New York’s Shortsightedness Will Cost the State and the Nation

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To the readers of Natural Gas & Electricity, I would like to offer two apologies. One is from this writer personally, and the second is on behalf of the State of New York. For many years, I have had the privilege of being published by NG&E, a publication that is one of the foremost of its kind in dealing with energy industry issues. I thank you all for being kind enough to read what I have written on various topics, which I thought would be of interest to you.

ALL POLITICS

For that reason, any satisfaction derived from the publication of the January 2015 issue containing my article on the gloomy outlook for fracking in New York State,1 was crushed when, barely a day after the issue was published, Gov. Andrew Cuomo finally and unequivocally announced that the Empire State’s moratorium on fracking would now coalesce into a permanent ban. I wanted to apologize to this readership, for had I acted with greater alacrity, then possibly my analysis would have lasted a bit longer before being rendered academic by the state’s actions. This first apology was the easier to make.

Now it falls upon me to make a second, far more difficult apology. I would like to apologize to you readers, and, in fact, to America, for the procrastination, obfuscation, and plain old shortsightedness of New York politicians. And while I might be a lone voice among the Empire State’s political glitterati, if I may be so bold, I think I am joined by a great number of sensible, fellow New Yorkers, principally found along the state’s Southern Tier.

I apologize for years of unnecessary foot-dragging by not just one, but two New York governors, as fracking became a political “third rail” that no one was willing to touch. Delay, delay, and delay became the mantra, and any thought of decisive action was viewed with horror because of the potential for ballot-box fallout.

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I apologize for the shell game played by New York’s current administration, shuffling this critical issue between state agencies until those in power obtained the result that was politically expedient for them. Drilling via the technology of hydraulic fracturing is foremost an environmental issue, designated by law to fall within the purview of the state’s Department of Environmental Conservation (DEC). Then why was the DEC not allowed to do its job?
Pennsylvanians, new and old, will enjoy a better life as they find greater opportunities for employment, increase their wages, and improve their standard of living. New Yorkers will wonder about “what could have been.”

Landowners in New York will regret that, beneath their very feet, lay untold riches that could assure them and their posterity a much better life. They will be envious of their neighbors in Pennsylvania, and their fellow Americans in North Dakota, Texas, and elsewhere, as those more forward-thinking jurisdictions thrive with the development of their natural resources.

New Yorkers will regret that the very laws of their home state are being flaunted by those in power. As previously written in these very pages, the relevant law of New York explicitly provides that the state’s natural resources can and should be used in a manner that benefits not only industry and landowners, but all citizens, and in such a way as to assure the health and safety of the people. Indeed, there is something very un-American about New Yorkers being prohibited from exercising their constitutional rights to use their private property as they see fit, because an aloof bureaucracy has deemed it unsafe.

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Finally, America will regret this. Certainly, fracking has continued and shall continue in the aforementioned states that have authorized it, yet simultaneously regulate it, control it, and tax it. But denying the nation that part of nature’s bounty that lies beneath the soil of New York State is detrimental to the country as a whole. Notwithstanding the energy

PLENTY OF BLAME TO GO AROUND

I even apologize a bit for New York’s highest state court, for reason of its decision in the Dryden case, affirming the right of municipalities to treat fracking as a local zoning issue, and thus authorizing them to ban same. Certainly, I do not shy away from my prior writing that the New York Court of Appeals was legally correct, at least from one perspective. But I am steadfast in faulting that tribunal’s majority for not according greater weight to the clearly expressed minority view that, among other things, this was an issue better left to elected lawmakers than judges.

An apology is defined as “an expression of regret.” New York has a great deal to regret in this instance, even if many don’t realize it yet.

LOST OPPORTUNITIES

New York will immediately regret the loss of jobs and economic gains to be had from hydraulic fracturing operations. New Yorkers will gaze with sorrow across our lengthy border with Pennsylvania, as the Keystone State sees jobs, industry, and wealth return to it as the bounty of the Marcellus Shale is harvested.
market’s gyrations as of this writing, to simply declare that one state’s natural resources can never be used is to deny all Americans of a key component of energy independence, economic growth, and personal wealth.

**POINTS ON HOW TO AVOID SAME ERROR ELSEWHERE**

Having made my apologies, both personally and on behalf of my home state, I would be quite remiss if I did not take the opportunity to impart more substantive comments before I conclude. And I can think of nothing more substantive and valuable to this readership than a few observations as to how New York’s mistakes can be avoided in other jurisdictions.

Some might think the solution is a political one, but that would be incorrect. In reality, politics plays only a limited role here, insofar as it is politicians, in the form of elected lawmakers, who make the law. For, in truth, preventing further misadventures such as what occurred in New York starts with the law itself.

**Property Rights Laws Should Be Supreme**

Preserving the right to develop natural resources begins with the prevailing law of each and every state. Here is where New York’s controlling law was not that far off the mark, but nonetheless proved to be weak enough to make it susceptible to executive and judicial tinkering. Commencing with the Dryden case that we discussed in January, we can see that New York’s Energy Law was, indeed, rather specific. As point of fact, the statute’s clear text explicitly insists that the Empire State’s natural resources be developed, exploited, and put to good use, and that such endeavors are to be undertaken with respect for the right of the state’s citizens to economically benefit from the natural wealth to be found beneath their own lands. New York’s law accords a healthy respect for the rights of private property and for the freedom of New Yorkers to use their own land in a manner they deem best.

