

Client Update

The Empire State Strikes Back: New York State Bans Hydraulic Fracturing

NEW YORK

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On December 17, 2014, the administration of Governor Andrew Cuomo announced that it would prohibit all high-volume hydraulic fracturing in New York State, citing concerns about the environment and human health and questions about the economic benefits of hydraulic fracturing. Hydraulic fracturing, commonly known as “fracking,” is a technique used to extract oil and natural gas from subterranean rock by injecting water and a mixture of chemicals to break apart the rock and release the oil or gas into a well. Fracking in New York State has been the subject of intense debate for nearly a decade, pitting environmental protection groups and public health advocates against oil and gas companies and individuals who wish to lease their land to those companies.

THE CONTROVERSY OVER FRACKING

Hydraulic fracturing has been used for several decades as an oil- and gas-extraction technique. More recently, technical advances, including horizontal drilling, have made the process economically viable on a vastly expanded scale. Fracking has helped transform the United States into the world’s top producer of petroleum.

Many environmental and public health groups have opposed fracking. They cite various concerns, including the contamination of drinking water, the potentially toxic properties of the fracking fluids, impacts to climate change due to released unflared methane and the potential for triggering earthquakes. In 2008, these and other concerns led New York’s then-governor, David Paterson, to impose a moratorium on fracking within the state until the completion of a Supplemental Generic Environmental Impact Statement (“SGEIS”) by the New York State Department of Environmental Conservation (the “DEC”), with input from the New York State Department of Health (the “DOH”). The DOH’s Public Health Review findings, which will serve as key supplemental information for the final SGEIS, were released on December 17, 2014.

While waiting for the state to issue the SGEIS, New York, which sits on part of the Marcellus Shale, the largest producing shale gas basin in the United States, has largely waited in limbo, while neighboring Pennsylvania and other states moved aggressively to tap the resource. Landowners and officials in several economically depressed New York counties along the Pennsylvania border, known as the Southern Tier, have been among the most vocal in advocating for the right to frack, which they view as a boon to the local economy. Many farmers and other landowners in the region had hoped to lease land or mineral rights to petroleum and natural gas companies, which have also supported lifting the moratorium. The state's agricultural interests have been conflicted over whether to support fracking, and Upstate New York's tourism industry has largely opposed fracking, fearing that it would drive away vacationers. A number of towns and municipalities, including some within the Southern Tier, took independent action to ban fracking within their respective boundaries, a move that was upheld by the New York State Court of Appeals in June 2014.

This patchwork of support and opposition that has developed while the SGEIS has been pending is reflective of a deep divide that has developed, within the Southern Tier and throughout the state, as to whether the benefits of fracking outweigh its potential drawbacks.

LEGAL BASIS FOR REGULATING AND PROHIBITING FRACKING

Article 23 of New York's Environmental Conservation Law grants authority to the DEC's Division of Mineral Resources to regulate oil and gas activity within New York State so as to protect the environment and public safety. Section 23-0305(8)(d) of the law grants the DEC the power to:

[r]equire the drilling, casing, operation, plugging and replugging of wells . . . in accordance with rules and regulations of the [DEC] in such manner as to prevent or remedy the following, including but not limited to: the escape of oil, gas, brine or water out of one stratum into another; the intrusion of water into oil or gas strata other than during enhanced recovery operations; the pollution of fresh water supplies by oil, gas, salt water or other contaminants; and blowouts, cavings, seepages and fires.

One of the primary concerns of the DOH's Public Health Review is that New York's fresh drinking water supply is threatened by fracking. Preventing impacts to drinking water represents sufficient grounds under the law for the DEC to

prohibit hydraulic fracturing. The DEC's discretion to act in the public interest is quite broad.

FINDINGS OF THE PUBLIC HEALTH REPORT

The DOH's Public Health Review sets the stage for the DEC to formally prohibit fracking in New York when it issues the final SGEIS, which is expected to be released in early 2015. At that time, the State Environmental Quality Review ("SEQR") process will be complete, and the DEC Commissioner will issue a legally binding Findings Statement prohibiting fracking within ten days.

The crux of the DOH's Public Health Review is that too much scientific uncertainty remains regarding the health effects of fracking for the state to allow the practice to go forward. The report cites seven areas of particular concern that led the DOH to conclude that fracking should be prohibited: (i) potential impacts to respiratory health from increased particulate matter, diesel exhaust and volatile organic chemicals; (ii) effects on global climate change as methane is released into the atmosphere; (iii) impacts to drinking water from the underground migration of methane and potentially toxic fracking chemicals; (iv) soil and water contamination from surface spills; (v) surface water contamination due to inadequate treatment of the large volumes of chemical-laden wastewater that the process produces; (vi) earthquakes induced by the fracturing; and (vii) potentially negative impacts to municipalities that would benefit economically from fracking. With respect to these areas of concern, as well as more generalized studies of impacts to human health, the DOH concludes that further scientific research is required. Until the body of scientific research provides sufficient data to conclude that the risks posed by fracking are low and manageable, the DOH recommends that fracking be prohibited.

In a December 17, 2014 joint press release with the DOH, the DEC asserted that it would follow the recommendations of the report and finalize the ban. Governor Cuomo has also stated that he would uphold the findings of the SEQR process.

IMPACTS OF THE BAN

Unless it is overruled by the courts, the upcoming binding Findings Statement by the DEC will codify the *de facto* moratorium on fracking that has been in place since 2008. Because the moratorium is already in effect, the ban should not involve ceasing any ongoing actions by landowners or operators.

Nonetheless, while many across the state have applauded the ban, the decision has angered those who had hoped to benefit from fracking. Many landowners

and other residents of the Southern Tier object strongly to what they perceive as interference in their ability to rejuvenate their local economies. And oil and gas companies that had been waiting to begin fracking in the region will now have to explore other opportunities, such as those across the border in Pennsylvania.

Litigation challenging the ban is a near certainty. Property owners have long threatened to bring suit against the state for depriving them of the right to use their mineral rights for financial gain. Such a lawsuit may require extensive discovery into the scientific merits of the state's findings, something that some courts have been hesitant to open the door to in the past.

Even if the ban on fracking is upheld by the courts, it need not be permanent. Because the primary basis for the ban is the state of scientific uncertainty about the safety of current fracking practices, the DEC can amend its policy in the future if additional information is obtained about the effects of fracking or if safety technology improves. At such time, the Governor can initiate another SGEIS process resulting in a new binding Findings Statement and new rules that might allow fracking to proceed subject to regulation.

We will continue to monitor developments regarding hydraulic fracturing in New York State.

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Please do not hesitate to contact us with any questions.