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**Energy Bar  
Association  
Program**



# Energy Bar Association's Mission Statement

EBA has approximately 2,600 member and promotes the professional excellence and ethical integrity of its members in the practice, administration, and development of energy laws, regulations and policies by providing:

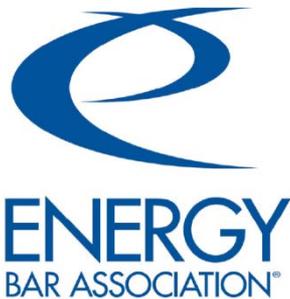
- superior educational programming,
- networking opportunities, and
- information resources.



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BAR ASSOCIATION®

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Calendar of Events  
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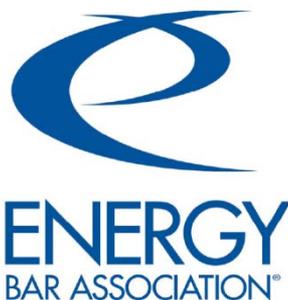


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**2016 Annual Meeting &  
Conference**

**June 7-8, 2016**

Washington, DC





# ***For Better or For Worse? How the Hydraulic Fracturing Debate is Shaping Natural Gas Infrastructure Development***

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2 February 2016

Hogan Lovells US LLP  
Litigation Center

Washington, D.C.

# Energy Bar Association

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- About EBA's Natural Gas Committee
  - Sarah Tucker, Chair
- EBA's Commitment to Educational Programming and Networking Opportunities
  - Lisa Levine, EBA Executive Director
- EBA Opportunities and Membership Drive

# Introductions

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- **Session Moderator**
  - Janna Chesno, Hogan Lovells US LLP
  
- **Panelists**
  - Shippen Howe, Of Counsel, Van Ness Feldman LLP
  - Ben Norris, Senior Counsel, American Petroleum Institute
  - Mark Brownstein, Vice President, Climate and Energy Program, Environmental Defense Fund

\* Bios provided in attached appendix.

# Overview

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- **Goals of Today's Presentation**
  - Explore policy and legal debate surrounding increased production of unconventional sources of natural gas through horizontal drilling and hydraulic fracturing
  - Provide insight into key court cases, as well as other federal, state and local initiatives and proceedings playing out across the U.S.
  - Analyze case studies in key states
  - Discuss advances in technology
  - Discuss the role of natural gas in carbon-free policy efforts
  - Evaluate how these developments may affect assumptions associated with natural gas infrastructure development
- **Question and Answer**
  - We invite attendees to ask questions of the panel.

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# **Appendix: Panel Bios**

# Panel Bios

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## ***Mark Brownstein***

- Mark is a Vice President in the Climate and Energy Program at Environmental Defense Fund. Mark leads EDF's work on the oil and gas industry with particular focus on methane emissions and the risks to public health and environment associated with unconventional oil and gas development. In addition, he specializes in a variety of electric and gas utility-related policy and regulatory issues.
- Mark's career includes time as an attorney in private environmental practice, an air quality regulator with the New Jersey Department of Environmental Protection, and an aide to a member of the U.S. House of Representatives.
- Mark is an adjunct professor of law at New York University Law School where he co-teaches a seminar on public policy and energy project finance.
- Mark holds a J.D. from the University of Michigan Law School, and a B.A. from Vassar College

## ***Shippen Howe***

- Shippen is an Of Counsel with Van Ness Feldman. He has over twenty years of experience working in the electric power and natural gas industries. Shippen has a thorough knowledge of FERC regulations and requirements under the Natural Gas Act (NGA) and the Natural Gas Policy Act (NGPA) and numerous federal environmental statutes, including: the National Environmental Policies Act (NEPA); the Coastal Zone Management Act (CZMA); the Energy Policy Acts of 2005 and 2007; the Endangered Species Act (ESA); the Migratory Bird Treaty Act (MBTA); the Wild and Scenic Rivers Act (WSRA); and the National Historic Preservation Act (NHPA).
- Shippen advises natural gas pipeline clients on day-to-day matters such as capacity release, tariff implementation and revision, and blanket certificate construction. Additionally, he has assisted clients with rate filings and major audits of their FERC compliance procedures.
- Shippen received his B.A. from Boston University and his J.D. from Case Western Reserve University School of Law.

