SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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.

Index No.:

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS-PLAINTIFFS' VERIFIED PETITION AND COMPLAINT

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs the Joint Landowners Coalition of New York, Inc. ("JLCNY"); the Kark Family 2012 Tr. ("Kark Trust"); LADTM, LLC ("LADTM"); and Schaefer Timber & Stone, LLC ("Schaefer") (collectively, "Petitioners") respectfully submit this Memorandum of Law and accompanying submissions in support of the Verified Petition and Complaint, dated February 14, 2014 ("Petition"), seeking, *inter alia*, mandamus relief against the Respondents-Defendants, Governor Andrew M. Cuomo ("Governor Cuomo); the New York State Department of Environmental Conservation ("DEC"); DEC Commissioner Joseph J. Martens ("Commissioner Martens"); New York State Department of Health ("DOH"); and DOH Commissioner Dr. Nirav R. Shah ("Commissioner Shah") (collectively, "Respondents"). Petitioners seek to end the now egregiously long five-and-a-half-year supplemental review of high-volume hydraulic fracturing ("HVHF") in New York, which began in 2008, and which has been plagued by persistent, protracted bureaucratic delay and the Respondents' refusal to complete this process. As a result of these delays, Petitioners have been unable to develop the lucrative deposits of shale gas lying within their properties.

Together, Respondents have acted to prevent HVHF in the State of New York in direct violation of express statutory and regulatory timing directives in the State Environmental Quality Review Act ("SEQRA") and the Energy Law, as well as any and all rule of reason. As Lead Agency in the SEQRA process, the DEC and Commissioner Martens have failed to perform their non-discretionary duties and issue a finalized Supplemental Generic Environmental Impact Statement ("SGEIS"). Accordingly, mandamus relief is warranted to compel the DEC to issue the final SGEIS, in order to relieve Petitioners from their ongoing injuries. Petitioners respectfully ask this Court to compel Commissioner Martens and the DEC, to, on a date certain:

(1) issue the final supplemental generic environmental impact statement ("Final SGEIS") relative to HVHF; (2) issue the related Findings Statement in accordance with the timelines in 6 NYCRR § 617.11; and (3) render a final decision as to whether and under what circumstances HVHF will be permitted in this State (collectively, the "SGEIS Process").

In addition, Petitioners seek a declaration that the late-in-the-game referral by Commissioner Martens to Commissioner Shah and the DOH in September of 2012 for another study of purported health impacts (the "DOH review") was arbitrary and capricious, an abuse of discretion, and an illegal delegation of Commissioner Martens' and the DEC's Lead Agency responsibilities. The DOH was never identified as an "involved agency;" however, since the beginning of the SGEIS Process, the DOH has been intimately involved, on a consulting basis, and provided guidance and input as to the health impacts of HVHF. This is demonstrated by express articulations in the Draft SGEIS (published on September 30, 2009), the First Revised Draft SGEIS (released on July 8, 2011), and the Second Revised Draft SGEIS (issued on September 7, 2011).

Despite the DOH's extensive involvement throughout this process, Commissioner Martens made a referral to Commissioner Shah and the DOH late in September 2012 to assess the purported the health impacts of HVHF. This was after Commissioner Martens and the DEC concluded that any health risks associated with HVHF were preventable with proper regulatory controls. This after-the-fact referral was made in violation of SEQRA, over an entire year after issuance of the Second Revised Draft SGEIS and more than four years into the SGEIS Process. Therefore, the DOH review referral is an apparent stalling tactic, an arbitrary and capricious decision and abuse of Commissioner Martens' discretion.

To the extent that Commissioner Martens and the DEC persist in delaying completion of the SGEIS Process based on the still-pending DOH review, they have unlawfully abrogated their Lead Agency responsibilities. In short, after already concluding that HVHF could be undertaken safely with no significant adverse health impacts, Commissioner Martens and the DEC have done an "about-face." Rather than exercising their independent decision-making authority as Lead Agency and concluding the SGEIS Process, Commissioner Martens and the DEC have, instead: (1) granted Commissioner Shah and the DOH unfettered discretion regarding the timeline for completing the DOH review (and hence concluding the SGEIS Process); and (2) effectively asserted that the fate of HVHF in New York turns on Dr. Shah's purported conclusions. This is an unlawful delegation of the DEC's procedural and substantive responsibilities as Lead Agency under SEQRA and, therefore, cannot be a basis for continued delay.

