STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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JOINT LANDOWNERS COALITION OF NEW YORK, INC; THE KARK FAMILY 2012 TR.; LADTM, LLC; SCHAEFER TIMBER & STONE, LLC;

Petitioners-Plaintiffs,

vs.

ANDREW M. CUOMO, Governor of the State of New York, 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,

Respondents-Defendants

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Supreme Court Albany County Article 78 Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding
RJI # 01-14-ST5472 Index # 843-2014

Appearances:

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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 ("Commisioner 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**

The Joint Landowners Coalition of New York, Inc. ("JLCNY") is a non-profit

organization, incorporated under the laws of New York State. JLCNY's current membership includes 38 landowner coalitions comprised of over 70,000 landowners who own approximately one million acres located in fourteen of New York's counties. The stated mission of JLCNY is "to foster, promote, advance, and protect the common interest of the people as it pertains to natural gas development through education and best environmental practices." JLCNY's president advises that, absent Court action, the members will continue to suffer injury from the inability to develop oil and gas estates.

The Kark Family 2012 Tr. ("Kark Trust") owns a mineral estate located in the Town of Fenton, State of New York. The Kark Trust has an oil and gas lease with the Chesapeake Energy Corporation ("Chesapeake"). The lease expires in July of 2017. Chesapeake has a pending well permit application for the drilling of six horizontal wells at the mineral estate.

LADTM, LLC ("LADTM") is a limited liability company organized under the laws of New York State. Schaefer Timber & Stone, LLC ("Schaefer") is also a limited liability company organized under the laws of New York State. Schaefer is a member of LADTM. Prior to July 20, 2007, Schaefer owned 93.3 acres ("Schaefer parcel") in the Town of Colesville, State of New York. On or about July 20, 2007, Schaefer entered into an oil and gas lease for the Schaefer parcel with an entity now known as Norse Energy Corporation USA ("Norse")[1]. In March of 2008, Schaefer conveyed the Schaefer parcel and reserved the right to all surface and subsurface oil, gas and minerals. In August of 2008, a corrected deed was executed to reflect that Schaefer excepted and reserved an undivided one-half interest in all oil, gas and other minerals relative to the parcel. In August of 2012, LADTM acquired full ownership of all the oil, gas and minerals underlying the parcel.

In sum, petitioners maintain that respondents' failure to act on HVHF is causing irreparable injury by preventing the realization of royalties or other development of their oil and gas estates.

**Timing of Relevant Events**

In July of 2008, then Governor Paterson directed NYSDEC to complete a SGEIS of high-volume hydraulic fracturing ("HVHF") combined with horizontal drilling. NYSDEC released a

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[1] Norse filed for Bankruptcy in December of 2012.

draft scope in October of 2008. Also, NYSDEC held six public scoping meetings in November and December of 2008 and received numerous written comments in response to the draft scope. In February of 2009, NYSDEC released the final scope of the SGEIS. In September of 2009, NYSDEC published the draft SGEIS and set a public review and comment deadline of December 31, 2009.

In December of 2010, then Governor Paterson issued an executive order # 41 directing NYSDEC to conduct further environmental review and publish a revised draft SGEIS by June 1, 2011. In January of 2011, the Governor issued an executive order which continued Governor Paterson's executive order # 41. On July 8, 2011, NYDEC released the first revised draft SGEIS. On September 7, 2011, NYSDEC released a second revised draft SGEIS. Public hearings were again held and the public comment period was eventually extended to January 11, 2012. The last public hearing was held on November 30, 2011. In September of 2012, Commissioner Martens asked NYSDOH to assess the potential public health impacts of HVHF. In February of 2013, Dr. Shah wrote to Commissioner Martens and indicated that additional time was necessary to complete the assessment.

On January 31, 2014, petitioners sent a written demand to Commissioner Martens. Therein they sought finalization of the SGEIS process. They also indicated that they wanted Commissioner Martens to provide a definite and reasonable timeline for completion of the SGEIS process, by February 14, 2014. Commissioner Martens did not respond. The instant proceeding ensued.

**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.

**Respondents' Motion to Dismiss**

**Standing**

Respondents argue that all petitioners lack a cognizable interest and injury-in-fact within the zone of interests governed by the statutes and regulations they rely upon. In particular, respondents argue that petitioners' alleged injuries are indistinguishable from those experienced by the general public. Additionally, respondents stress that petitioners' alleged injuries are economic in nature, and therefore not within SEQRA's zone of interests.

