

# Protecting Watersheds from Gas Production Hazards: What Municipalities in New York Can Do

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Drilling along the Colorado River, Garfield County, CO, <http://www.endocrinedisruption.com/photoviewer.php?photoorder=1&c=gasphoto>

# The Authority of Municipalities to Make Law

- Inherent powers of local governments
- Home Rule powers granted by NYS Constitution
- Powers granted by state law
- State limitations on local government powers
- Federal limitations on local government powers

# Inherent Authority of Local Governments

- Many believe that the inherent authority of communities to govern themselves is central to democracy
- Cities are ancient legal entities
- The Corporation of the City of New York is one of the oldest corporations in North America, first chartered in 1653
- A number of towns and cities in our country were established before the constitution of the United States

# Authority of Town and Cities under the New York Constitution

- New York's first constitution after declaring independence from the English crown in 1777 preserved some degree of the independence local governments had enjoyed under the colonial charter
- The 1777 constitution prohibited the legislative transfer to state officials of functions previously performed by local officials, and required the election "by the people" of town officers
- Increases in powers granted to local governments were contained in provisions adopted in the constitutional conventions of 1846, 1894, and 1938

# Municipal Home Rule Laws

- A movement to codify the authority of local governments in state constitutions and statutes began with the constriction of municipal governing authority imposed by courts and legislatures following the Civil War
- New York is one of forty-three states whose state laws acknowledge the right of citizens, through their municipal governments, to make local laws
- Today, the need has never been greater for communities to assert their rights of local democracy and make laws protecting the health, safety, and quality of life in our communities

# Dillon's Rule

- In 1868, a railroad lawyer turned Iowa Supreme Court Justice, John Dillon, wrote an opinion that has been followed in many jurisdictions to limit municipal sovereignty. When the US Supreme Court adopted the rule in 1907, in the case of *Hunter v. Pittsburgh*, it became a corner stone of American municipal law
- The first part of Dillon's Rule states that local governments have only three types of powers:
  - Those granted in express words
  - Those necessarily or fairly implied in or incident to the powers expressly granted, and
  - Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable
- The second part of Dillon's Rule states that if there is any reasonable doubt whether a power has been conferred on a local government, then the power has NOT been conferred. This is the rule of strict construction of local government powers.

# Dillon's Rule in New York

- Dillon's Rule is followed in 39 states
- In 1925 the New York Court of Appeals held in *Browne v. City of New York*, that local governments are powerless to act other than pursuant to the areas of authority specifically delegated to them in state statutes
- In direct response to the resulting ambiguity that existed over the extent of authority of local governments, the home rule article of the New York Constitution was amended in 1963



# 1963 Amendments to the New York Constitution

- The 1963 amendments are the most recent amendments to New York's constitutional provisions relating to home rule
- They were adopted by the vote of the people of New York
- The 1963 amendments powerfully restate and expand the home rule powers of local governments

## ARTICLE IX\*

### LOCAL GOVERNMENTS

#### **Bill of rights for local governments.**

Section 1. Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

(a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article.

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\*New article adopted by amendment approved by vote of the people November 5, 1963. Former Article IX repealed, except for sections 5, 6 and 8 which were relettered subdivisions (a), (b) and (c) respectively of new section 13 of Article XIII.

# Art. 9 of New York Constitution

- §2. (a) The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.
- (b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:
  - (1) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers . . . in addition to the powers vested in them by this article. A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year

# Art. 9 of New York Constitution

§2. (c) In addition to powers granted in the statute of local governments or any other law, . . . (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government: . . .

- (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

# Art. 9 of New York Constitution

§3. . . .