Finally, since taking office in January of 2011, Governor Cuomo has controlled and delayed the SGEIS Process and precluded the DEC from finalizing the SGEIS and independently exercising its discretionary decision-making authority as Lead Agency. Despite the fact that SEQRA does not delegate any authority to Governor Cuomo, he has remained involved through the SGEIS Process, in excess of his authority. These actions merit an order prohibiting Governor Cuomo from further interfering in the SGEIS Process. In addition, by intervening in the SGEIS Process and causing the resulting delay, Governor Cuomo has acted as an Interested Agency. Therefore, all of his records relating to the SGEIS Process should be opened to public scrutiny.

STATEMENT OF FACTS

A full recitation of facts pertinent to this proceeding/action is set forth in: (1) the Petition; (2) the Affidavit of Dan Fitzsimmons ("Fitzsimmons Aff."); (3) the Affidavit of

Jonathan R. Kark ("Kark Aff.); (4) the Affidavit of Larry Schaefer on behalf of LADTM, LLM ("LADTM Aff."); and (5) the Affidavit of Larry Schaefer on behalf of Schaefer Timber & Stone, LLC ("Schaefer Aff."). Petitioners respectfully refer the Court to those submissions for a complete and detailed history of the SGEIS Process to date. For the Court's convenience, a synopsis of relevant facts is set forth here.

The SGEIS Process commenced in July of 2008, when then-Governor Paterson directed the DEC to engage in environmental review of horizontal drilling with HVHF (the "Directive"). Petition, ¶¶ 6, 7. After hosting six public scoping meetings and receiving thousands of written comments, the DEC, with full involvement from and in consultation with the DOH, published the Draft SGEIS in September of 2009. *Id.* ¶¶ 78–81. The DEC again held multiple public hearings and received public comments on the Draft SGEIS until December 31, 2009. *Id.* ¶ 80. The DEC then claimed to be reviewing those comments for over a year, in a purported effort to finalize the SGEIS. *Id.*, ¶ 83. Under the regulations, the Final SGEIS was due within 45 days after the close of the public hearings which, at the latest, was February 14, 2010. *See* 6 NYCRR § 617.9(a)(5).

On December 13, 2010, then-Governor Paterson issued Executive Order No. 41, ordering further environmental review, preventing the DEC from issuing oil and gas well permits utilizing HVHF, and ordering release of a revised Draft SGEIS by June 1, 2011. *Id.*, ¶¶ 84-85; Exh. I. In January of 2011, Governor Cuomo issued Executive Order No. 2, which continued Executive Order No. 41. *Id.*, ¶ 86; Exh. J.

In violation of Executive Order No. 41, the DEC failed to publish the revised SGEIS by June 1, 2011. The First Revised Draft SGEIS was published over a month late on July 8, 2011. *Id.* ¶ 93. At this time, Commissioner Martens announced that the DEC had concluded that

HVHF could be undertaken safely with strong regulatory controls. *Id.* ¶ 94. Instead of moving forward with review of public comments on the First Revised Draft SGEIS, the DEC hired an independent consultant to further review socioeconomic, community character, visual, noise, and transportation impacts that may be associated with HVHF. *Id.* ¶ 95; Exh. K.

On September 7, 2011, over three months after the June 1st deadline imposed by Executive Orders No. 41 and No. 2, the DEC issued the Second Revised Draft SGEIS, which contained new proposed mitigation measures relative to the potential impacts described by the independent consultant. *Id.* ¶ 96. Public hearings were conducted on the Second Revised Draft SGEIS concurrently with review of the DEC's proposed regulations for HVHF, which were released September 28, 2011. *Id.*, ¶¶ 99-100. At an electronic town meeting held in October 2011, Commissioner Martens again confirmed that the DEC had fully considered public health impacts and stated that regulatory controls would prevent contamination of natural resources and eliminate human exposure pathways. *Id.*, ¶ 101; Exh. O.

The last public hearing on the Second Revised Draft SGEIS was held on November 30, 2011 and the public comment period closed on January 11, 2012, more than two years ago. Pursuant to the regulations, the latest date for issuing the Final SGEIS was 45 days later, or February 25, 2012. *See* 6 NYCRR § 617.9(a)(5). It is now late February 2014 and the Final SGEIS still has not been issued.