# Panel Bios (cont'd)

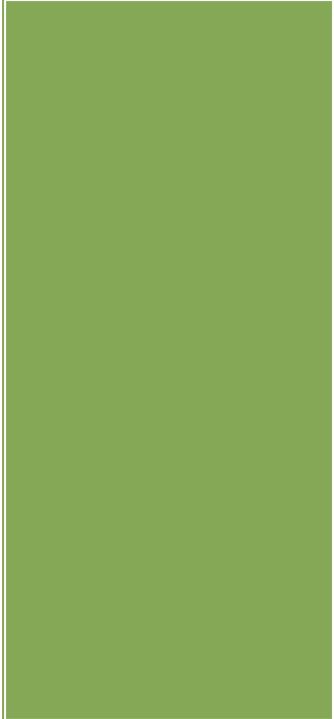
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## ***Ben Norris***

- Ben serves as Senior Counsel in API's Office of General Counsel, where he advises the Institute and its members on state and federal legislative, regulatory, and litigation matters affecting the oil and gas upstream sector.
- Ben's portfolio includes hydraulic fracturing, LNG and crude oil exports, and related environmental matters. He was the lead legal advisor to API during its successful push to repeal the crude oil export ban. He also advises the Institute on state and local ballot measure campaigns and related election law issues.
- Ben received a BA in Political Science and English from Rice University in Houston, TX, and a JD from Washington University in St. Louis, MO, where he served as Articles Editor of the Washington University Law Review.

## ***Janna Chesno (moderator)***

- Janna is a Senior Associate with Hogan Lovells. Janna's practice includes advising clients on regulation of U.S. natural gas pipeline, liquids, and liquefied natural gas assets. She represents clients in federal and state agency project permitting proceedings, including on NEPA compliance and appellate matters. Janna has served as lead energy regulatory and pipeline safety due diligence counsel on over \$2B in successful investment.
- Janna's career also includes serving as in-house counsel to Dominion, where she represented the company in negotiations and in rate and certificate proceedings before the Federal Energy Regulatory Commission.
- Janna serves on the Board of the Energy Bar Association and is a co-author of Regulation of the Gas Industry, "Liquefied Natural Gas", Matthew Bender & Company, Inc. © 2015 (W. Mogel ed.).
- Janna holds a J.D. from Georgetown Law, and a B.A. from the University of Alabama.

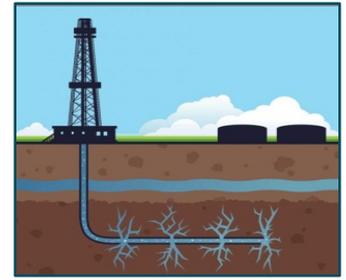


# Hydraulic Fracturing and Natural Gas Infrastructure Federal Regulation



*Shippen Howe*  
**Van Ness Feldman, LLP**

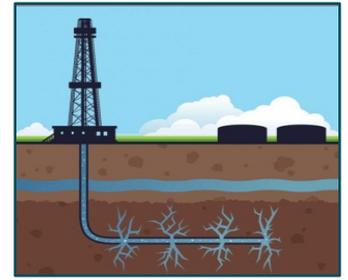
# I. Federal Regulation



## EPA – Water

1. Study on Hydraulic fracturing impacts on water
  - December 2012 – EPA issues Progress Report
    - Seven case studies selected for in-depth analysis
  - August 2014 – EPA issues academic papers
  - June 2015 – EPA issues draft “Assessment,”  
[http://cfpub.epa.gov/si/si\\_public\\_record\\_report.cfm?dirEntryID=244651](http://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryID=244651)
    - “We did not find evidence that hydraulic fracturing mechanisms have led to widespread, systemic impacts on water resources in the United States.”
  - January 2016 - EPA’s Science Advisory Board issues draft report on EPA’s June 2015 Assessment,
    - EPA’s statement was ambiguous and needed clarification (e.g., “systematic,” “widespread,” “impacts”)
    - EPA should provide an analysis of local impacts
    - EPA should acknowledge limitations of FracFocus
    - EPA should distinguish chemicals in “flowback” vs. “produced” water

# I. Federal Regulation



## EPA – Water (con't)

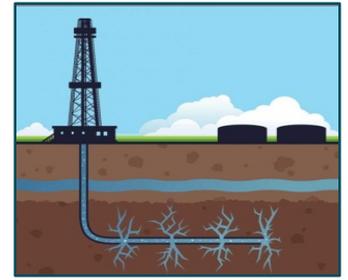
### 3. Underground Injection Control under SDWA