(c) Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed

# Judicial Interpretation of Home Rules Powers

Since 1964, courts in New York have continued to find limitations on home rule powers

# Regulating Land Use in New York

- In New York, the state legislature has delegated primary authority to regulate land use in the public interest to the local level
- The state has retained authority to regulate certain aspects of land use, delegated some authority to county or regional agencies, and in certain instances has shared land use authority with local governments
- Occasionally, the legislature withdraws this delegated authority by enacting legislation that pre-empts the local role

The Home Rule Authority of New York Municipalities in the Land Use Context, Joe Stinson, 1997, <http://www.pace.edu/LawSchool/landuse/stinso.html>

The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control, John Nolon, 10 PACE ENVTL. L. REV. 497 (Spring 1993)

# Authority under Home Rule Statute

- The authority contained in the Municipal Home Rule Law (MHRL) to adopt laws for “the protection and enhancement of [their] physical and visual environment” authorizes the enactment of laws do not fit squarely within the orbit of traditional land use law
- For example, in the 1989 Court of Appeals case of *Ardizzone v. Elliot*, the court stated that the municipality had the power to regulate the freshwater wetlands within its boundaries under the Municipal Home Rule Law



# Art. 23 Restriction on Local Powers

§ 23-0303. Administration of article

2. The provisions of this article 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

# Municipal Compacts

- In 1960, the New York legislature authorized local governments to cooperate by entering into inter-municipal agreements for the performance of their respective functions, powers, and duties and allows them to cooperate regarding land use planning, regulation, and administration with the enactment of Article 5-G of the General Municipal Law
- In 1993 the state legislature authorized county governments to assist constituent localities in land use matters. The 1993 amendments modified General Municipal Law §§ 119-u and 239-d, as well as General City Law § 20-g, Town Law § 284 and Village Law § 7-741
- Pursuant to these amendments, a county planning agency can act in an advisory capacity, assist in the preparation of a comprehensive plan, assist in the preparation of land use regulations, and participate in the formation of individual or joint administrative bodies

Grassroots Regionalism Under New York Law: Encouraging Intermunicipal Land Use Compacts, John R. Nolon, March, 1999,

# New York County and Town Hydro-Fracking Laws and Resolutions

City of Auburn Moratorium - June 2, 2011  
Ulster County Resolution - March 15, 2011  
Town of Fabius Resolution - February 28, 2011  
City of Buffalo Ban - February 8, 2011  
Town of Gorham Moratorium - December 30, 2010  
Ontario County HFRAC Ban And Waste Disposal Law - December 17, 2010  
Town of Tully HFRAC Moratorium - November 3, 2010  
Town of Lysander Road Protection Law - October 23, 2010  
Tompkins County HFRAC Ban - October 19, 2010  
Town of Marcellus HFRAC Moratorium - September 20, 2010  
Town of Skaneateles HFRAC Moratorium - August 23, 2010  
Putnam County AC Resolution - August 3, 2010  
Westchester County HFRAC Resolution - June 7, 2010

Westchester County HFRAC Resolution - June 7, 2010  
Tompkins County HFRAC State Memorializing Resolution - May. 18, 2010  
Cortland County State Memorializing Resolution - Apr. 23, 2010  
Town of Virgil Aquifer Protection Law - April 8, 2010  
Sullivan County HFRAC Ban - Mar. 18, 2010  
Sullivan County HFRAC Federal Memorializing Resolution - Mar. 18, 2010  
Town of DeWitt Local Law HFRAC Ban - Mar. 8, 2010  
Onondaga County HFRAC State Memorializing Resolution - Mar. 2, 2010  
Onondaga County HFRAC Ban - Feb. 2, 2010  
Onondaga County HFRAC Federal Memorializing Resolution - Feb 2, 2010  
Town of Onondaga HFRAC Resolution - Jan. 4, 2010  
New York City HFRAC Resolution - Nov. 16, 2009

**Local Law #3 for the year 2010, a local law amending the Town of Virgil Zoning Law and Zoning Map**

SECTION 1 The Zoning Law adopted on February 15, 2007 is hereby amended by deleting Sections 560 through 590 and by adding the following:

AQUIFER PROTECTION DISTRICT

SECTION 560 PURPOSE

The purpose of the Aquifer Protection District is, in the interest of public health, safety, and general welfare, to preserve the quality and quantity of the Town's groundwater resources in order to ensure a safe and healthy drinking water supply. This is to be accomplished by regulating land uses which might contribute to the contamination of any aquifers identified as necessary for the present and future water supply of the Town of Virgil.

SECTION 561 SCOPE

The Aquifer Protection District shall be considered as overlying other zoning districts. Any uses permitted in the portions of the districts so overlaid shall be permitted subject to all the provisions of this district. In any cases where conflicts arise between these supplemental regulations and any other existing regulations, the more restrictive shall apply.