Both Commissioner Martens and Commissioner Shah have stated that the completion of the SGEIS process was imminent. *Id.* ¶¶ 106-07. However, in lieu of issuing the Final SGEIS, in September 2012 Commissioner Martens formally requested that Commissioner Shah and the DOH perform the DOH review. *Id.*, ¶ 114; Exh. T. Again, in early 2013 Commissioner Martens and Commissioner Shah continued to state that the DOH review would be completed within a

few weeks. *Id.* ¶¶ 119-20. In February 2013, Commissioner Shah requested additional time to complete his DOH review. *Id.*, ¶ 123; Exh. Y. On February 27, 2013, the proposed regulations for HVHF expired due to Commissioner Martens' and the DEC's failure to complete the SEQRA Process and meet the deadlines in the State Administrative Procedure Act ("SAPA"). *Id.*, ¶ 130.

In October 2013, after all of these delays and missed deadlines, Commissioner Martens stated that completion of the SEQRA Process should not be expected any time soon and that there was no "great urgency" for completing SEQRA review despite that the process had been ongoing for more than five years. *Id.*, ¶ 135; Exh. DD. Most recently, in January 2014, while clarifying his testimony at a legislative budget hearing, Commissioner Martens stated it was "extremely unlikely" that any permits for HVHF would be issued before the end of *March 2015*. (Emphasis added) *Id.* ¶ 140, Exh. FF.

These unreasonable and unlawful delays coupled with the Executive Orders creating the Moratorium on the issuance of oil and gas well permits, have precluded all natural gas development utilizing HVHF in New York State (the "Moratorium"). *Id.*, ¶¶ 8, 10. Petitioners have been severely harmed, as they have been unable to exercise their rights to extract, lease, or otherwise profit from their oil and gas estates. Petitioner LADTM, LLC's predecessor in title and current member of LADTM, LLC, Schaefer Timber & Stone, LLC, had a valid existing lease with Norse Energy Corporation, USA. Schaefer Timber & Stone, LLC was the owner in fee simple absolute of approximately 93.3 acres of vacant real property located in the Town of Colesville, County of Broome. On February 4, 2010 with the intent to develop the Schaefer Parcel, Norse filed a well permit application with the DEC for a conventional vertical well. Upon information and belief, Norse filed the well permit application for a vertical well with the intent of drilling other wells using HVHF from the same well pad as soon as HVHF was permitted in

New York. On September 16, 2010, the DEC granted Norse's well permit application; however, the permit has since expired by its terms. *See* Schaefer Aff.; LADTM Aff.

On July 29, 2009 Chesapeake Energy Corporation filed well permit applications for six horizontal wells to be developed on the property of the Kark Family 2012 Tr. using HVHF. Due to the ongoing Moratorium, Chesapeake's well permit application has been pending for four-and-a-half years.

Petitioners Kark Family 2012 Tr., Schaefer Timber & Stone, LLC, and LADTM, LLC have all failed to receive any royalty payments for their oil and gas estates, despite having executed oil and gas leases with oil and gas operators that applied for permits to develop the oil and gas on their premises. *See* Kark Aff.; Schaefer Aff.; LADTM Aff. The Moratorium and the DEC's failure to finalize the SGEIS Process has prevented Petitioner JLCNY from accomplishing its mission "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." *Id.* ¶ 24; Exh. B. Petitioner JLCNY and its members have suffered economic harm as a result. *Id.* ¶ 27.

Therefore, Petitioners seek, *inter alia,* to force the Respondents to perform a non-discretionary duty as required by SEQRA and complete the SGEIS Process. *See id.* ¶ 1. Exh. A. On January 31, 2014, Petitioners sent a Demand Letter to the Respondents, demanding that the SGEIS Process be completed. *Id.* Having received no response, Petitioners bring this proceeding/action for the relief requested herein and in the Petition.

ARGUMENT

I. PETITIONERS HAVE STANDING.

Organizations can allege two different types of standing: associational or organizational. To demonstrate associational standing, an organization must show that at least one of its members has standing to sue individually. The organization must also show that its purposes in being a party to the lawsuit are "representative of the organizational purposes it asserts and that the case would not require the participation of individual members." *New York State Psychiatric Ass'n, Inc. v. Mills,* 29 A.D. 3d 1058, 1059 (3d Dept. 2006) (quoting *New York State Ass'n of Nurse Anesthetists v. Novello,* 2 N.Y.3d 207, 211 (N.Y. 2004). Organizational standing requires that the organization itself suffer an injury. *Mixon v. Grinker*, 157 A.D.2d 423, 426–27 (1t Dept. 1990). The United States Supreme Court has held that organizational standing is apparent when the organization has suffered a concrete injury leading to a drain on the organization's resources. *Id.* (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982).