- In the Energy Policy Act of 2005, Congress created a broad exemption for hydraulic fracturing under the SDWA. Specifically, hydraulic fracturing – except when using diesel fuel – is excluded from the definition of underground injection and is not subject to regulation under the UIC program (SDWA Section 1421(d)(1)(B)).
- Guidance issued February 12, 2014, after lawsuit over permitting requirements
- Issues include what is “diesel” and state regulatory authority over enforcement

### 4. Effluent Guidelines Plan (Pretreatment standards for water – flowback and produced) – For Discharges to Treatment Facilities

- October 2011 – EPA issues *Effluent Guidelines Program Plan*, 76 Fed. Reg. 66,286 (Oct. 26, 2011)
- April 2015 – EPA proposes rule, 80 Fed Reg. 18,557 (April 7, 2015)
- Pretreatment standards for new and existing sources

# I. Federal Regulation



## EPA – Air

1. EPA issued final rule regulating oil and gas facilities, 77 Fed. Reg. 49,490 (Aug. 16, 2012)
  - *NSPS* (CAA § 111(b))- Addressed VOC's and SO<sub>2</sub> for new and modified facilities
    - Requires green completion, or “REC,” for new and recompleted wells by 1/1/15 (i.e., no flaring)
  - *NESHAP* (CAA § 112)- Addressed HAPs for existing and new/modified facilities
  - Rule did not address regulation of methane
2. EPA published amendments to its final rule, mainly addressing storage vessel provisions, 78 Fed. Reg. 58,416 (Sept. 23, 2013)

# I. Federal Regulation



## EPA – Air (con't)

3. September 2015 - EPA proposes amendments to the NSPS to include standards for methane as well as VOC emissions, 80 Fed. Reg. 56,593 (Sept. 18, 2015)
  - Applies to new and modified facilities for oil and natural gas
  - Applies to previously unregulated facilities (oil wells, pneumatic pumps, and fugitive emissions from well sites and compressor stations)
  - Applies to facilities not previously regulated for methane (gas wells, gas processing plants, compressor stations)
4. What about for existing oil and gas facilities?
  - Issue of what is a “major source” under PSD or Title V Permitting, 80 Fed. Reg. 56,579 (Sept. 18, 2015).
  - EPA has issued draft Control Techniques Guidelines for existing sources - just VOCs - recommendations to state agencies, 80 Fed. Reg. 56,577 (Sept. 18, 2015 ) (notice of availability)
  - Natural Gas STAR Methane Challenge (July 23, 2015)
  - No proposed rule outstanding for existing sources

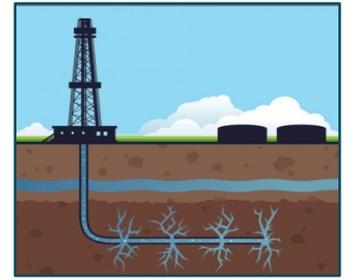
# I. Federal Regulation



## Interior – BLM

### 1. Description of Hydraulic Fracturing Rules

- First proposed in May 2012, 77 Fed. Reg. 27, 691 (May 11, 2012)
- March 26, 2015, BLM issued Final Rule that primarily addresses, 58 Fed. Reg. 16,128 (Mar. 26, 2015):
  - Well casing and cementing
  - Monitoring of HF process
  - Disclosure of chemicals
  - Surface storage of waste
- Highlights include:
  - Allows post-fracturing disclosure of chemicals
  - Eliminates use of “type wells” for monitoring well integrity; replaced with best practices standards
  - Use of FracFocus for reporting



# I. Federal Regulation

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## Interior – BLM (con't)

### 2. Opposition

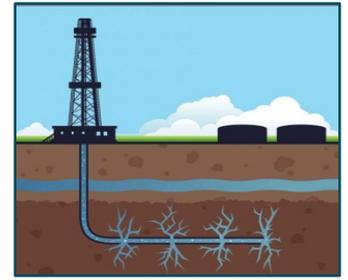
- Industry
  - Duplicative of state regulation and costly
- Environmental Organizations
  - Chemical disclosure and well integrity testing inadequate
  - EA Inadequate

