

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.*

**VERIFIED PETITION  
AND COMPLAINT**  
Index No.:

**JURY TRIAL DEMANDED**

Petitioners-Plaintiffs the Joint Landowners Coalition of New York, Inc. (“JLCNY”); the Kark Family 2012 Tr.; LADTM, LLC (“LADTM”); and Schaefer Timber & Stone, LLC (“Schaefer”) (collectively “Petitioners”), complaining of the Respondents-Defendants (“Respondents”) herein allege and state as follows:

**NATURE OF THE PROCEEDING**

1. Petitioners bring this special proceeding and plenary action pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) and CPLR § 3001 for an order and/or judgment, *inter alia*: (1) compelling the New York State Department of Environmental Conservation (“DEC”) and DEC Commissioner Joseph J. Martens to finalize the Supplemental Generic Environmental Impact Statement (“SGEIS”) relative to oil and gas well permits in New York State involving high-volume hydraulic fracturing (“HVHF”) combined with horizontal drilling

and issue a Findings Statement pursuant to the State Environmental Quality Review Act (“SEQRA”), Article 8 of the Environmental Conservation Law (“ECL”), (collectively finalizing the SGEIS and issuing a Finding Statement shall be referred to as the “SGEIS Process”); (2) determining that the DEC and Commissioner Martens’ latest referral of all or parts of the SGEIS to the New York State Department of Health (“DOH”) and Commissioner Dr. Nirav R. Shah for review of purported public health issues related to HVHF was arbitrary and capricious, an abuse of discretion, and an improper delegation of the DEC and Commissioner Martens’ Lead Agency responsibilities, and that the DOH and Commissioner Shah, therefore, are proceeding without or in excess of their jurisdiction; (3) declaring that Governor Andrew M. Cuomo is in fact an Interested Agency for the purposes of SEQRA review because of his direct intervention in the SGEIS Process and, accordingly, ordering his records relative to the SGEIS Process to be opened for public scrutiny; and (4) declaring that Governor Cuomo is acting without or in excess of his jurisdiction by orchestrating the delay in the SGEIS Process and interfering with and precluding the DEC and Commissioner Martens from independently exercising their discretionary decision-making authority and issuing final standards relative to HVHF and, accordingly, ordering Governor Cuomo to cease and desist from further interference in the SGEIS Process.

2. It is the stated public policy of New York to promote the development of existing indigenous oil and natural gas resources, including Devonian shales, in a manner that prevents waste, protects correlative rights, and provides for greater ultimate recovery of these resources; and each state agency is required by law to conduct its affairs so as to conform to New York’s energy policy. *See* ECL § 23-0301 and Energy Law §§ 3-101(5), 3-103.

3. To carry out this purpose, the ECL mandates that oil and gas well permit applications be processed “as expeditiously as possible.” ECL § 23-0501(3).

4. The Marcellus Shale formation is estimated to contain approximated 500 trillion cubic feet of natural gas and covers approximately 54,000 square miles, primarily in New York, Ohio, Pennsylvania, and West Virginia.

5. By 2008, numerous oil and gas operators were pursuing leases in the Southern Tier of New York and elsewhere to explore the Marcellus Shale formation for development utilizing HVHF.

6. As a result of this heightened interest in shale development, the New York State Legislature introduced and passed legislation to promote shale development using multiple well pads for HVHF combined with horizontal drilling. In response, on or about July 23, 2008, then-Governor David Paterson ordered the DEC to complete a supplemental environmental review of HVHF combined with horizontal drilling pursuant to SEQRA (hereinafter the “Directive”).

7. The Directive led the DEC to cease processing well permits proposing the use of HVHF combined with horizontal drilling pending completion of the SGEIS. In turn, this halted the development of Devonian shale formations in New York, while its sister states Ohio, Pennsylvania, and West Virginia have been earnestly developing the significant energy reserves from Devonian shales, including the Marcellus Shale.

8. The inability to obtain permits to develop Devonian shale resources utilizing HVHF pending the finalization of the SGEIS Process was later confirmed by Executive Orders from two successive Governors. Thus, the SGEIS Process has resulted in a statewide moratorium on all shale development in New York (hereinafter the “Moratorium”).

9. After the issuance of the Directive, the DEC began its environmental review of HVHF and in November 2008, indicated that its target timeframe for completion of the SGEIS Process was summer 2009.

10. Today, over five years later, this deadline has passed and there is no end in sight for the completion of the SGEIS Process, leaving Petitioners unable to develop their mineral estates.

11. In an effort to protect their private property rights, Petitioners authorized a Demand Letter to be sent to the Respondents demanding that the SGEIS Process be completed. Petitioners notified Respondents of their intention to file this Petition and Complaint in the event that the Respondents failed to reply to the Demand Letter by February 13, 2014. A true and accurate copy of the Demand Letter is attached hereto as **Exhibit A**.

