



## Win for Industry: Longmont and Fort Collins' Fracking Bans Materially Impede the State's Interest and are Preempted by State Law

By [Karen Spaulding](#)

Today, the Supreme Court confirmed that local regulations prohibiting hydraulic fracturing are in operational conflict with the Oil and Gas Conservation Act and the Colorado Oil and Gas Conservation Commission's (COGCC) rules and regulations, and are preempted by state law. Twenty-four years after its decisions in *Bowen Edwards* and *Voss*, the Supreme Court admitted that its preemption analysis was confusing and at times contradictory. In *Longmont v. COGA, et al.* the Supreme Court clarified that prior to analyzing whether there is a conflict between state law and a local law, a court must determine whether the regulated matter at issue is one of state, local, or mixed state and local concern.

The Court found under the *Voss* four-part test that the Longmont fracking ban implicated a matter of mixed state and local concern. The Court found that the first and second parts of the *Voss* test weighed in favor of a matter of state concern because of a need for statewide uniformity in regulation of hydraulic fracturing, and that a "ripple" effect of individual local bans would materially impede the state's interest. The Court also found that the Colorado Constitution neither commits the matter to state nor local regulation. Unfortunately, as to the third part of the *Voss* test, whether the matter was traditionally regulated by local or state government, the Court stated that "the third factor does not suggest either a statewide or purely local concern." Clearly, the Court failed to grasp the difference between local surface land use regulations, some of which are permitted in the oil and gas context, and the regulation of the technical aspects of oil and gas drilling, such as hydraulic fracturing. Thus, the Court concluded that under the four-part *Voss* test, the regulation of hydraulic fracturing and the storage of hydraulic fracturing fluids was a matter of mixed state and local concern.

The Court next turned to its preemption analysis, and after finding no express or implied preemption, clarified the confusion in the long line of Colorado preemption cases utilizing different operational conflicts tests. The Court determined that the correct test under operational conflicts analysis is whether the local regulation materially impedes or destroys the state's interest, "recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard." The Court further explained that this preemption analysis requires the evaluation of the state and local regulations on their face and is "not a factual inquiry as to the effect of those schemes 'on the ground'" as Longmont postulated.

The Court held that Art. XVI of Longmont's Code materially impeded the state's interest in the efficient production of the state's oil and gas resources, and rendered the state's hydraulic fracturing regulations superfluous. Consequently, the Court affirmed Judge Mallard's trial court decision granting summary judgment in COGA's favor. The Court remanded the matter to Judge Mallard to lift the stay she imposed upon the hydraulic fracturing of wells in Longmont pending this appeal.

The Supreme Court used the same legal framework to determine that Fort Collins' 5 year moratorium on hydraulic fracturing was effectively a prohibition preempted by state law because it materially impeded the state's interest in hydraulic fracturing of wells and in fostering the economic development of the state's oil and gas resources. The Court expressed no view as to whether a moratorium on hydraulic fracturing of a shorter period of time might survive preemption. However, the Court discussed a Colorado case which permitted a 10 month moratorium which was upheld as valid, and a U.S. District Court case from New Jersey in which a one year moratorium was preempted because it operated as a prohibition. It appears likely that this Court would find a local ordinance with a 10 month or shorter hydraulic fracturing moratorium valid, but a moratorium of more than 10 months invalid.

Here are the links to the full Supreme Court opinions for [Longmont](#) and [Fort Collins](#). For more information, please contact [Karen Spaulding](#).