Nothing herein shall regulate farm management practices which are consistent with generally accepted principles of farming.

SECTION 566 PROHIBITED USES AND ACTIVITIES

The following uses and activities are prohibited:

- A. The discharge, land application, or disposal of any hazardous material, toxic substance, or radioactive material.
- B. The manufacturing or processing of any hazardous material or toxic substances in Areas I & II.
- C. Petroleum storage facilities or vehicular servicing in Area I.
- D. Petroleum storage facilities with a total tank capacity in excess of 40,000 gallons in Areas II, III, IV, and V.
- E. The open storage of pesticides, herbicides, or fungicides.
- F. The open storage of coal or chloride salts.
- G. The dumping or disposing of snow or ice collected offsite from roadways or parking areas into or within 50 feet linear distance of any watercourse, *or onto land located in Areas I & II.*
- H. Any form of underground injection of drilling fluids, hazardous materials, or toxic substances, for the purpose of disposal.
- I. Gas exploration and drilling in Areas I, II, & III on the surface, but not below ground.
- J. Solid waste disposal facilities and junkyards in Areas I, II, III, & IV.
- K. Onsite wastewater treatment systems in Area I.
- L. The disposal of toxic substances or hazardous materials by means of discharge to an onsite wastewater treatment system in all areas.
- M. The mining of sod, loam, sand, gravel, aggregate, quarried stone, or like material in Areas I & II except when incidental to, or in connection with, the construction or maintenance of a building.
- N. Subsurface discharge from floor drains in all areas.

SECTION 2 Zoning Law Section 105 is hereby amended by adding the following definitions:

CONSUMPTIVE USE: The loss of water from a ground-water or surface water source through a manmade conveyance system (including such water that is purveyed through a public water supply system) due to transpiration by vegetation, incorporation into products during their manufacture, evaporation, diversion from the WATERSHED OR RECHARGE AREA, or any other process by which the water withdrawn is not returned to the WATERSHED OR RECHARGE AREA undiminished in quantity.

HAZARDOUS MATERIAL: Any substance found listed in either 40 CFR 261, 40 CFR 302, 6 NYCRR 371, or 6 NYCRR 597, alone or in combination, including but not limited to petroleum products, organic chemical solvents, heavy metal sludges, acids with a pH less than or equal to two (2), alkalis with a pH greater than or equal to twelve point five (12.5), radioactive substances, pathological or infectious wastes or any material exhibiting the characteristics of ignitability, corrosivity, reactivity or EP toxicity.

RECHARGE AREA: An area of land where rainwater infiltrates the ground to reach an aquifer.

TOXIC SUBSTANCE: Any compound or material which is or may be harmful to human health, as defined by § 4801, Subdivision 2, of the New York State Public Health Law.

WATERSHED: A region or area contributing stormwater ultimately to a particular watercourse or body of water.

# Keuka Watershed Improvement Cooperative

- The KWIC or Keuka Watershed Improvement Cooperative was formed by inter-municipal agreement in 1993. The previous watershed organization known as the Keuka Lake Perimeter Committee became dysfunctional in the early 1980's after several towns pulled out of the agreement
- The municipalities determined that tourism and tax base depend on a clean and healthy lake. Local tourism generates nearly \$50 million dollars a year, and real property tax base represents an estimated \$1 billion along the lake (up to 70% of all assessed value in many towns)
- KWIC mission is “to protect and improve the purity of waters in the Keuka Lake Watershed by planning for uniform regulation of wastewater management regulations and pursue appropriate action to resolve other potential threats to Keuka Lake”