### 3. Litigation

- U.S. District Court in Wyoming issues a preliminary injunction, Wyoming v. Jewell, Order on Motion for Preliminary Injunction, No. 2:15-CV-043-5WS (D. Wy. Sept. 30, 2015)
- Motion by Interior to separately address legal authority of BLM to issue the rule denied. Id., Order Denying Motion, (Dec. 29, 2015)

# I. Federal Regulation

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## Interior – BLM (con't)

4. NOPR to Prevent Gas Waste (January 22, 2016), See BLM website. NOPR addresses:
- Venting and flaring of gas from oil wells
  - Leaks and fugitive emissions – well sites and compressors
  - Gas lost from pneumatic controllers and pumps
  - Gas lost from storage wells
  - Well maintenance and liquids unloading
  - Gas lost from drilling and completion (EPA rules)

# Hydraulic Fracturing and Natural Gas Infrastructure: Industry Standards and Local Control Issues

A tall, slender industrial tower, likely a flare stack or distillation column, stands prominently in the center of the image. The tower is illuminated from below, creating a bright glow. The background shows a large industrial facility with various structures and pipes, set against a sky with scattered clouds. The overall scene is captured in a blue-tinted, high-contrast style.

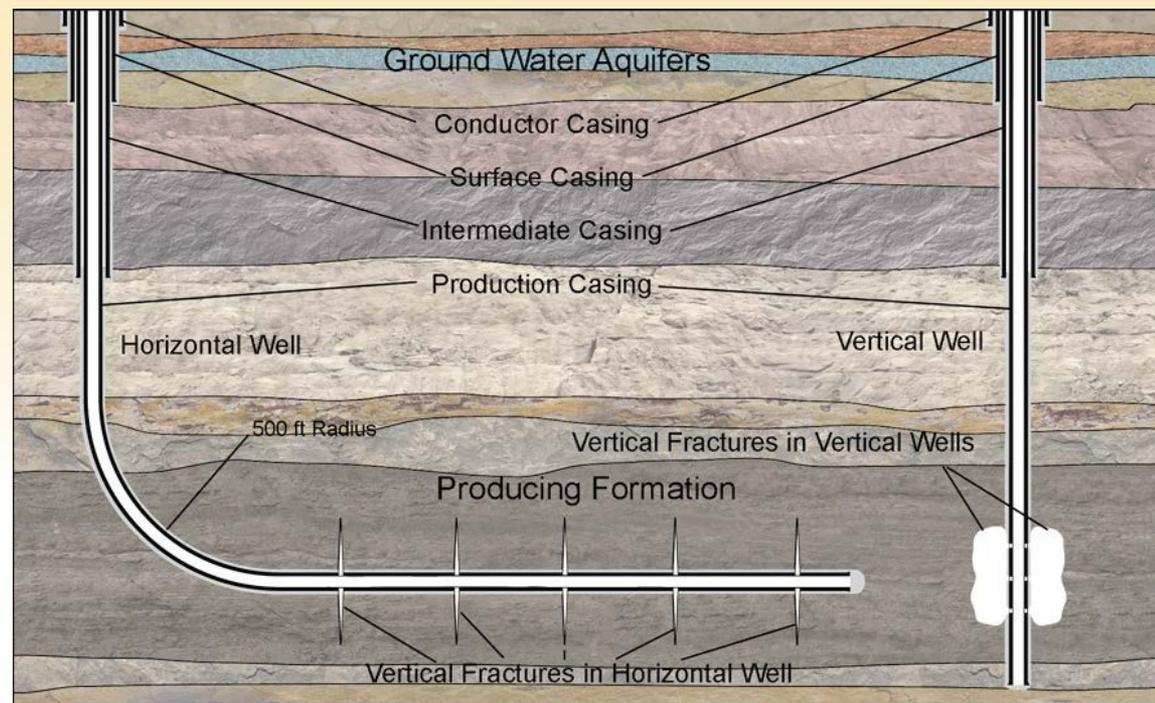
Ben Norris – Senior Counsel, API Office of General Counsel

EBA Presentation – Tuesday, February 2, 2016

- API is accredited by the American National Standards Institute (ANSI)
  - Openness, balance, consensus, due Process
  - Standards undergo regular review
  - Regular program audits (conducted by ANSI)
  
- Transparent process (anyone can comment on any document – [www.api.org/standards](http://www.api.org/standards))
  - All comments must be considered
  
- API corporate membership is not required (contact API at [standards@api.org](mailto:standards@api.org) for consensus group participation information)