Notwithstanding such unequivocal statements in the law, New York’s highest court apparently found them neither clear-cut nor forceful enough to overcome—or at least balance out—other constitutional imperatives. Simply put, Dryden held that New York’s stated deference for “home rule” by municipalities overcame not only the provisions of the Energy Law favoring private development, but also individual liberty interests of New Yorkers in making use of their property in the way they deemed best.

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Therefore, one lesson to be immediately taken is that even an energy statute as straightforward as New York’s might not be strong enough to survive contrary interests. In any state where fracking is to be pursued (or even where it might be pursued already), the fact that a relevant energy or environmental law promotes private development of natural resources is probably not enough. Instead, interested parties in those states should take immediate steps to make their own statutes as explicit and undeniable as possible, in favor of preserving private property rights. Anything less than paramountcy for the rights of private property owners can and will be subjected to the same kind of attack New York landowners faced.

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**“Home Rule” Can Lead to a Tyranny of the Minority**

The foregoing proceeds in a straight line to our second point. The aforementioned principle of “home rule” dealt a major setback to fracking in the Empire State, as we saw in the Dryden case. New York’s highest court accorded a great deal of deference to the municipality’s inherent power to promulgate zoning regulations that effectively banned
Part and parcel of local zoning laws is the inherent danger that they can be used to overpower other lawful provisions. The misfortune of the New York situation was that local zoning laws were permitted to dominate the majority’s calculus in the Dryden case. Once more, I am not alone in this observation, in that the dissent explicitly recognized this problem.

At least in part, New York’s laws appear to allow purely municipal zoning laws to operate in such a manner as not merely to restrict the areas within a town where a particular business can be sited, but also to effectively exclude such operations from the town entirely, by the simple expedient of saying “not here.” The dissent in Dryden took a firm hold of this anomaly, and held it up for all to see, albeit in a losing cause.

This bad policy starkly highlights an essential point of the downfall of fracking in New York. Notwithstanding an overall energy policy favoring the development of natural resources, economic gain, and private rights of property ownership, said policies were overcome by local opposition, taking the form of exclusionary zoning laws. In as few words as possible, energy law fell victim to zoning law. That is New York’s loss.

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But such losses need not be replicated outside of New York. Other jurisdictions can and should take steps to assure that: (1) statewide energy policies and laws are supreme over municipal laws; (2) home rule is strictly delimited to specific matters that are truly of local concern; and (3) local zoning ordinances are likewise cabined in their scope, so that they may properly zone activity but are denied the ability to wholly exclude endeavors not to their liking.

ONE AGENCY WITH OVERALL AUTHORITY

The final lesson springs from the division of authority among New York’s administrative agencies. The leverage of two
New York governors over fracking arose in the first instance because of the hazy lines of authority between competing agencies—or at least their perception of an alleged blurred division of responsibility, which these chief executives exploited.

In the instance of New York, decades ago this state determined that the development of natural resources rightfully was a matter of the environment, and so committed jurisdiction over such matters to its Department of Environmental Conservation. Just a quick illustration: in New York, if you are that part of the energy industry that extracts natural resources from the ground, you fall within the DEC’s ambit. If you are that part of the energy sector that delivers energy to the people of New York, then you come under the jurisdiction of the state’s Public Service Commission. This policy is simple enough and eminently sensible.

But what happened here was the intervention of New York State’s Department of Health (DOH). We will let readers draw their own conclusions as to whether or not the DOH was goaded into stepping into the fray, particularly once it appeared that the DEC was leaning toward permitted fracking, admittedly under heavy regulation. We gladly admit that, because one of the most strongly voiced objections to fracking is its supposed danger to drinking water supplies, public health issues are inarguably implicated in these matters.

To be sure, we are not at all contending that public health and environmental concerns should be excluded from the analysis. Rather, what we are arguing is that the consideration of all of the above should be committed to one agency, for its own rightful determination, and without interference from competing agencies. Certainly, New York’s DEC was not without its own capabilities to examine the controversy from all aspects. Before all the foregoing events took place, most would readily agree that the DEC was well capable of addressing such matters from a comprehensive viewpoint of natural resources, the environment, and public health.

In significant part, fracking’s downfall in New York was attributable to the review of an additional agency, in this case the health department. Is that truly what New York’s law intended? But intended or not, it happened, and we know the result. How can other jurisdictions avoid this mistake?

A cursory survey shows that most states have agencies that parallel New York’s organization, and, with it, laws that divide areas of responsibility. To avoid the travails of the Empire State, other jurisdictions need to reexamine, and, if necessary, reinforce laws that apportion jurisdiction in an unequivocal manner. A state with an analog for New York’s DEC must be firm that energy and natural resource matters, in all their aspects, be committed to that agency alone. At the least, laws that forbid a competing agency’s interference or at least circumscribe that agency to an advisory role must be in place or fortified. To do otherwise invites discordant agencies to muddle the resolution of such important issues, and produce disharmonious results.

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EXAMINE STATE LAWS ELSEWHERE

To this writer, above we find the key mistakes that led to the unfortunate results recently had in New York. Other states would be wise to learn from them. And members of the energy industry should carefully reexamine the laws of the jurisdictions in which they operate or plan to operate, to ensure that the same tragedy does not befall them.

I conclude where I began. On behalf of New York State, I apologize. But this humble apology will never, ever make up for the self-inflicted losses we will suffer, as a state and as a nation, for years to come.

NOTES
3. See Note 1.