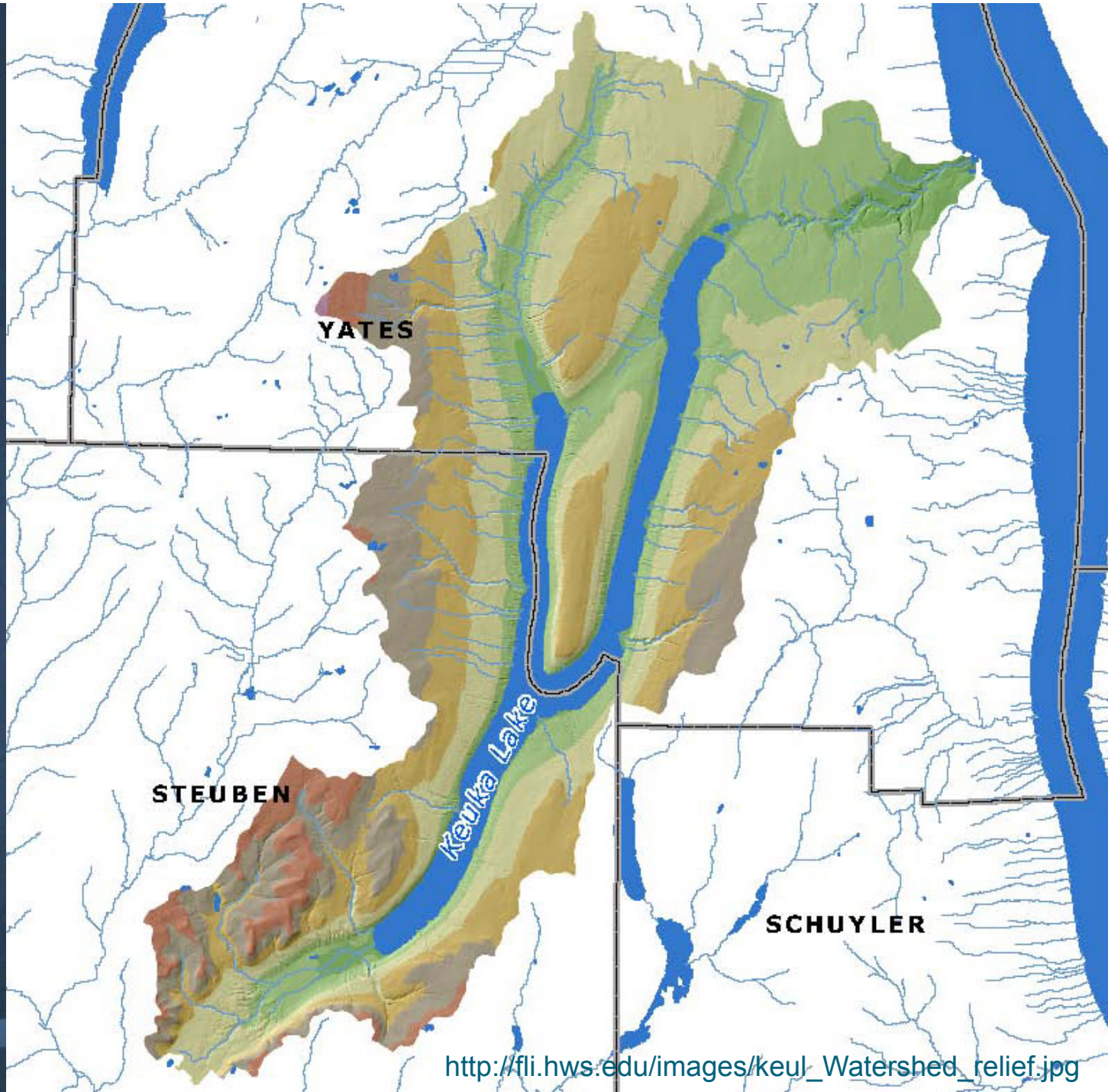
<http://keukawatershed.com/>

[http://www.keukalakeassoc.org/how/wq\\_kwic\\_history.php](http://www.keukalakeassoc.org/how/wq_kwic_history.php)

# Yates County







# Federal Limitations on Local Government Powers

Although the powers of local governments are not addressed in the federal constitution, it is generally considered that the US Supreme Court has the same powers to invalidate local laws that it has to invalidate state laws under the constitution

- Contract Clause
- Commerce Clause
- Due Process Clause of the 14<sup>th</sup> Amendment