The respondents also contend that JLCNY lacks both associational and individual standing. As to associational standing, respondents assert that JLCNY's member landowners' alleged injuries are no different from the potential injuries incurred by any other mineral rights owner or lessee in New York. Additionally, respondents argue that the member landowners' alleged injuries are too tenuous and speculative to support standing. As to individual standing, respondents contend that JLCNY lacks a sufficiently distinct, non-speculative injury to support standing on its own behalf. Finally, as to both individual and associational standing for JLCNY, respondents stress that the alleged injuries are not within the zone of interests sought to be protected by SEQRA and the other relevant statutes and regulations. As to the remaining petitioners, respondents argue that they have also failed to establish any direct, non-speculative injury that falls within the zone of interests.

Petitioners stress that their mineral interests are the direct object of respondents' inaction on the SGEIS. Additionally, petitioners contend that respondents' are confusing the issue of whether an injury is redressable with the concept of "injury in fact". Petitioners also stress that their interests are different from the general public because many in the general public do not own relevant mineral estates.

Petitioners further contend that JLCNY's mission has been completely frustrated by the unlawful delays in the SGEIS process. They also cite the significant time and money expended by JLCNY in submitting comments to the Second Revised Draft SGEIS and the former draft regulations. In sum, petitioners contend that JLCNY has individual standing because their organizational mission has been rendered null by respondents' actions/inactions relative to the SGEIS process.

As to organizational standing, petitioners contend that their member landowners have standing to sue. Petitioners also assert that it is difficult to imagine who, other than owners of mineral estates, could possibly be more adversely affected by New York's unwillingness to complete the SGEIS process. Petitioners also challenge the characterization of their interests as speculative. In support, they point to the proximity of members' mineral estates to estates in other states where HVHF development is booming. In sum, petitioners contend that they have met all of the requirements for organizational standing for JLCNY.

As to the issue of zone of interests, petitioners stress that as property owners they have a legally cognizable interest in decisions that affect their property rights/interests. Petitioners also argue that respondents are oversimplifying the zone of interests test by placing undue emphasis on the necessity of an environmental interest. Finally, petitioners stress that their claims are not based upon a substantive SEQRA challenge. Accordingly, they argue that an environmental interest is not required to satisfy the zone of interests test.

In reply, respondents note that petitioners primarily rely upon inapposite federal cases. Respondents also note that the mineral estates are not actual "subject of" the SGEIS. Additionally, respondents contend that there is no presumption of injury here because the SGEIS is not being undertaken as part of a zoning enactment. Respondents also assert that the fact that there are members of the public that do not own a mineral interest in the relevant area does not render the alleged injuries sufficiently distinct from the public at large. The respondents reiterate their assertion that petitioners' lack of any articulated environmental harm or impact is fatal to this action. Finally, respondents assert that there is no case law support for petitioners' position that an articulated environmental harm or impact is only necessary for claims based on substantive SEQRA challenges.

**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 their submissions is upon petitioners' inability to realize royalties and economic benefits from the use of HVHF in the development of their 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. Rather, they argue that they need not claim an environmental harm because: (1) they are not raising substantive SEQRA challenges; and (2) they have the requisite geographical proximity to challenge respondents' actions/inactions relative to the SGEIS process. The Court found no case law support for petitioners' first proposition. In a recent decision, the Court of Appeals indicated, without any qualifiers, that they have consistently held that a SEQRA challenger must allege environmental harm (*see*, Id.). As to the second proposition, 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. 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.

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

SO ORDERED AND ADJUDGED.

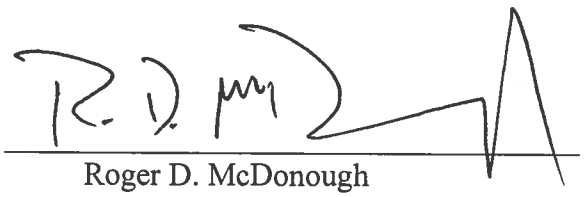
This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to the counsel for respondents who is directed to enter this Decision, Order and Judgment without notice and to serve petitioners' counsel with a

copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgement 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 Considered[2]:

1. Notice of Verified Petition, dated February 14, 2014;
2. Verified Petition and Complaint, dated February 14, 2014;
3. Affidavit of Larry Schaefer (on behalf of LADTM), sworn to February 11, 2014, with annexed exhibits;
4. Affidavit of Larry Schaefer (on behalf of Schaefer), sworn to February 11, 2014, with annexed exhibits;
5. Affidavit of Jonathan R. Kark, sworn to February 11, 2014, with annexed exhibits;
6. Affidavit of Dan Fitzsimmons, sworn to February 11, 2014, with annexed exhibit;
7. Respondents' Notice of Motion, dated March 18, 2014;
8. Affirmation of Scott R. Kurkoski, Esq., dated March 28, 2014, with annexed exhibits.

[2] Both sides submitted memoranda of law and reply memoranda of law in support of their respective arguments.