12. The Respondents failed to respond to the Demand Letter or otherwise provide guidance as to when the SGEIS Process will be completed.

13. Over the last five-and-a-half-years, every deadline provided by the Respondents regarding the anticipated completion of the SGEIS Process and the corresponding deadlines found in the controlling regulations have been exceeded, often by months and, on many occasions, by years.

14. The Respondents' conduct and pattern of persistent delay created a regulatory environment that has caused Petitioners to lose out on economic benefits associated with their mineral estates and have the lessees of Petitioners and/or their members with no viable business option but to let their leases sit idle or worse, let them expire having never had an opportunity to develop the mineral estate.

15. Petitioners and/or their members are unable to realize any economic benefits from their oil and gas estates. They are unable to sell, auction, lease or otherwise dispose of their mineral rights by reason of the negative reputation that is being created for New York State as a

result of the protracted delays associated with the SGEIS Process and the illegal conduct of Respondents as described herein.

16. The Respondents' failure to complete the SGEIS Process has created a negative business reputation for New York State, as well as substantial economic harm to Petitioners and/or their members. This has damaged not only Petitioners, but all mineral owners in New York State and New York residents and municipalities that would benefit from the development of the clean burning, indigenous energy resource through utilization of HVHF combined with horizontal drilling.

17. Under SEQRA, the DEC and Commissioner Martens are required to expedite the SGEIS Process in the interest of prompt review and with minimal procedural and administrative delays. *See* ECL § 8-0107; 6 NYCRR § 617.3(h).

18. The DEC and Commissioner Martens failed to meet that standard by any measure of reasonableness. Indeed, the five-and-a-half year delay in completing the SGEIS Process is legally unjustifiable.

19. The September 2012 delegation by the DEC and Commissioner Martens to the DOH and Commissioner Shah requesting additional review of the purported health impacts associated with HVHF (the "DOH review") was arbitrary and capricious, an abuse of discretion, and an unlawful abrogation of their statutory obligations as Lead Agency under SEQRA. The referral amounts to nothing more than an excuse to further delay a process that has already been prolonged for a patently unreasonable and unjustifiable amount of time.

20. Moreover, upon information and belief, since taking office in January 2011, Governor Cuomo has injected himself in the SGEIS Process, controlled its progression, and precluded the DEC and Commissioner Martens from independently exercising their discretionary

decision-making authority; however, Governor Cuomo has no approval authority over any aspect of the SGEIS Process. As such, Governor Cuomo has acted without and in excess of his authority, meriting a court order prohibiting him from any further interference with the SEQRA Process. In exercising control over the entire SGEIS Process, Governor Cuomo has also acted as an Interested Agency, and thus, his records relative to the SGEIS Process must be made available for public scrutiny.

21. Respondents' conduct also directly contradicts the public policy of New York and their obligation to conduct their affairs so as to conform to New York's energy and environmental policies; namely, to promote the development of indigenous oil and gas resources, including Devonian shales, prevent waste of those resources, protect the correlative rights of all mineral owners, and complete review of well permit applications "as expeditiously as possible." *See ECL §§ 23-0301, 25-0501(3); Energy Law §§ 3-101(5), 3-103.*

22. To remedy these wrongs, Petitioners initiate this proceeding to compel finalization of the SGEIS Process and for the ancillary relief set forth herein.

### PARTIES

23. Petitioner the JLCNY is a grassroots, non-profit organization, incorporated under the laws of New York State with its principal place of business in Binghamton, New York. The JLCNY's current membership includes 38 landowner coalitions representing the interests of over 70,000 landowners and one million acres spread across fourteen counties in New York. The JLCNY was formed in 2010 in a response to the regulatory barriers to natural gas development in New York.

24. Under its Bylaws, the JLCNY describes a landowner coalition as a "group of property owners who have joined together to lease and/or manage their oil and gas rights, and

whose purpose is consistent with the mission of the JLCNY.” JLCNY Bylaws, art. II, A. A true and accurate copy of the JLCNY Bylaws is attached hereto as **Exhibit B**. The JLCNY’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.” *Id.* at art. I, B.

25. The landowner coalitions and property owners represented by the JLCNY are all actively engaged in pursuing the JLCNY’s stated mission. The members of the JLCNY share a common interest in promoting natural gas development within New York State and in moving the purpose of the JLCNY forward.

26. The DEC’s failure to complete the SGEIS Process prevents the JLCNY and its members from pursuing its mission to foster, promote, or advance natural gas development within New York State.

