

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARK S. WALLACH, as the Bankruptcy Trustee of Norse
Energy Corp. USA and JAMES LOBDELL;

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 and Section 3001
of the Civil Practice Law and Rules,

-against-

THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, JOSEPH J.
MARTENS, in his official capacity as Commissioner of the
New York State Department of Environmental Conservation,
THE NEW YORK STATE DEPARTMENT OF HEALTH,
DR. NIRAV R. SHAH, in his official capacity as Commissioner
of the New York State Department of Health, and ANDREW M.
CUOMO, in his official capacity as Governor of the State of
New York,

Respondents-Defendants

Supreme Court Albany County Article 78 Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding
RJI # 01-13-ST5281 Index # 6773-2013

Appearances:

ERIC T. SCHNEIDERMAN
New York Attorney General
Attorney for Respondents-Defendants
(Morgan Costello, Esq., Assistant
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Esq., AAG; and Lisa M. Burianek, Esq., AAG)
The Capitol
Albany, NY 12224-0341

THE WEST FIRM, PLLC
Attorneys for Petitioners-Plaintiffs
(Thomas S. West, Esq., of Counsel)
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DECISION/ORDER/JUDGMENT

Roger D. McDonough, Justice

Petitioners-Plaintiffs (“Petitioners”) seek, in sum and substance, an Order and/or Judgment: (1) compelling the New York State Department of Environmental Conservation (“NYSDEC”) and NYSDEC Commissioner Joseph J. Martens (“Commissioner Martens”) to finalize a Supplemental Generic Environmental Impact Statement (“SGEIS”) relative to high-volume hydraulic fracturing combined with horizontal drilling (“HVHF”) and issue a Findings Statement pursuant to the State Environmental Quality Review Act (“SEQRA”); (2) finding that the New York State Department of Health (“NYSDOH”) and Commissioner, Dr. Nirav R. Shah (“Dr. Shah”) are proceeding without, or in excess of, their jurisdiction; (3) finding that Governor Andrew M. Cuomo (“Governor”) is an interested agency for purposes of SEQRA review; (4) finding that the Governor is acting without, or in excess of, his jurisdiction; (5) ordering the Governor to cease and desist from interference in the SGEIS process; and (6) certain discovery and conditional relief. Petitioners seek the relief under Article 78 and CPLR § 3001.

Respondents-Defendants (“Respondents”) move to dismiss the action based upon: (1) lack of standing; (2) failure to state a cause of action; and (3) untimeliness. Petitioners have served their reply/opposition papers and the matter is fully submitted.

The Court heard oral argument on this matter, and a related one, on April 25, 2014.

Background

This matter, and a related matter before the Court, focus primarily on the length and propriety of New York’s moratorium on HVHF.

Petitioners

Mark Wallach (“Mr. Wallach”) is the appointed Trustee of Norse Energy Corp. (“Norse”). Mr. Wallach attributes Norse’s bankruptcy and inability to develop its mineral rights to New York’s failure to finalize the standards for HVHF. He indicates that, without a final SGEIS and corresponding findings, Norse’s assets will remain of substantially less value than they would be in New York permitted shale development using HVHF.

James Lobdell (“Mr. Lobdell”) is a resident of the Town of Oxford, Chenango County. He describes himself in an investor in the parent company of Norse. Mr. Lobdell indicates that

he has lost almost his entire investment in Norse. He attributes this loss to New York's failure to issue final HVHF standards and to process natural gas well permits based upon those standards. Mr. Lobdell concludes that finalization of the standards will restore value to Norse assets and help him regain some of his lost investment.

Procedural Background

The petition sets forth three claims for relief. The first, brought pursuant to CPLR § 7803(1), seeks to compel completion of the SGEIS Process. Alternatively, petitioners request an immediate hearing. The second claim, brought pursuant to CPLR §§ 7803 and 3001, seeks a determination that NYSDEC's 2012 referral to NYSDOH was arbitrary and capricious, an abuse of discretion, and an improper delegation of Lead Agency responsibilities. Alternatively, petitioners seek a determination that the continued delay/continued deferral to NYSDOH is arbitrary and capricious, an abuse of discretion, and an improper delegation of Lead Agency responsibilities. Petitioners also seek a determination that NYSDOH and Dr. Shah are proceeding without, or in excess of, their jurisdiction, together with an order prohibiting respondents from taking further action to obstruct completion of the SGEIS process. The third claim seeks Article 78 relief against the Governor. Specifically, petitioners seek a determination that the Governor is an interested agency under SEQRA. They also seek a determination that the Governor has acted without, or in excess of, his jurisdiction, together with an order prohibiting the Governor from further interfering with the SGEIS process. Finally, petitioners seek disclosure of various documents and internal communications. Respondents seek dismissal of the entire action based upon, *inter alia*, petitioners' lack of standing.

Discussion

Petitioners bear the burden of establishing both an injury-in-fact and that the claimed injury is "within the zone of interests sought to be protected by the statute alleged to have been violated" (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 [1991]). Additionally, a party raising a SEQRA challenge "must demonstrate that it will suffer an injury that is environmental and not solely economic in nature" (Matter of Mobil Oil Corp. v Syracuse Indus. Development Agency, 76 NY2d 428, 433, [1990]). The Court of Appeals has described SEQRA's zone of interest as encompassing: "the impact of agency action on the relationship between the citizens of this State and their environment" (Society of Plastic Indus. v County of

Suffolk, *supra* at 777). Accordingly, to have standing to challenge administrative action under SEQRA, a party must demonstrate a legally cognizable injury to said environmental relationship (Id.).