# Designation as a Sole Source Aquifer under the Safe Drinking Water Act

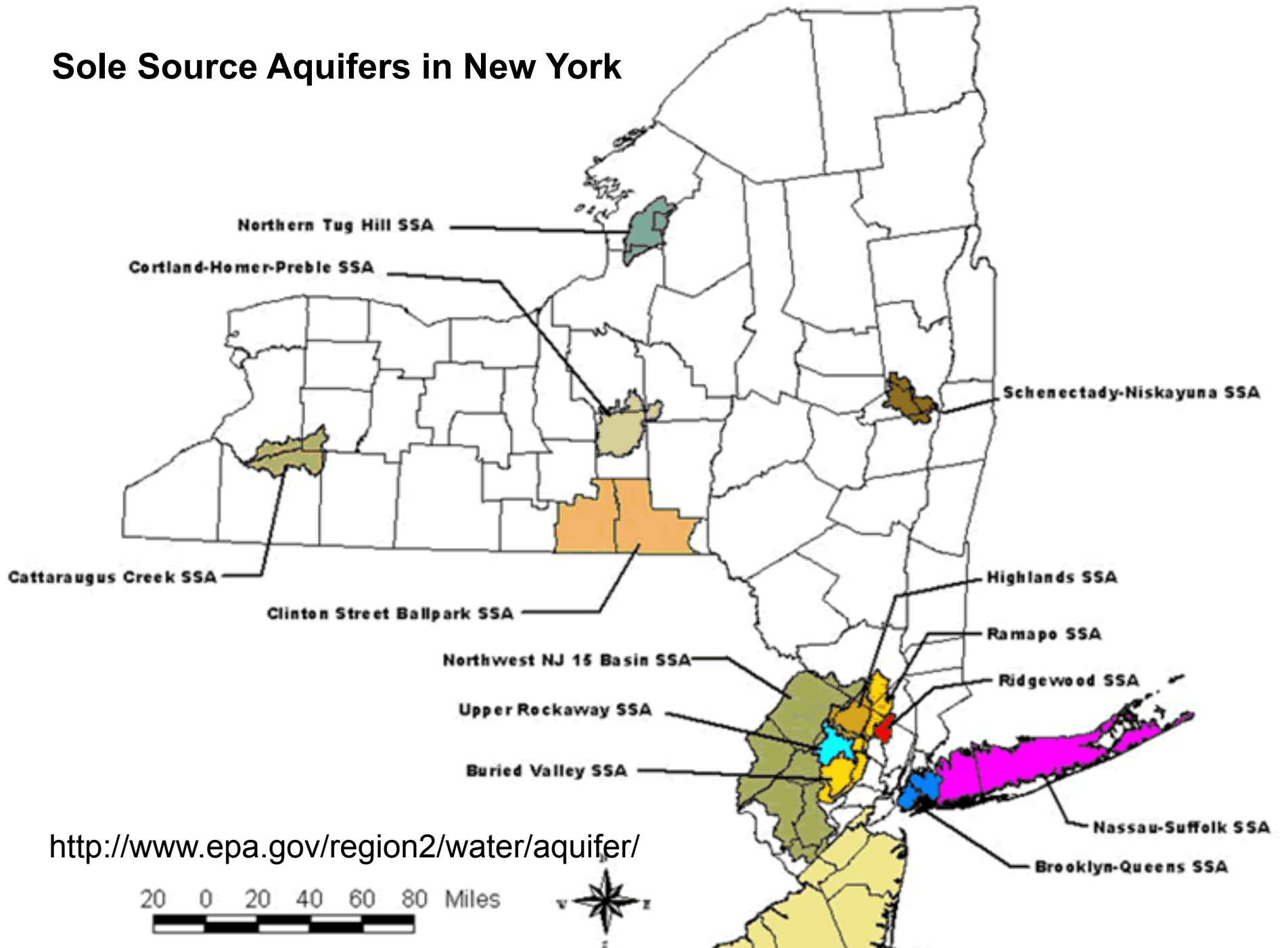
- Sole Source Aquifers are designated by the US Environmental Protection Agency as the sole or main source of drinking water for a community, under provisions of the Federal Safe Drinking Water Act
- A sole source aquifer (SSA) is defined as one which supplies at least fifty percent (50%) of the drinking water consumed in the area overlying the aquifer
- SSA's can have no alternative drinking water source(s) which could physically, legally, and economically supply all those who depend upon the aquifer for drinking water
- The designations are made in response to a petition from the locality, and after public hearing