As a grassroots, non-profit membership organization, the JLCNY meets the requirements for both associational and organizational standing. The JLCNY represents landowner coalitions and private property owners, all of whom have been injured by the indefinite delay in completion of the SGEIS Process and the now five-and-a-half-year-long Moratorium. Fitzsimmons Aff. The JLCNY represents groups and individuals who have been unable to lease their oil and gas estates, unable to extract and develop their oil and gas estates, or unable to otherwise receive royalty payments or profit from their oil and gas estates. *Id.* ¶ 8. It is unnecessary for an individual member of the JLCNY to participate in this lawsuit, as the requested relief is not to merely address the individual grievance of one of the JLCNY's members, but instead would benefit all of the JLCNY's members.

The JLCNY can also properly assert organizational standing because the organization's stated mission 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." Petition ¶ 24; Exh. B. This mission has been so frustrated by the Respondents' delay in finalizing the SGEIS Process that the JLCNY as an organization has suffered a concrete injury as it has been unable to move forward and achieve its goals and the goals of its members. Furthermore, the JLCNY has spent a significant amount of time preparing and submitting comments on the Second Revised Draft SGEIS as well as the former draft Regulations, which were never finalized. Preparing both sets of comments also cause the JLCNY to expend significant monetary resources. Most importantly, the DEC allowed the draft Regulations to expire instead of finalizing them in accord with SEQRA and the State Administrative Procedure Act, making the JLCNY's expenditures in regard to those comments a complete loss.

Finally, the remaining Petitioners also have standing. The Moratorium and the DEC's failure to finalize the SGEIS Process have unlawfully interfered with the mineral rights of each of the Petitioners. Specifically, The Kark Trust has a valid existing oil and gas lease with Chesapeake Energy Corporation, with property that has been included in well permits for HVHF but, due to the Moratorium, the Kark Trust has not received any royalty payments for its oil and gas estate. Kark Aff. ¶¶ 5–7. LADTM has been injured in the same manner. It has been unable to develop or earn royalties for its oil and gas estate and unable realize the benefits of a well permit granted to Norse Energy. LADTM Aff. ¶ 11. Furthermore, as a member of LADTM, LLC, Schafer has suffered and continues to suffer from the lack of development and subsequent royalty payments for LADTM's oil and gas estate. Schaefer Aff. ¶¶ 5–7; 20. Because the Moratorium unlawfully interferes with the Kark Trust's and LADTM's oil and gas estates, all of

the Petitioners are currently suffering from an irreparable injury. *See Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (interference with the exercise of mineral rights is an irreparable injury justifying injunctive relief). As the United States Supreme Court has held, when multiple parties bring an action together, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 53, n. 2 (2006). Accordingly, if this Court doubts the validity of the JLCNY's associational or organizational standing, the JLCNY may proceed in this action as a petitioner-plaintiff because the other named Petitioners all have standing.

For the foregoing reasons, the JLCNY is a proper Petitioner.

II. MANDAMUS ACTION IS WARRANTED TO COMPEL COMPLETION OF THE SGEIS PROCESS.

A. Mandamus Actions Under Article 78.

Mandamus to compel a government officer or entity to perform a non-discretionary duty is an appropriate remedy when there is a clear legal right to the relief sought. *Matter of Brusco v. Braun*, 84 N.Y.2d 674, 679 (N.Y. 1994). A clear legal right to relief may exist: (1) where the act sought to be compelled is required by law (e.g. pursuant to statute); or (2) where refusal to act is arbitrary or capricious. *See Matter of Small v. Moss*, 277 N.Y. 501, 507 (1938).

