“F”racking”: just say that one word and you are most likely to provoke strong reactions from your listeners. Some will be strenuously in favor, while others will be vehemently opposed. But at least they have an opinion.

This attitude is not so for the state of New York. To be sure, we do not mean the good people of the Empire State: for or against, they have been heard from, loudly and often. Rather, we refer to their elected leaders, who have been dilly-dallying over taking a position on this issue for years and show no signs of abandoning their indecisiveness.

The state of New York has delayed, procrastinated, and otherwise just plain evaded.

Precisely, while other states forge ahead with regulating, taxing, and, most importantly, allowing exploration via fracking to proceed, for well over five years now the state of New York has delayed, procrastinated, and otherwise just plain evaded promulgating even the most rudimentary of

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Volume 30
Number 12

Environment
Social Cost of Carbon Statistical Modeling Is Smoke and Mirrors
Kevin Dayaratna and David Kreutzer... 7

Columns
Natural Gas Matters
Commission Kicks Off Major Changes in Gas-Power Relationships
Richard G. Smead ......................... 12

NERC and Enforcement Issues
Self-Reporting Routine Compliance Violations
Deborah Carpentier.......................... 16

Volume 30, Bibliography of Articles.. 19
Volume 30, Subject Index ............... 21

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regulations on the subject. This has cost the Empire State incalculable wealth in energy development, job creation, and taxes.1

It has been argued that this malaise is by design, not accident, and that New York’s governor and the agencies under his command have deliberately postponed a decision on authorizing fracking as a drilling methodology. New York landowners are understandably frustrated, as other jurisdictions leap forward in exploiting the shared Marcellus Shale.2

New York landowners are understandably frustrated.

DISGRUNTLED LAND OWNERS SUE

This discontent has now taken the shape of a very real lawsuit aimed at breaking the bureaucratic logjam. While the litigation is still in a nascent stage, the purpose of this writing is to set forth the factual background and basic legal arguments put forth by these disgruntled citizens.

Of course, this readership is well acquainted with “fracking,” the modern process of using horizontal drilling and the injection of high-pressure fluids to release previously hard-to-access reservoirs of natural gas from impermeable shale formations. Even the most conservative estimates project that there are massive quantities of natural gas trapped in the shale, sufficient, if realized, to fulfill US energy needs for decades and permit the nation to take a gigantic stride toward total energy self-sufficiency.3 As this once-overlooked technology has been embraced by the industry, opponents have raised concerns over, among other things, potential dangers to aquifers and so forth.

Notwithstanding these genuine concerns, jurisdictions other than New York have forged ahead to promulgate regulatory schemes authorizing fracking, while at the same time addressing key regulatory and environmental issues. Pennsylvania, for one, recently enacted a regulatory and taxation framework for exploiting the wondrous natural resource of the Marcellus Shale.4 Yet to date, New York has foregone the opportunities for energy security, job creation, and tax revenue afforded by permitting fracking operations.

This prompted the instant litigation, led by the Joint Landowners Coalition of New York, a self-described umbrella organization representing over 70,000 individuals and entities owning over a million acres spread far and wide across New York’s “Southern Tier,” essentially the Empire State’s lengthy border with neighboring Pennsylvania. Additional plaintiffs include individual landowners whose oil and gas leases with major developers have expired of their own accord, while drilling applications gathered dust on the shelves of New York regulators.

The defendants are New York’s current governor, Andrew Cuomo; Joseph Martens, the head of New York’s Department of Environmental Conservation (DEC); and Dr. Nirav Shah, commissioner of the New York State Department of Health (DOH). Indeed, the propriety of the role being played here by the DOH is one of the more serious allegations made by the plaintiffs in this lawsuit.

STATE LAW CLEARLY ENCOURAGES EXPLORATION AND PRODUCTION

A few words regarding the state law underlying the litigation.

New York’s Environmental Conservation Law bestows authority to license drilling projects on the DEC. In turn, agency action is largely dictated by a New York law, the State Environmental Quality Review Act (SEQRA), basically an environmental protection statute. Among its requirements are the filing and approval of Generic Environmental Impact Statements (GEIS) by explorers, modified by supplemental GEISs as necessary.

But paramount to the above are the explicit statutory directives found elsewhere in state law. New York has a declared policy of promoting the development of indigenous oil and natural gas resources.5 The development of such natural resources shall be regulated in a manner that prevents waste, protects the correlative rights and privileges of private landowners, and provides for the greatest ultimate recovery of oil and natural gas.6 And to assure these statutory objectives are met, the law further mandates that state officials shall conform agency policies and behavior to the fulfillment of said legislatively crafted goals.7

To carry out these directives, since 1992 oil and natural gas drillers within New York have been able to rely on a relatively streamlined
process for approving drilling permits. Operating pursuant to a GEIS promulgated that same year, the DEC routinely expedited the approval of drilling that fit within the parameters of the basic GEIS and, significantly, without the need for further review pursuant to SEQRA. The system worked smoothly for more than a decade and a half—until the blossoming of fracking. By 2008, both citizens and industry came to appreciate the riches that lay beneath the state’s Southern Tier, and New York’s legislature enacted ordinances aimed at developing the Marcellus Shale.

