

The Moratorium Continues...

October 4, 2013

The environmental review of proposed regulations that, if adopted, would permit high-volume hydraulic fracturing gas drilling (“fracking”) in New York State, has been slow. New York State Department of Environmental Conservation (“DEC”) issued a Draft Supplemental Generic Environmental Impact Statement (“Draft SGEIS”) evaluating the potential adverse environmental effects of fracking in September 2009. That Draft SGEIS was intended to update the 1992 Generic Environmental Impact Statement prepared for DEC’s Oil, Gas and Solution Mining Regulatory Program by addressing environmental issues presented by the relatively new drilling technology. Although four years have passed since the Draft SGEIS was issued, DEC has yet to complete the State Environmental Quality Review Act (“SEQRA”) review, barring the promulgation of fracking regulations.

The SEQRA process has been extended numerous times by calls for further evaluation of potential environmental impacts. In December 2010, Governor Patterson ordered DEC to comprehensively analyze the potential environmental impacts associated with fracking and consider the thousands of public comments received by the agency regarding the Draft SGEIS. The results of that evaluation were incorporated into a Revised Draft SGEIS issued by DEC in September 7, 2011. More than a year later, in October 2012, DEC Commissioner Joe Martens announced that DEC would postpone finalizing the SEIS until such time that New York State Health Commissioner Nirav Shah could complete a public health impact evaluation of fracking.[1] In February 2013, Health Commissioner Shah requested additional time to complete that assessment, indicating that DOH would be consulting studies performed by United States Environmental Protection Agency, Geisinger Health Systems, and the University of Pennsylvania[2]. As of the date of this writing, the public health assessment has yet to be completed and litigation recently ensued regarding DOH’s review.[3] Earlier this year, Governor Cuomo indicated that he would make a decision on whether to lift the fracking moratorium before the 2014 election.[4]

While the environmental and health impact review continued, some municipalities within the State enacted local zoning laws banning fracking which, in turn, spurred litigation regarding the preemptive effect of the New York State Oil, Gas and Solution Mining Law (“OGSML”).[5] On August 29, 2013, the New York Court of Appeals granted leave to appeal in *Matter of Norse Energy USA v. Town of Dryden* and in *Cooperstown Holstein v. Town of Middlefield*.**[6]** In both cases, the Appellate Division Third Department held that the OGSML does not preempt local zoning regulation prohibiting fracking. Relying on municipalities’ constitutionally delegated home rule authority, the supersession language of ECL 23-0303(2), legislative history, and case law construing a similar supersession clause within the Mined Land Reclamation Law[7], the Third Department found that OGSML “does not serve to preempt a municipality’s authority to enact a local zoning ordinance prohibiting oil, gas and solution mining or drilling within its borders”.**[8]** The Court of Appeals is expected to issue its decision in the spring of 2014.

As the fracking moratorium in New York approaches its sixth year, some in the industry have seemingly grown wary of the State's regulatory standstill and the uncertainty it presents. Within the last month, for example, Chesapeake Energy Corp. released more than 13,000 acres of land leased for oil and gas development in Broome and Tioga Counties. The leases were the subject of a lawsuit with more than two hundred landowners in which Chesapeake sought to extend the terms of its leases by invoking force majeure, citing the State's permit moratorium. Chesapeake settled, releasing its rights to the land and allowing owners to pursue leases with others.[9]

It remains to be seen how the Governor's Office and Court of Appeals will balance the competing interests of those seeking to exploit the natural resource with municipalities' home rule authority to regulate land use and the political pressure associated with environmental concerns. What seems clear, and what should be encouraging to stakeholders, is that these issues are likely to be resolved over the next twelve months. Maybe.

[1] <http://polhudson.lohudblogs.com/2012/09/20/dec-chief-rejects-outside-health-impacts-asks-health-dept-to-get-more-involved/>

[2] See http://www.scribd.com/embeds/125170207/content?start_page=1&view_mode=scroll.

[3] On September 13, 2013, Seneca Lake Pure Waters Association commenced an Article 78 proceeding in Albany County Supreme Court to compel NYSDOH to disclose the documents it was reviewing as part of its fracking health impact assessment. *Seneca Lake Pure Waters Association v. New York State Department of Health*, Index No. 5068-13.

[4] See <http://stateimpact.npr.org/pennsylvania/2013/05/24/new-york-governor-says-hell-make-fracking-decision-before-2014-election/>

[5] ECL 23-0301 *et. seq.*

[6] *Matter of Norse Energy Corp. USA v Town of Dryden*, 2013 N.Y. LEXIS 2118 (N.Y. Aug. 29, 2013); *Cooperstown Holstein Corp. v Town of Middlefield*, 2013 N.Y. LEXIS 2086 (N.Y. Aug. 29, 2013)

[7] ECL 23-2703.

[8] *Matter of Norse Energy Corp. USA v Town of Dryden*, 108 A.D.3d 25, 36 (3d Dep't 2013); see also *Cooperstown Holstein Corp. v Town of Middlefield*, 106 A.D.3d 1170, 1171 (3d Dep't 2013).

[9] See http://www.huffingtonpost.com/2013/09/09/chesapeake-energy-gas-drilling_n_3895088.html

Practices

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