Pursuant to Civil Practice Law and Rules ("CPLR") § 7803(1), a proceeding in the nature of mandamus may be brought under CPLR Article 78 to compel a governmental body or officer to perform a non-discretionary duty, such as acting upon an application or issuing a final decision. *See Matter of Utica Cheese v. Barber*, 49 N.Y.2d 1028, 1303 (1980) (granting mandamus relief and ordering a hearing and ultimate determination within 90 days relative to an application for a dealer license that had been pending for sixteen months); *Matter of Costco*

Wholesale Corp. v. Town Bd. of Town of Oyster Bay, 90 A.D.3d 657, 658–59 (2d. Dept. 2011) (affirming lower court's holding that mandamus relief was warranted to compel the town board to file a final environmental impact statement where both statutory and regulatory timelines had been exceeded); *Matter of Brodsky v. S.Y.S. Dep't of Envtl. Conserv.,* 1 Misc. 3d 690, 695 (Sup. Ct. Albany Cnty. 2003) (holding that an application for permit renewal that was pending for ten years stated a claim for mandamus relief).

Even when a governmental body retains discretion and decision-making authority, an Article 78 action is proper to compel the body to move forward with a nondiscretionary action. *Matter of 2433 Knapp St. Rest. Bar v. Dep't of Consumer Affairs of City of N.Y.,* 150 A.D.2d 464, 465 (2d Dept. 1989). While the courts may not instruct the governmental body or officer how it should act, it can remind the body or officer that it is duty-bound to act. *Id.* Thus, mandamus relief pursuant to § 7803(1) is proper to compel an administrative body to render a determination where, as here, the lead agency has unreasonably delayed its decision-making. *See Daniel v. N.Y.S. Div. of Housing Community Renewal,* 179 Misc. 2d 452, 458 (Sup. Ct. N.Y. Cnty. 1998).

B. Completing The SGEIS Process Is A Non-Discretionary Duty Under SEQRA.

The DEC is the Lead Agency charged with implementing and enforcing SEQRA. SEQRA governs the completion of the SGEIS Process and, as such, the DEC must finalize the SGEIS Process. Because of the express timeframes in SEQRA, which govern the environmental impact review process, courts have repeatedly granted mandamus action to compel agencies and governing bodies to complete their non-discretionary duties. *Costco Wholesale Corp.,* 90 A.D.2d at 658–59 (granting mandamus relief based on the deadlines set forth in 6 NYCRR § 617.9[a][5], to compel completion of SEQRA review); *Matter of Mamaroneck Beach & Yacht*

Club, Inc. v. Fraioli, 24 A.D.3d 669, 671 (2d Dept. 2005) (granting mandamus relief based on the deadlines set forth in 6 NYCRR § 617.6[b], to compel commencement of SEQRA review of a site plan); *Matter of Lowe's Home Ctrs., Inc. v. Venditto*, 15 Misc. 3d 1108(A), 2007 WL 852057, *4 (Sup. Ct. Nassau Cnty. Mar. 19, 2007) (unreported) (granting mandamus relief based on timelines set forth in 6 NYCRR § 617.9[a][2], to compel determination on adequacy of draft environmental impact statement).

In regard to the instant case, Environmental Conservation Law ("ECL") § 8-0107 requires that all agencies shall fulfill their duties as prescribed by state regulations with "minimum procedural and administrative delay . . . and shall expedite all proceedings hereunder in the interests of prompt review." 6 NYCRR § 617.9(a)(5) requires that a final environmental impact statement be issued "within 45 calendar days after the close of any hearing or within 60 calendar days after the filing of the draft EIS, whichever occurs later." SEQRA does allow agencies to seek extensions to these deadlines; however, such an extension requires that "additional time is necessary to prepare the statement adequately," or that problems with the proposed action necessitating material reconsideration have been identified. *Id.* § 617.9(a)(5)(ii)[a], [b].

The mandates in SEQRA and the deadlines found in the New York Code of Rules and Regulations are not discretionary, nor may an agency act at its own discretion in deciding whether, if ever, it will complete its mandatory obligations. As former Commissioner of the DEC Peter Grannis testified, "the [draft] SGEIS is not a referendum on whether the proposed drilling is good or bad – rather it's a legally mandated environmental assessment." Pet. ¶ 82, Exh. H. Commissioner Grannis correctly characterized the DEC's duties under SEQRA and in relation to the SGEIS Process as legally mandated.

Yet, instead of fulfilling its mandatory duties, the DEC has missed every deadline associated with completion of the SGEIS Process since 2008. The DEC has failed to minimize delays associated with its duties and has further failed to expedite all proceedings undertaken in the interest of prompt review. *See* Exh. GG for a full list of timeline exceedances. Importantly, the most recent draft SGEIS, the Second Revised Draft SGEIS was released to the public on September 7, 2011. Pet. ¶ 96. The public comment period for that draft closed on January 11, 2012. *Id.* ¶ 100. The final SGEIS should have been issued within 45 days; yet it is nearly a fully 24 months past this deadline and the DEC has still not finalized the SGEIS Process. All of these failures to fulfill its non-discretionary duties have shattered the public's faith in the DEC. It remains unclear if, or when, the SGEIS Process will ever be completed.