# Benefits of Designation as SSA

- The most direct benefit of SSA designation is that all Federal financially assisted projects that have the potential to contaminate the SSA area are subject to review by the EPA
- SSA designation also heightens awareness on the part of state and local governmental agencies. Regulators may have to more closely scrutinize a project before granting a permit in a Sole Source Aquifer
- For example, the NY Environmental Conservation Law requires that any person seeking a SPDES permit or a renewal within an area designated as a sole source aquifer, shall include as a part of the required information, the name and address of all public water purveyors with a service area within three miles of the applicant's facility

The Facts About Sole Source Aquifers, Steven Winkley, New York Rural Water Association, <http://www.nyruralwater.org/publications/spring2002/SWSpring02.cfm>

# Sole Source Aquifers in New York

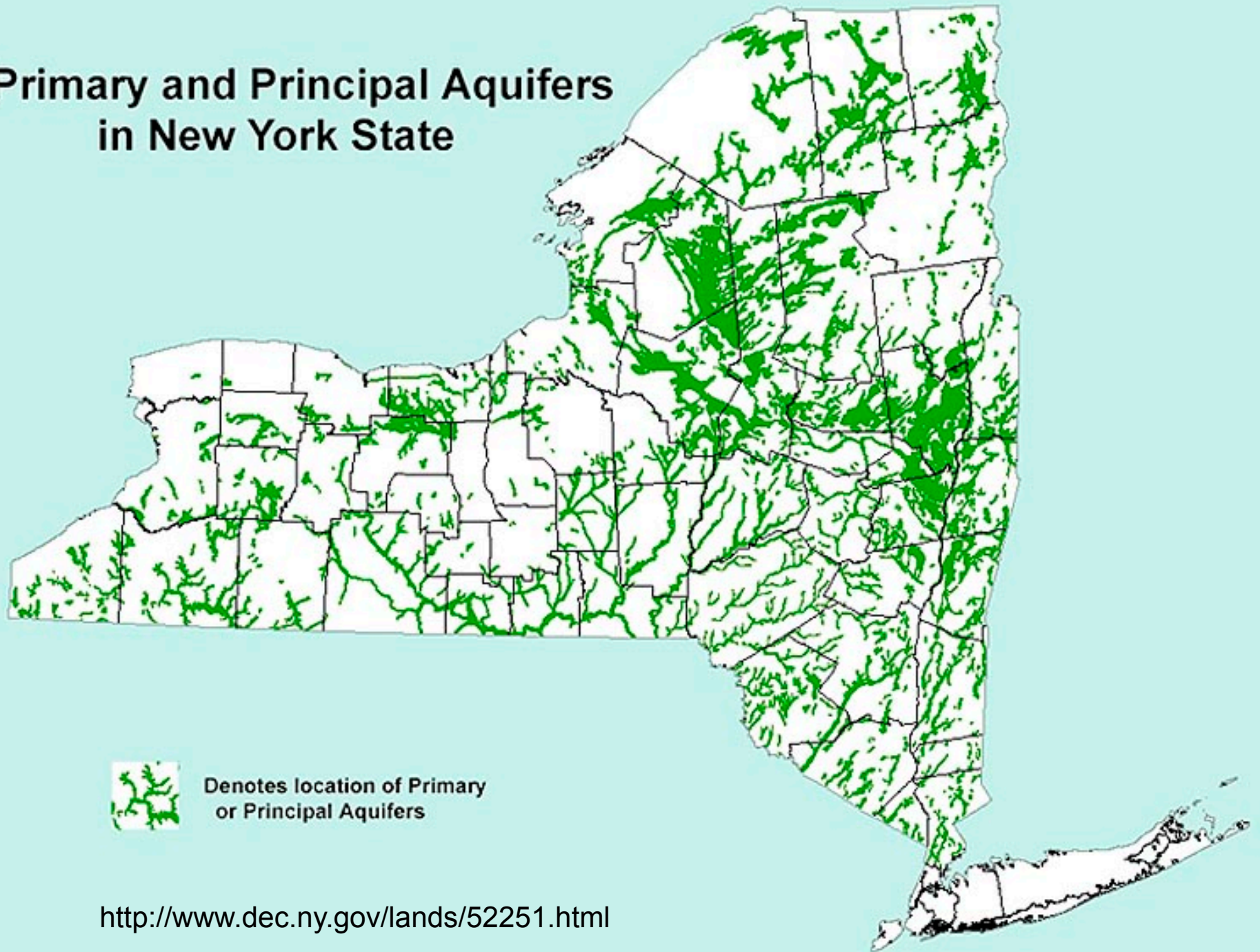


<http://www.epa.gov/region2/water/aquifer/>

# New York Sole Source Aquifers

- Nassau-Suffolk Aquifer System (2.4 million people)
- Brooklyn-Queens Aquifer System (650,000)
- Ramapo River Valley Aquifer System (250,000)
- Cattaraugus Creek Basin Aquifer System (200,000)
- Schenectady-Niskayuna Aquifer System (140,000)
- Clinton Street Ballpark Aquifer System (130,000)
- Cortland-Homer Preble Aquifer System (35,000)

## Primary and Principal Aquifers in New York State



<http://www.dec.ny.gov/lands/52251.html>

# Cortland - Homer - Preble Sole Source Aquifer



Location



## Notes and Explanation:

The Cortland-Homer-Preble Sole Source Aquifer was designated under the authority of Section 1424(e) of the Safe Drinking Water Act, Federal Register Citation-53FR 22046. Publication Date-06/13/88.

## Map Status and Disclaimer:

Please note that this working map is a computer representation compiled by the Environmental Protection Agency (EPA) from sources which have supplies data or information that may not have been verified by EPA. This data is offered here as a general representation only, and is not to be used for commercial purposes without verification by an independent professional qualified to verify such data or information. The EPA does not guarantee the accuracy, completeness, or timeliness of the information shown, and shall not be liable for any loss or injury resulting from reliance upon the information shown



- County
- Major Road
