEPA</p>
Intrastate Production	<p><b>Possible Federal Pre-emption</b></p> <p>Pike Balancing Test</p>	<p><b>Possible Federal Pre-emption</b></p> <p>Pike Balancing Test</p> <p><b>State Pre-emption if no zoning ordinances limiting extraction are in place</b></p> <p>Enact ordinance banning fossil fuel extraction</p> <p>Limit Fuel Consumption and Encourage Access to Renewables</p> <p>Look to SEQRA</p>
Intrastate Generation/ Transmission	<p><b>Possible Federal Pre-emption</b></p> <p>Pike Balancing Test</p>	<p><b>Possible Federal Pre-emption</b></p> <p>Pike Balancing Test</p> <p><b>State Pre-emption</b></p> <p>Limit Fuel Consumption and Encourage Access to Renewables</p> <p>Participate in Approval Process</p>
Intrastate Distribution	<p><b>Duty to Serve Rules</b></p> <p>Amend Public Service Law to incorporate CLCPA</p>	<p><b>State Pre-emption</b></p> <p>Participation in Rate Cases</p> <p>Limit Fuel Consumption and Encourage Access to Renewables</p>

**Table Description:** The table above lists the possible issues that may arise at the state and federal level and the different phases of the supply chain (listed in red), as well as areas in which advocacy should be focused in addressing these issues (listed in green).

### D. Advocacy Pathway Flow Chart



## **E. Models for Municipal Legislation**

This section presents models for municipal legislation blocking fossil fuel use or consumption. Where available, models from New York municipalities are used. Where examples from New York are not available, municipal legislation in other states are presented.

The appendix provides the following municipal legislation samples:

- A Municipal Draft of Building Code Requiring Net-Zero Buildings by 2030 – Ithaca, NY
- B Municipal Ordinance for Small-Scale and Private Wind Energy Facilities – Vernon, NY
- C Municipal Climate Action Plan – East Hampton, NY
- D Municipal Resolution Adopting a Solar Energy Facilities Law – Duanesburg, NY
- E Municipal Adoption of Community Choice Aggregation Program – White Plains, NY
- F Municipal Regulation of Air Pollution – White Plains, NY
- G Municipal Prohibition of Natural Gas Infrastructure in New Buildings – Berkeley, CA
- H Municipal Prohibition of New Fossil Fuel Infrastructure in Major Construction – Brookline, MA

## VIII. SAFE Policies in New York

Stand.earth’s SAFE Cities team tracks, supports, aggregates, and promotes city and county policies that prevent expanded fossil fuel production and consumption, and that require decarbonizing buildings, transportation, and electricity. The following commitments and types of ordinances meet those SAFE criteria.

### SAFE policies fall into four categories:

- **Local government resolutions** such as climate emergency declarations that explicitly mention the need to end fossil fuel expansion, resolutions affirming commitment to the Paris Climate Agreement, or endorsements of the new global Fossil Fuel Non-Proliferation Treaty.
- **Temporary restrictions on new fossil fuel infrastructure** such as emergency moratoriums to stop new proposals for fossil fuel infrastructure. These crucial safeguards are put in place while a longer term plan can be developed.
- **Permanent restrictions on new fossil fuel infrastructure** such as permanent policies using local regulatory power that focus on preventing fossil fuel infrastructure expansion to reduce the risk of spills, explosions, and other environmental hazards while protecting public health and safety.
- **Electrification policies** such as mandates that new buildings be 100% electric, plans to electrify public transportation fleets, bans on the construction of new gas stations, etc.

The table below explains which of these types of policies are fully supported under New York state law; which have gray areas or barriers; and which would need state-level legislation or regulatory change to be permissible.

We classify each resolution using a “stoplight” code – green, yellow and red – indicating potential success of a legal strategy employed by a municipality. The stoplight designation applies only to the general strategy, not to a specific fact pattern or case, and therefore does not represent legal advice, and should not be relied upon as a substitute for legal analysis of specific cases. The stoplight analysis is strictly based on legal potential for successful outcomes, and does not consider political or cost considerations, such as legal fees, associated with a given strategy. Thus, an unfavorable stoplight analysis does not necessarily mean that a strategy should not be undertaken if it has other strategic value, such as public relations or economic implications that serve the larger advocacy goals. Similarly, a favorable spotlight analysis does not necessarily mean there will not be challenges or legal barriers associated with a strategy.

The stoplight codes mean the following:

- Green:** Municipality generally has primacy of jurisdiction and legal criteria favor municipal discretion in such areas as land use, zoning, and infrastructure decisions.
- Yellow:** Municipality may lack primacy of jurisdiction and legal criteria favor state or federal authorities, however legal criteria take municipal priorities into account and therefore a municipality has a chance at prevailing under certain legal arguments or circumstances.
- Red:** Municipality authority is typically preempted or limited and the chances of success on the merits of available legal arguments are unfavorable.