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FOOT-DRAGGING BEGINS

Notwithstanding this legislative momentum, then-Governor David Paterson ordered the DEC to simultaneously complete a supplemental environmental study. He also halted the issuance of drilling permits for fracking while the environmental analysis was ongoing. This halt in the issuance of drilling permits came to be known, technically and colloquially, as the “Moratorium.”

The additional environmental study was compiled, and public comment on it invited at the end of 2009. It is alleged that the general expectation was the supplemental GEIS would be soon resolved one way or the other, and, if positive in whole or part, well permits would start to be issued for fracking operations. In short, the Moratorium would come to an end in the short term.

It was not to be. In December of the following year, 2010, Paterson (by that time a “lame duck” governor) issued another directive, this time ordering the DEC to conduct further studies while maintaining the Moratorium. The newly elected Governor Cuomo wasted no time in even further extending the prohibition on issuing drilling permits. In fact, it was Cuomo’s very second executive order, entered on January 2, 2011.

By mid-June 2011, DEC Commissioner Martens announced his agency had compiled more than 1,000 pages of analysis regarding the pros and cons of fracking in New York. Notwithstanding the existence of this weighty tome, he unilaterally created a fracking “Advisory Panel,” designated to provide recommendations to the DEC on the issue. According to the complaint in this case, the panel met sporadically but never produced any formal recommendations.

New York’s bureaucrats propounded a second supplemental GEIS in the fall of 2011, with a statement from the DEC that fracking regulations would be promulgated in a matter of weeks. That did not happen, and the agency dragged the process well past Election Day 2012. Interestingly, it is alleged in the lawsuit that a DOH report from February 2012 declared that any health risks stemming from fracking operations were preventable, implicitly giving the OK for issuing fracking permits without further delay.

The Moratorium was still in effect in February 2013, when Governor Cuomo ordered Martens not to issue the supplemental study. The governor instead directed even more review by the DEC, that agency to be assisted by Commissioner Shah and the DOH. In October 2013 (in time for trick or treat?), Martens declared that the conclusion of the DOH review was not on the horizon; thus, new regulations, let alone drilling permits, would not be forthcoming any time soon.

Indeed, in testimony before New York’s legislators, Martens declared in January 2014 that the earliest fracking permits might be issued would be March of the next year, 2015. To end this tortuous history, the lawsuit that we are discussing commenced in mid-February 2014, some five-and-a-half years after former Governor Paterson issued his first directive aimed to bring New York into the age of fracking.

OUTRAGE BEGINS

Against this turgid chronology, the plaintiffs have made numerous allegations of wrongdoing by their state government, with the following being the most serious charges. The plaintiffs have characterized these delays and interagency maneuvers as deliberately lacking in transparency. Such opacity is directly contradictory to New York’s environmental laws, which, in fact, encourage public awareness and participation in DEC reviews. The landowners further accuse agency officials of wasting time and taxpayer money with all these machinations.
But most of all, the landowners decry the state’s five-and-a-half years of extending the Moratorium, effectively forbidding fracking within New York while adjoining jurisdictions employ the technology and develop their own Marcellus Shale properties. This is all to the detriment of New York’s energy industry, economy, and job opportunities for its citizens, the landowners assert. One allegation puts it quite succinctly, “New York remains on the sidelines during what is arguably one of the most significant energy revolutions this country has ever seen.” This claim has yet to be proved in court, to be sure, but any reasonable observer can certainly perceive more than a grain of truth in that accusation.

Against this turgid chronology, the plaintiffs have made numerous allegations of wrongdoing.

More precisely as to their individual economic interests, the landowners allege that the state’s refusal to make progress on the fracking issue has caused their valuable leases to expire, without realization of the gains anticipated by both lessors and lessees from entering into these accords in the first instance. The landowners are forbidden, by the stagnant bureaucracy, from using the mineral resources underlying this land, thus depriving the landowners of the enrichment that development would bring. Their property remains underused, a result antithetical to the avowed purpose of the New York law that explicitly promotes the exploiting of the state’s natural resources. Generically, they have further alleged widespread damage to the state as a whole from this bureaucratic procrastination, as New York has lost out on energy reliability and independence, job creation, and enhanced tax revenue.