# API Hydraulic Fracturing Standards: 100-1, Well Integrity and Fracture Containment (Oct. 2015)

- Addresses four main components of well design and construction:
  - Conductor casing: isolate shallow groundwater and surface sediments
  - Surface casing: isolate groundwater aquifers
  - Intermediate casing: isolate subsurface formations and protect from pressure
  - Production casing: isolate hydrocarbon production zone
- Assure isolation, meet and exceed regulatory requirements, achieve well integrity, contain well pressure



- Flowback management
  - Underground injection
  - On- or offsite treatment
  - Reuse and recycling
- Mitigation of surface impacts
  - Surface water
  - Soil
  - Wildlife
  - Ecosystems
- Also addresses spill prevention, baseline water sampling, and air quality

- Five Phase Model for oil and gas projects
  - General engagement
  - Entry phase
  - Exploration phase
  - Development phase
  - Operations/Production phase
  - Exit phase

## ➤ Statewide

- California
- Colorado (21 proposed initiatives)
- Michigan – 2018?

## ➤ Local

- California
- Colorado
- Illinois
- Ohio (as many as ten or more jurisdictions)
- Non-initiated: CO, FL, MA, MD, NC, NY, PA, VA

# Legal Framework and Issues

	MUNICIPAL (County or City)	STATE
INITIATED	Youngstown, Ohio	Colorado
LEGISLATIVE	Middlefield and Dryden, New York	Texas