The DEC's delays in finalizing the SGEIS Process cannot be explained as a reasonable extension as imagined by the regulations. Indeed, the DEC has made numerous public statements dispelling any myth that additional time is needed to complete the SGEIS Process. For example, the DEC and other State agencies have concluded that HVHF can be performed safely. Petition ¶ 94 (quoting Commissioner Martens in July 2011 as stating "we've concluded that [HVHF] can be undertaken safely, along with strong and aggressive regulations."); *id.* ¶ 106 (quoting Commissioner Martens at a joint budget hearing in February 2012 testifying that "[HVHF] can be done safely"); *id.* ¶ 109 (quoting a DOH report believed to be from February 2012 finding that "significant adverse impacts on human health are not expected for routine HVHF operations"). The DEC and Governor Cuomo have also been quoted countless times stating that issuance of the Final SGEIS was imminent. *Id.* ¶ 104 (reporting that Governor Cuomo stated review of HVHF would be completed in late spring 2012); *id.* ¶ 105 (explaining a DEC Fact Sheet published in January 2012 indicating that the SGEIS Process would be

completed that year); *id.* ¶ (quoting Governor Cuomo at a February 7, 2012 joint budget hearing stating "there are months, not years, worth of more work to do.").

Together, these statements verify that the DEC has not identified any potential impacts from HVHF that would necessitate material reconsideration of the Second Revised Draft SGEIS and as such, the DEC should not be permitted to ask for an extension to complete the SGEIS Process. Based on the foregoing, this court should compel the DEC to finalize the SGEIS Process.

C. The Energy Law And ECL Article 23 Compel The DEC To Finalize The SGEIS Process.

SEQRA is not the only statute that mandates that the DEC complete the SGEIS Process expediently. Section 3-101(5) of the Energy Law provides that the energy policy of the State is "to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including . . . natural gas from Devonian shale formations." Section 3-101(1) declares that the State energy policy also includes "obtain[ing] and maintain[ing] an adequate and continuous supply of safe, dependable and economical energy for the people of the state and to accelerate development . . . ." Furthermore, § 1-103 provides that "[e]very agency of the state shall conduct its affairs so as to conform to the state energy policy expressed in this chapter." The language of the Energy Law makes clear that all agencies in the State of New York have a non-discretionary duty to advance development of the State's indigenous energy resources. The agencies of the State should ensure that their actions work toward the policy of finding and maintaining a continuous supply of dependable, economical energy. The now five-and-a-half year-long Moratorium on natural gas development using HVHF defies the stated energy policy of New York.

Article 23 of the Environmental Conservation Law ("ECL") further governs mineral resources including oil and natural gas. Its declaration of policy provides that the public interest is:

> [T]o regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected . . . .

ECL § 23-0301. Again, the ECL emphasizes that agencies should ensure that their actions provide for greater ultimate recovery of oil and natural gas. The DEC's delay in completing the SGEIS Process in no way comports with this policy.

The DEC has done nothing but hinder these statutory mandates through the SGEIS Process. Given that the legislature has expressly directed the DEC to encourage and promote natural gas development and to ensure a greater ultimate recovery of oil and gas for private landowners, this Court should compel the DEC to complete its non-discretionary duty and finalize the SGEIS Process. Because of the DEC's failure to fulfill its duties and uphold the values and policies of New York, this court should compel the DEC to finalize the SGEIS Process.

D. The DEC's Failure To Complete The SGEIS Process Is Arbitrary And Capricious.

Again, a clear legal right to relief exists: (1) where the act sought to be compelled is required by law (e.g. pursuant to statute); or (2) *where refusal to act is arbitrary or capricious. See Small,* 277 N.Y. 501, 507 (1938) (emphasis added). Similarly, courts have jurisdiction under Article 78 to determine whether a governing body or officer has acted in a manner that is "arbitrary and capricious or an abuse of discretion." CPLR § 7803 (3). An agency action is

arbitrary and capricious when it lacks a factual basis. *See Saline v. Cimino,* 1 N.Y.3d 166, 172 (2003) (citing *Matter of Williams v. City of N.Y.,* 64 N.y.2d 800, 802 (1985)).