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**STRONG LEGAL GROUNDS**

The landowners’ legal claims are succinct and flow quite naturally from the state of affairs they have detailed in the complaint. In essence, the plaintiffs have made a three-pronged attack against the obstinate bureaucracy.

**Bureaucracy Should Be Forced to Act**

First up is their claim for *mandamus*, pursuant to New York’s Article 78 law. In sum, *mandamus* is a remedy purposed to compel governmental authorities to act in a given situation. Notably, it does not control what the resulting action should be, merely that government act.

Long-established New York precedent advocates *mandamus* where government action is required by statute and/or where bureaucratic delay is arbitrary or capricious. The plaintiffs rely on the previously discussed New York environmental law in arguing that the supplemental GEIS should have been issued long ago. The five-and-a-half-year delay in regulating fracking operations only plays into their further contention that the state’s recalcitrance is arbitrary and capricious—yet another ground on which *mandamus* can be properly granted.

**Clearly Against Statutes**

The plaintiffs’ second argument looks to New York’s energy policy, as clearly articulated in statute. The state’s own Energy Law is clear-cut; it declares a policy of fostering and promoting “prudent development and wise use of all indigenous state energy resources,” in order to assure “an adequate and continuous supply of safe, dependable, and economical energy for the people of the state.” The landowners are no doubt placing their faith in the fact that this legislative proclamation is both unambiguous and sensible. Given such clarity, the plaintiffs allege, the inordinate obfuscation of the responsible agencies here flies in the face of state law and policy.

In addition, the delays here constitute an arbitrary and capricious defiance of these statutory mandates, once again in contravention of clearly articulated legislative goals.

**Arbitrary and Capricious, Plus Transparency Desired**

The purportedly arbitrary and capricious nature of the bureaucracy’s actions to date grounds the plaintiff’s third argument, itself a dual attack upon both agencies and the state’s chief executive. The landowners decry the involvement of the health commissioner in this affair. They note jurisdiction over this process
is statutorily committed to the environmental regulators, and thus any delegation of authority to Commissioner Shah constitutes the twin evils of arbitrary and capricious action. In a similar vein, the plaintiffs argue that Governor Cuomo committed the same sins by overstepping the bounds of his lawful authority and imposing his will on the DEC in the matter of prohibiting fracking.

Parenthetically, the plaintiffs also hope to bring some transparency to the entire process as well. Relying on statutes defining the respective standing and roles of public agencies in such matters, the landowners have invoked New York law mandating the public disclosure of executive records created in regulatory reviews such as the one here. The primary targets for such disclosure are Commissioner Shah and Governor Cuomo, the obvious intent being to buttress the claims of injudicious meddling by the state’s chief executive.

Notably, monetary damages are not the focus of the legal relief sought. Direction without such damages is the norm, as mandamus proceedings are injunctive, not monetary, in nature. The ultimate objective of the landowners is the finalization of all regulatory reviews or, in the alternative, a full-blown judicial proceeding wherein the responsible bureaucrats will explain to a judge why they cannot complete the task at hand. In either event, the aggrieved parties want an answer as to their ability to commence fracking operations.

REMAINS TO BE SEEN

And so, there we have the pending litigation brought by various New Yorkers against their state government over its reluctance to move forward on the fracking issue. We have yet to see the state’s response, but it is not difficult to imagine that it will be composed of the typical denials and affirmative defenses, including the assertion that the involved agencies have at all times acted lawfully.

Of course, the plaintiffs bear the burden of proving their allegations, but one must honestly ask can the government successfully defend its actions to date? Even those most opposed to fracking would concede that five-and-a-half years of purported study without resolution does not bode well for the regulators, especially when placed in counterpoise to the forward progress of contiguous states on precisely the same issue.

We can make no predictions as to the eventual outcome here. It is simply too early to tell. Nonetheless, we can forecast, with reasonable accuracy, that this case will present an interesting test of power between two coequal branches of government.

We can make no predictions as to the eventual outcome here. It is simply too early to tell.

As this readership well knows, the judiciary is an important check and balance on the executive branch of government, particularly so with regard to regulatory agencies and their power over highly regulated sectors, such as the energy industry. It remains to be seen what the courts will make of the legal arguments here. But we can take comfort in the fact that the Empire State still elects its trial court judges by popular vote, thus freeing the judicial branch from obeisance to its executive counterpart.

All we can do now is wait and see if fracking will become a reality in New York.

NOTES


3. See Note 1, p. 84. Hamm claims exploitation of shale gas will make America energy self-sufficient for the next 200 years.


5. N.Y. Energy L. Section 3-101(5).


7. N.Y. Energy L. Section 3-103.


12. N.Y. Energy L. Section 3-101(1).