Petitioners have not alleged that they will suffer any form of environmental harm as a result of respondents' actions/inactions relative to the SGEIS process (*see*, Matter of Mobil Oil Corp., *supra* at 433). The three claims in the petition/complaint, and all of petitioners' other submissions, make clear that the potential injuries are solely economic in nature. Indeed, the entire focus of the submissions is upon Norse's inability to realize royalties and economic benefits from the use of HVHF in the development of their mineral estates. Similarly, Mr. Lobdell's injuries are attributed to an investment loss caused by Norse's inability to develop mineral estates. Accordingly, as petitioners have failed to allege any environmental harm, this Court is constrained to dismiss this matter based upon lack of standing (*see*, Matter of Association for a Better Long Island, Inc. v New York State Dept. of Environmental Control, 23 NY3d 1, 3 [2014]).

Petitioners do not dispute that they are raising SEQRA challenges in their three claims for relief. The sole recognized exception to the environmental harm requirement appears to require that the SEQRA challenge be brought by a property owner whose land was targeted for rezoning (*see*, Matter of Gernatt Asphalt Products, Inc. v Town of Sardinia, 87 NY2d 668, 687 [1996]; Matter of Mobil Oil Corp., *supra* at 434-435). That exception clearly does not apply to this matter. Additionally, petitioners' argument that an environmental injury is unnecessary where the subject of an agency's action directly affects a particular property interest is directly at odds with the Court of Appeals recent decision in Matter of Association for a Better Long Island, Inc., (*supra* at 1-3). Said decision directly addresses an impacted landowner and therefore cannot be characterized as merely addressing citizen or third party SEQRA challenges. In sum, the Court is unaware of any exceptions to the Court of Appeals SEQRA standing rulings beyond the rezoning exception and has not been persuaded that a further exception can or should be carved out at this time.

Further, the Court finds no basis to confer "citizen public interest" standing upon Mr. Lobdell. The matter before the Court does not present any unique circumstances that would warrant the narrow application of this particular ground for standing (*see*, Matter of Hebel v

West, 25 AD3d 172, 176-177 [3rd Dept. 2005]). The Court has not been persuaded that a litigant with purely economic injuries could circumvent the repeated Court of Appeals' holdings on SEQRA standing by merely asserting "citizen public interest" standing. The Court recognizes the possibility that respondents' alleged actions/inactions in the SGEIS process are potentially shielded from challenges brought by landowners and others in favor of the use of HVHF for the development of their mineral estates. Nevertheless, the Court does not discern any applicable exception in the SEQRA case law that would allow standing to be conferred upon the petitioners herein. In sum, petitioners' economic injuries do not confer standing for petitioners' three SEQRA claims. As these are the sole claims raised in the petition/complaint, the matter must be dismissed in its entirety.

In light of this finding, the Court need not reach respondents' remaining standing arguments or respondents' alternative arguments seeking outright dismissal of petitioners' claims. Further, the Court finds that declaratory relief is wholly unavailable in light of petitioners' lack of standing. Finally, in light of the Court's holding, the Court finds no basis to order any discovery proceedings in this matter. Accordingly, it is unnecessary for the Court to reach respondents' motion seeking: (1) the striking of certain discovery demands; and (2) a protective order.

Based on the foregoing, the petition/complaint is dismissed and the relief requested therein is in all respects denied.

SO ORDERED AND ADJUDGED.

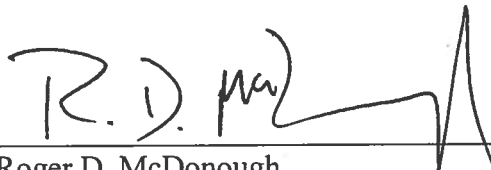
This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to the counsel for respondents who is directed to enter this Decision, Order and Judgment without notice and to serve petitioners' counsel with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment and the papers considered to the County Clerk. The

signing of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER

Dated: Albany, New York
July 11, 2014



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered¹:

1. Notice of Verified Petition, dated December 17, 2013;
2. Affidavit of Mark S. Wallach, sworn to December 16, 2013, with annexed exhibit;
3. Affidavit of James Lobdell, sworn to December 13, 2013;
4. Verified Petition/Complaint, dated December 17, 2013, with annexed exhibits;
5. Amended Verified Petition/Complaint, dated January 3, 2014, with annexed exhibits;
6. Respondents' Notice of Motion, dated February 7, 2014;
7. Affirmation of Stephen M. Nagle, Esq., A.A.G., dated February 7, 2014, with annexed exhibits;
8. Respondents' Notice of Motion, dated February 21, 2014;
9. Affirmation of Stephen M. Nagle, Esq., A.A.G., dated February 21, 2014, with annexed exhibits;
10. Affirmation of Michael P. Joy, Esq., dated February 28, 2014, with annexed exhibit;
11. Affirmation of Thomas P. West, Esq., dated March 5, 2014, with annexed exhibits;
12. Affidavit of Mark S. Wallach, Esq., dated March 1, 2014, with annexed exhibit;
13. Supplemental Affirmation of Thomas P. West, Esq., dated March 27, 2014, with annexed exhibits.

¹ Both sides submitted memoranda of law, reply memoranda of law and supplemental briefs in support of their respective arguments.