As previously explained, the DEC lacks any factual basis for delaying the finalization of the SGEIS Process. The DEC and Commissioner Martens have continued to make misleading statements indicating that completion of the SGEIS was imminent. The DEC may not argue at this stage that its delay in finalizing the SGEIS Process is due to true concern for the purported impacts of HVHF. Again, in accord with binding regulations, the DEC was required to issue the Final SGEIS in February 2012. Neither the DEC, nor Commissioner Martens have given any legally recognizable justification for the agency's delay in finalizing the SGEIS Process.

In September 2012, the DEC unlawfully requested that the DOH and Commissioner Shah complete a DOH Review. This action by the DEC was arbitrary and capricious as the DEC lacks authority under SEQRA to delegate any of its non-discretionary duties. Just as federal agencies lack authority to expand their own powers, State agencies are similarly restricted. *Cf. Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."). Because the DEC lacked the authority to delegate its duties to the DOH and Commissioner Shah, the pending DOH review serves only to delay completion of the SGEIS Process, thereby further injuring Petitioners.

Finally, no common law standard of reasonableness could justify or tolerate such a lengthy delay in the completion of the SGEIS Process. Courts in New York have consistently found that in the absence of statutorily mandated deadlines for agency action, a reasonableness

standard should apply. *See Utica Cheese*, 49 N.Y.2d at 1030 (finding that the principles of fairness required agencies to issue decisions promptly); *2433 Knapp St. Rest. Bar,* 150 A.D.2d at 465 (granting mandamus relief after a two-and-a-half year delay by agencies in deciding petitioner's permit); *Brodsky*, 1 Misc. 3d at 695 (finding that in the absence of statutorily mandated timelines, "there is still a general requirement that applications for permits or licenses be acted upon within a reasonable time.").

On its face, the five-and-a-half-year delay on natural gas extraction and the failure of the DEC to complete the SGEIS Process are unreasonable, warranting mandamus relief. The DEC's abuse of discretion in deferring its issuance of the Final SGEIS based upon the DOH review, and the DEC's refusal to provide the public with any accurate information regarding completion of the SGEIS Process necessitate an order from this Court compelling the DEC to finalize the SGEIS Process.

E. If The Court Finds Any Genuine Issue Of Fact As To Why The DEC Is Entitled To More Time To Complete The SGEIS Process, A Jury Trial Is Warranted.

In the event that this Court finds any *bona fide* issues of fact regarding a claim by Respondents that they need more time to finalize the SGEIS Process, Petitioners request an immediate jury trial pursuant to CPLR §§ 7804(h) and 410. *See Matter of Preddice v. Callanan*, 96 A.D.2d 613, 614 (3d Dept. 1983) (holding that petitioners bringing actions under Article 78 are entitled to a trial by jury to review issues of fact). In the event a jury trial is ordered, Petitioners respectfully request an order: (1) compelling Commissioner Martens and Commissioner Shah to testify as to why the DEC or DOH requires additional time to complete the SGEIS Process; and (2) requiring the DEC, the DOH, and the Executive Chamber to make available for public review all records pertaining to their actions throughout this process.

III. THE DEC'S REFERRAL OF THE SGEIS PROCESS TO THE DOH FOR A HEALTH REVIEW WAS AN IMPROPER DELEGATION OF AUTHORITY.

"A lead agency's discretion to solicit comments at [a late] stage in the SEQRA process must be balanced against SEQRA's mandate that the regulations be implemented 'with minimum procedural and administrative delay . . . [and] in the interest of prompt review." *Matter of Riverkeeper, Inc.* v. *Pl. Bd. of Town of Southeast*, 9 N.Y.3d 219, 235 (quoting 6 NYCRR § 617.3[h]). The DEC and Commissioner Martens' actions fail to balance this important mandate. The referral to the DOH and Commissioner Shah for the DOH review was arbitrary and capricious and the DEC lacked authority to discharge its duties to another agency. Indeed, a lead agency "must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment" and "the lead agency need not await another agency's permitting decision before exercising its independent judgment on the issues. *Id.* at 234.

Under SEQRA, an "involved agency" is defined as "an agency that has jurisdiction by law to fund, approve, or directly undertake an action." 6 NYCRR § 617.2(s). SEQRA does not confer any of these jurisdictions upon the DOH and as such, the DOH does not qualify as an involved agency. An "interested agency":

> [M]eans an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action. An "interested agency" has the same ability to participate in the review process as a member of the public.