- Aquifer Boundary



LEGEND





# Relationship between Sole Source Aquifer Status and Primary Aquifer Status in NY

- The NYS Department of Environmental Conservation states on its website that it believes that all of the Primary Water Supply Aquifers in New York State would qualify for designation as Sole Source Aquifers, but that there is no direct technical relationship between the designation of “Sole Source” aquifers and Primary and Principal Aquifers
- Vice versa?

# Cortland Homer Preble Aquifer System

In response to a petition from the Cortland County Legislature, the Region II Regional Administrator of the EPA determined in 1988 that the Cortland-Homer-Preble Aquifer System underlying portions of Cortland and Onondaga Counties, New York:

- Is the sole source of drinking water for the 35,000 residents in the aquifer service area;
- There are no viable alternative drinking water sources of sufficient supply; and
- If contamination were to occur, it would pose a significant hazard to public health, and

Cortland Homer Preble Aquifer System, US EPA Region 2, [http://www.epa.gov/region2/water/aquifer/cortland/fr\\_cortl.htm#I9](http://www.epa.gov/region2/water/aquifer/cortland/fr_cortl.htm#I9)

# Findings

- Although all public water supply wells in the aquifer meet or exceed the appropriate Federal and State drinking water standards, there have been several cases of private well contamination by organic solvents. In addition, the aquifer is highly vulnerable to contamination, due to high soil permeability and shallow depth to ground water. Potential sources of contamination include transportation routes, septic systems, highway, rural and urban runoff, commercial and industrial facilities, and agricultural practices

Cortland Homer Preble Aquifer System, US EPA Region 2, [http://www.epa.gov/region2/water/aquifer/cortland/fr\\_cortl.htm#19](http://www.epa.gov/region2/water/aquifer/cortland/fr_cortl.htm#19)

# Conclusion

- There is a lot of case law interpreting home rule and local zoning powers in New York, but not much related to zoning that impacts gas drilling activities
- It is expensive to assert rights through the court system, but it may be even more expensive not to assert them
- If towns don't assert their rights to make local laws to protect their local environments, the health and property rights of their citizens are likely to be diminished

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