# Snapshot of local opposition – New York

Hydrofracking bans on NYS county-owned lands



NYS hydrofracking bans and moratoria 8 July 2014



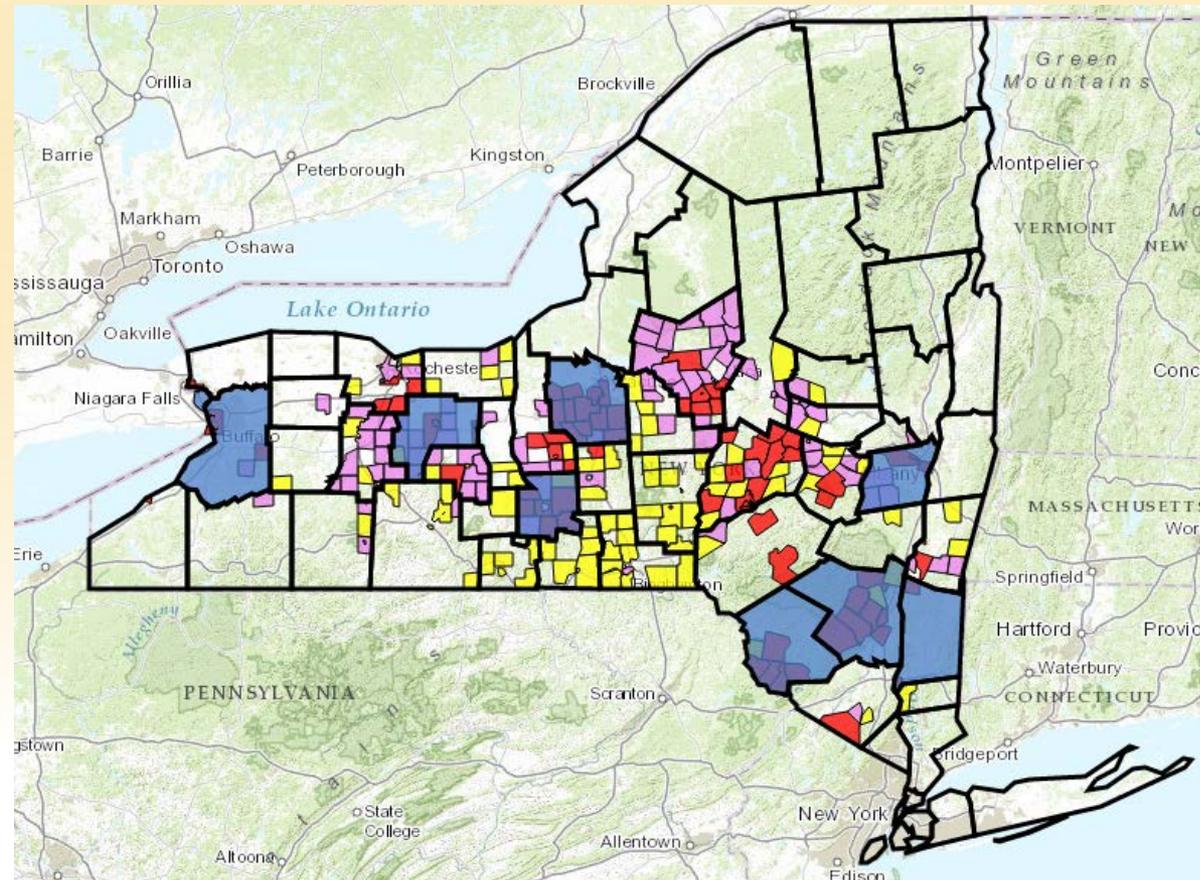
Ban in place



Moratorium (expirations vary)



Movements for a ban or moratorium



## ➤ Litigation

### ❑ *Over two dozen cases in state and federal courts in seven states since 2011*

- California, Colorado, New Mexico, New York, Ohio, Pennsylvania, West Virginia
- Widely varying results to date due to differing state law, but also closely divided politics of the issue

### ❑ *Selected cases*

- *State ex rel. Morrison v. Beck Energy Corp.* (Ohio Sup. Ct. Feb. 17, 2015)
  - 4-3 decision striking down local permitting and fees-related ordinances as preempted by state law
  - Broke a string of industry losses on Marcellus preemption issues but hardly a sweeping victory
- *Robinson Twp. v. Commonwealth* (Penn. Sup. Ct. 2013)
  - 4-2 decision striking down legislative compromise on local control
  - Three-justice plurality opinion on Environmental Rights Amendment has potentially profound implications for regulated industries
  - Litigation ongoing

## ➤ NGO Strategies

### ❑ Community Environmental Legal Defense Fund

Established in 1995, the Legal Defense Fund has now become the principal advisor to community groups and municipal governments struggling to transition from merely *regulating* corporate harms to *stopping* those harms by asserting local, democratic control directly over corporations.

Through grassroots organizing, public education and outreach, legal assistance, and drafting of ordinances, we have now assisted over 110 municipalities in Pennsylvania, New Hampshire, Maine, and Virginia to draft and adopt new laws with over 350,000 people living under these governing frameworks. These laws address activities such as corporate water withdrawals, longwall coal mining, factory farming, the land application of sewage sludge, and uranium mining.

## ➤ Industry Strategies

### ❑ *Substantive challenges*

- Preemption by state law
- Takings
- Federal Constitutional claims: substantive due process, equal protection, First Amendment

### ❑ *Procedural challenges*

- Protesting state/local initiative titling, petition requirements, and other technical requirements
- Follow-on litigation

- ❑ Proposed initiated charter forms of government in three Ohio counties (Athens, Fulton, Medina) to prohibit construction of NEXUS interstate natural gas pipeline
  
- ❑ Protests were timely filed and adjudicated by Secretary of State, who rejected the petitions on (1) state preemption grounds, and (2) grounds related to state Constitutional and statutory requirements for county charters
  
- ❑ *Walker v. Husted* (Ohio Sup. Ct. Sept. 16, 2015)
  - In a 6-1 decision, the Court denied proponents' request for mandamus
  
  - The Court affirmed the Secretary on rationale (2) only; they declined to extend substantive preemption review powers to the Secretary, even in the face of clearly preempted proposals directly analogous to a case decided by the same Court seven months earlier
  
  - API, as amicus, advanced alternative theory that the state Constitution imposes limits on the power of initiative to “adopt” as opposed to “enforce”

# **EBA Energizer: For Better or For Worse? How the Hydraulic Fracturing Debate is Shaping Natural Gas Infrastructure Development**

Helpful background information:

<http://blogs.edf.org/energyexchange/2016/01/28/preventing-future-aliso-canyon-sized-gas-leaks-the-importance-of-well-integrity/>

[https://www.edf.org/sites/default/files/methane\\_studies\\_fact\\_sheet.pdf](https://www.edf.org/sites/default/files/methane_studies_fact_sheet.pdf)

<http://blogs.edf.org/energyexchange/2015/12/07/new-study-finds-oil-gas-methane-emissions-in-the-barnett-shale-almost-twice-what-official-estimates-suggest/>

<http://business.edf.org/blog/2016/01/12/methane-emissions-are-risky-business-for-investors/>