Type of Resolution or Policy	Stoplight Assessment	Justification (page in text where applicable)
<b>Local Government Resolutions</b>		
<b>Fossil Fuel Non-Proliferation Treaty endorsement</b>	<b>Green</b>	Municipal authority to make a declaratory statement or enforcement in support of a fossil fuel ban is not restricted, however enforcement of such a ban depends on the specific subject matter.
<b>SAFE Commitment</b>	<b>Yellow</b>	Municipal authority may vary depending on the category of SAFE policies. Certain temporary or permanent restrictions on fossil fuel infrastructure may be preempted by state or federal law.
<b>City/county plans to limit fossil fuel infrastructure or similar wording in climate action plan, climate emergency declaration, or executive order</b>	<b>Yellow</b>	Municipal authority to restrict new fossil fuel infrastructure may be upheld depending on the type of infrastructure the



		<p>municipality is attempting to restrict.</p> <p><a href="#">Portland, OR – Fossil Fuel Infrastructure Resolution</a></p> <p><a href="#">Ulster County, NY – Climate Action Plan Executive Order</a></p>
<b>Climate emergency (no badge on the SAFE map)</b>	Green	<p>25-26</p> <p><a href="#">Ulster County, NY- Climate Emergency Resolution</a></p> <p><a href="#">New York City, NY – Climate Emergency Resolution</a></p>
<b>Climate action plan (no badge on the SAFE map)</b>	Green	<p>25-26</p> <p><a href="#">Town of East Hampton, NY - Climate Action Plan</a></p> <p><a href="#">Ithaca, NY – Energy Action Plan</a></p>
<b>100% RE commitment</b>	Green	<p>25-32</p> <p><a href="#">Town of East Hampton, NY- 100% RE Commitment</a></p>
<b>Executive order (no badge on the SAFE map)</b>	Green	<p>25-26</p> <p><a href="#">New York City, NY – Climate Action Executive Order</a></p>
<b>Temporary restrictions on new fossil fuel infrastructure</b>		
<b>Permitting restrictions to do any of the things in 'no new infrastructure'</b>	Yellow	<p>Municipal authority to temporarily restrict new infrastructure may be upheld, however permanent restrictions depend on the specific subject matter.</p>
<b>Permanent restrictions on new fossil fuel infrastructure</b>		
<b>Bulk fossil fuel storage ban (or significant restriction)</b>	Yellow	8-10, 19-20
<b>Pipeline ban</b>	Red	7-10, 21-13
<b>New refinery and expansion prohibition</b>	Green	Although the possibility of state preemption exists,

		municipalities likely possess authority to prohibit new refineries through zoning laws. 19-20, 33-35
<b>Pipes and/or compressors restrictions</b>	Yellow	21-23, 33-35
<b>Oil train terminal ban</b>	Green	30-31 <a href="#">Portland, OR Ordinance to Restrict Bulk Fossil Fuel Terminals</a>
<b>Extraction equipment permitting restrictions or ban</b>	Green	19-20 <a href="#">Dryden, NY – Resolution in Support of Adopting Amendments to the Town of Dryden Zoning Ordinance Clarifying the Town’s Prohibition of Natural Gas Exploration and Extraction (p. 5-16)</a>
<b>Fossil fuel loading/unloading ban</b>	Green	30-31 <a href="#">South Portland Clear Skies Ordinance</a>
<b>Extraction ban</b>	Green	19-20 <a href="#">Dryden, NY – Resolution in Support of Adopting Amendments to the Town of Dryden Zoning Ordinance Clarifying the Town’s Prohibition of Natural Gas Exploration and Extraction (p. 5-16)</a>
<b>New Gas Station ban</b>	Green	25-26, 30-31, 33-35
<b>Electrification policies</b>		
<b>New buildings 100% electric (no new natural gas hook ups)</b>	Green	25-27, Appendices G and H <a href="#">Berkeley, CA- Municipal Prohibition of Natural Gas Infrastructure in New Buildings</a>

		<a href="#">Brookline, MA - Municipal Prohibition of New Fossil Fuel Infrastructure in Major Construction</a>
<b>Existing home and building electrification and decommissioning gas infrastructure</b>	Green	25-27, 31-32 <a href="#">New York City, NY – Local Law 97</a>
<b>Mass transit fleet electrification - 100% going forward</b>	Green	25-26, 30-31 <a href="#">New York City, NY – All Electric and Safe New York City Fleet</a>
<b>Zero emission zones</b>	Yellow if mandatory Green if voluntary	Depending on the size and location of the zone, municipalities may have zoning authority to create zero emissions zones, however, mandatory zero emissions zones may be held invalid if the law unreasonably burdens interstate commerce. 4-6, 30-31
<b>Internal Combustion Engine (ICE) car sale ban</b>	Yellow	Municipal ban of the sale of ICE cars may be held invalid if the law unreasonably burdens interstate commerce. 4-6, 30-31 <a href="#">California Executive Order Banning Sale of ICE Cars</a>
<b>ICE car ban</b>	Red	Banning the use of ICE cars raise constitutional challenges arising under the Commerce Clause, Takings Clause, Due Process Clause and Equal Protection Clause.

