

CLIENT ALERT

New York Issues Statewide Fracking Ban

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On December 17, New York Governor Andrew Cuomo announced the decision to ban high-volume hydraulic fracturing (commonly known as fracking) throughout New York State. Cuomo's announcement, which took place in a televised cabinet meeting, settles years of speculation and institutionalizes the moratorium on hydraulic fracturing that has been in place in New York since 2008. A final state Environmental Impact Statement, which will not be subject to public comment, will be issued to implement the ban in early 2015.

The production of natural gas from shale formations has rejuvenated the natural gas industry in several regions in the United States. The Marcellus Shale, a deep repository that runs through West Virginia, Ohio, Pennsylvania, and New York's Southern Tier, has been a prime target for development. While fracking has created a boom industry in states such as Pennsylvania, New York has approached the issue with caution. High volume hydraulic fracturing has been on hold in the state since the Department of Environmental Conservation (DEC) first launched its review of the practice over four years ago. Governor Cuomo declined to allow permits for hydraulic fracturing operations to be issued until the DEC conducted an environmental impact study and drafted new regulations to govern the process. This decision led to the Department of Health (DOH) study that ultimately formed the basis for the Governor's statewide ban.

Natural gas has advantages over other fossil fuels, particularly in CO₂ emission during combustion. However, some have raised environmental concerns associated with the production of shale gas. The fracturing of wells requires large amounts of water. Opponents of the process argue that significant use of water for shale gas production may affect the availability of water for other uses and can affect aquatic habitats. Hydraulic fracturing also produces large amounts of wastewater. This wastewater may contain dissolved chemicals and other contaminants that may require treatment before disposal or reuse. Additionally, according to the United States Geological Survey, hydraulic fracturing has the potential to cause small earthquakes. Finally, opponents of fracking argue that shale gas extraction involves increased industrial activity, including air and noise pollution, and may lead to the destruction of rural landscapes and habitat fragmentation.

The controversy in New York had its foundation in the fear of contamination of drinking water through the migration of naturally occurring methane gas or by chemicals in the hydraulic fracturing fluid that is injected underground during the fracking process. High population areas in the State, most notably New York City, are served by watersheds currently located in largely pristine settings. Any deterioration of these watersheds could have substantial cost consequences, including the requirement to filter a currently unfiltered, substantial drinking water source.

The DEC is charged with permitting drilling in New York, and as early as 1992, developed a Generic Environmental Impact Statement (GEIS) that set statewide parameters for the review of oil and gas well permitting. In 2008, the DEC began an environmental review of the impacts of fracking – a process that placed a *de facto* moratorium on fracking permits during the pendency of the review. In February 2009, the DEC narrowed the scope of issues to be reviewed into a Draft Supplemental Generic Environmental Impact Statement (SGEIS). More than 13,000 comments were received on the original SGEIS during the

comment period. Yet, before any action could be taken, in December 2010, then Governor David Paterson signed an executive order halting hydraulic fracturing in the State until July 1, 2011. He directed the DEC to conduct further environmental review to ensure that all environmental and public health impacts were mitigated or avoided and to then have this information presented to the public for further review.

In July 2011, the DEC released the full Preliminary Revised Draft SGEIS, prepared after considering the many comments received on the Draft SGEIS. In September 2011, DEC released the Revised Draft SGEIS, opening the public comment period until January 2012, by which time DEC had received some 80,000 comments. The proposal, along with the SGEIS, had it been implemented, would have banned fracking in the New York City and Syracuse watersheds and within 500 feet of the state's 18 primary aquifers. It also would have required that natural gas companies disclose the chemical additives used during the hydraulic fracturing process.

Due to the intense controversy over the issue, however, in September 2012, Joseph Martens, the State DEC Commissioner, asked DOH Commissioner Nirav Shah to review the work of the DEC to ensure that it sufficiently accounted for public health impacts of fracking.

While the DOH review was proceeding, a separate environmental regulatory process played out. The deadline for finalizing the proposed regulations under the State Administrative Procedures Act had been November 28, 2012. Instead of finalizing those regulations, however, the DEC filed a Notice of Continuation with the Department of State to extend the rulemaking process by 90 days to complete review of the draft SGEIS. To receive the needed extension, DEC was required by law to re-file the draft regulations along with the responses to public comments received during the public comment period, and preliminary revisions, responsive to those comments.

These draft regulations retained the key limits that were included in the earlier proposed rules, including a ban on fracking in the New York City and Syracuse watersheds and within 500 feet of the State's 18 primary aquifers. Similarly, they limited well pads within 4,000 feet of unfiltered surface drinking water supply watersheds; within 100-year floodplains; and within 2,000 feet of public drinking water supply wells, reservoirs, natural lakes, man-made impoundments, or springs. The revised proposal also included an additional 500-foot setback requirement from inhabited dwellings and places of assembly.

The DEC was criticized by a coalition of environmental groups, which said the agency should have waited for the results of the DOH study and the SGEIS before issuing regulations. Those groups argued that by releasing the draft regulations prior to the final SGEIS on which they were based, the public was left to evaluate the regulations without access to relevant health and environmental considerations.

By law, the DEC had to allow for a 30-day period – which ran from December 12, 2012 until January 11, 2013, for additional public comment. The DEC had until February 13, 2013 to issue new draft regulations and until February 27 to finalize those regulations, before the DEC would be required to restart the rule-making process and re-open it for public comment. However, as of February 13, 2013, neither the DOH results, nor the final SGEIS, had been made public, and Governor Cuomo announced that the decision on fracking would be delayed yet again.

The DEC then declared that it would not take any final action or make any decision on fracking until after Dr. Shah's DOH health review was completed and the DEC, through the environmental impact statement, was satisfied that fracking could be done safely in New York State. The DOH review found that the SGEIS did not properly assess or mitigate the public health concern.

Governor Cuomo's resulting statewide ban does on a universal basis what some municipalities had attempted individually, and that had been the subject of active litigation concerning municipal control and New York's home rule laws. Over 30 municipalities in upstate New York banned fracking, while 80 more issued temporary moratoria. Although these separate actions now have been supplanted by the Statewide ban, individual property owners seeking to capitalize on their mineral rights and receive royalties from fracking may have a clearer path to a remedy for being deprived of those economic gains. Industry response by developers who have invested billions of dollars for the rights to drill in the Marcellus, including challenges to the long and byzantine administrative process, will doubtlessly be considered over the coming weeks.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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