Despite the DOH's heavy involvement throughout the DEC's development of the SGEIS, the DOH has only the right to participate in the SGEIS Process like any other member of the public.

The DEC has consulted with the DOH multiple times throughout its development of the SGEIS. Specifically, the DOH evaluated purported health impacts associated with HVHF to aid the DEC in preparing the Draft SGEIS, the First Revised Draft SGEIS, and the Second Revised

Draft SGEIS. Petition ¶¶ 81, 98. While the DEC has treated the DOH as more than an interested party, the DEC lacks any authority to elevate the status of the DOH in relation to the SGEIS Process. Furthermore, the official referral to the DOH and Commissioner for the DOH review was unlawful as the DOH has only the right to participate in the review process as a member of the public.

Although the DEC had already allowed the DOH to expand its role in the SGEIS review process, the DEC's referral to the DOH and Commissioner Shah in September 2012 for the DOH review was clearly an improper delegation of its authority as lead agency. The DOH does not meet SEQRA's requirements for an "involved agency" and as such, the DOH and Commissioner Shah do not have any authority to participate in the SGEIS review, beyond that of a member of the public. The DEC is not free to unilaterally expand its powers or the powers of other agencies. *See Riverkeeper,* 9 N.Y.3d at 324 ("A lead agency improperly defers its duties when it abdicates its SEQRA responsibility to another agency or insulates itself from environmental decisionmaking." (internal citations omitted)). The referral to the DOH and Commissioner Shah constitute nothing more than a stall tactic by the DEC to aid in the delay of the completion of the SGEIS Process. The DOH already provided feedback for the other draft SGEISs, which demonstrates that the DEC's request for the DOH review was arbitrary and capricious and entirely unrelated to any legitimate public health concerns.

Because the DEC lacked authority to refer to the DOH and Commissioner Shah instead of completing its non-discretionary duties, this Court should compel the DEC to finalize the SGEIS Process.

IV. GOVERNOR CUOMO LACKS AUTHORITY TO INTERVENE IN OR OTHERWISE CONTROL THE SGEIS PROCESS.

As Governor of New York State, Respondent Governor Cuomo lacks any authority to delay or otherwise interfere with the DEC's lead agency responsibilities under SEQRA. Governor Cuomo took office in January 2011 and shortly thereafter issued Executive Order No. 2, which extended former-Governor Paterson's Moratorium on the issuance of well permits that considered the use of HVHF. Petition ¶¶ 84–86. Governor Cuomo's actions have consistently prevented the DEC and Commissioner Martens from exercising their independent decision-making authority and as such, this Court should order Governor Cuomo to cease interfering with the finalization of the SGEIS Process.

Although Governor Cuomo has no authority as a lead agency or even as an involved agency, he has and continues to control the entire SGEIS review. Because Governor Cuomo is, at best, an interested agency, he has the same right to participate in the SGEIS Process as any member of the general public. As such, Governor Cuomo should be ordered to make available for public scrutiny all of his records and the records from his office regarding the SGEIS Process. *See* 6 NYCRR § 617.2(t) (defining "interested agency" as "an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific . . . concern . . . ").

CONCLUSION

Because of the DEC's failure to complete its non-discretionary duty to complete the SGEIS Process, and because this is causing immediate, irreparable injury to Petitioners, they respectfully request that this Court compel completion of the SGEIS Process forthwith. Petitioners have no other available remedies to redress their ongoing injuries. The DEC has failed to meet the deadlines set forth in SEQRA and has failed to act in accordance with the State's official energy policy. The DEC has further failed to promote the development of indigenous oil and gas development as required by the Energy Law. The DEC and Commissioner Martens' September 2012 referral to the DOH and Commissioner Shah for the DOH review was an arbitrary and capricious action, an abuse of discretion, and in direct violation of the DEC's responsibilities as lead agency under SEQRA. The DOH and Commissioner Shah lack the authority to further delay the completion of the SGEIS Process. Finally, Governor Cuomo must be ordered to cease delaying the completion of the SGEIS Process and interfering with the DEC's authority as lead agency under SEQRA. Based upon this interference with the SGEIS review, Petitioners also request that Governor Cuomo be ordered to open his records regarding the entire SGEIS review for public scrutiny.

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