27. Since its formation, the JLCNY has been an actively involved participant throughout the current SGEIS Process. On behalf of its members, the JLCNY has spent significant amounts of time in preparing thorough comments in response to the Second Revised Draft SGEIS issued by the DEC September 7, 2011 and the proposed HVHF Regulations released by the DEC on September 28, 2011. The DEC’s failure to finalize the SGEIS Process has also caused the JLCNY to bear great economic expense in preparing and submitting substantive comments on the Second Revised Draft SGEIS and the HVHF Regulations. These costs appear to be spent in vain as the DEC has made no indications that it will finalize the SGEIS Process in the near future. Indeed, the JLCNY fears it may have to expend more resources to submit formal comments on the DOH review if/when it is finally released, or any other formal documents released as part of the SGEIS Process.

28. Petitioner the Kark Family 2012 Tr. (“Trust”), as represented by trustee Jonathan R. Kark, is owner of a mineral estate (hereinafter “Kark Mineral Estate”) in the town of Fenton, New York.

29. On or about July 10, 2007 the Trust’s predecessor, which owned the Kark Estate in fee simple, entered into an oil and gas lease for its entire oil and gas estate with Chesapeake Energy Corporation (“Chesapeake”). The oil and gas lease had an initial five year primary term with an optional five year extension. By payment and Notice of Extension of Oil and Gas Leased dated July 23, 2012 Chesapeake exercised its option and extended the primary term for an additional five years, to July 9, 2017. The Notice of Extension was properly recorded with the Broome County Clerk’s Office in Book 2384 of Deeds, page 629. A true and accurate copy of the Oil and Gas Lease is attached hereto as **Exhibit C**.

30. The highest and best use of the Kark Mineral Estate is for oil and gas development.

31. On June 29, 2009, Chesapeake filed a well permit application to drill six horizontal wells to develop the oil and gas from the Kark Mineral Estate. Chesapeake’s targeted formation was the Marcellus shale. These proposed wells are identified as Kark 1-1H, Kark 1-2H, Kark 1-3H, Kark1-4H, Kark1-5H, and Kark 1-6H. These proposed well would be completed using HVHF.

32. Upon information and belief, Chesapeake filed its well permit application in anticipation of the release of the Final SGEIS and with anticipation that permits for HVHF would be issued shortly thereafter.

33. By deed dated June 15, 2012, as recorded in the Broome County Clerk’s Office on July 17, 2012 in Book 2379 of Deeds, page 211, the Trust’s predecessor conveyed all “oil and

gas and petroleum products estate, interest and rights including, without limitation, all oil gas and other rights in, under, and that may be produced" to the Trust. The Trust stepped into the shoes of its predecessor and is now entitled to all royalty payments resulting from any natural gas development on the Kark Mineral Estate.

34. Due to the Moratorium, Chesapeake's well permit application has not been granted, no drilling has occurred, and the Trust has not received any royalty payments. Accordingly, the Trust has suffered injury in fact.

35. Petitioner LADTM is a limited liability company organized under the laws of the State of New York, with a principal place of business of 315 Old Route 10, Deposit, New York.

36. Petitioner Schaefer is a limited liability company organized under the laws of the State of New York, with a principal place of business of 315 Old Route 10, Deposit, New York.

37. At all times relevant herein, Schaefer was and is a member of LADTM.

38. Schaefer is a member of the Deposit Gas Group, a landowner coalition operating in Broome and Delaware Counties, New York. Deposit Gas Group is a member in good standing of the JLCNY. The goal of the Deposit Gas Group is to help its members with gas leasing, pipeline rights-of-way, easements and gas drilling in general.

39. Prior to July 20, 2007, Schaefer was the owner in fee simple absolute of approximately 93.3 acres of undeveloped real property located in the Town of Colesville, County of Broome, New York bearing tax map number 136.00-1-43.11. The property is approximately 93.3 acres as described in a Warranty Deed recorded on September 23, 2002 in the Broome County Clerk's Office at Book 2010 of Deeds at page 267 (hereinafter "Schaefer Parcel"). A true and accurate copy of the Warranty Deed is attached hereto as **Exhibit D**.

40. On or about July 20, 2007, Schaefer entered into an oil and gas lease for the Schaefer Parcel with Nornew, Inc., now known as Norse Energy Corporation USA (“Norse”), a copy of which is attached as **Exhibit E**. The lease provided for an initial five year primary term, subject to an option to extend the lease for a second five year term.

41. The highest and best use of the Schaefer Parcel is for oil and gas development.

42. Schafer’s sole purpose in entering into the oil and gas lease was to market, develop, and extract natural gas in the premises and receive royalty payments therefor.

43. On or about March 28, 2008, Schaefer conveyed the Schaefer Parcel reserving, *inter alia*, “the right to all surface and subsurface oil, gas and minerals . . . and to enter upon the premises for the purpose of exploration for and removal of any or all oil, gas and minerals” as more particularly described in a deed recorded in the Broome County Clerk’s Office on August 6, 2008 at Book 2238 of Deeds, page 167.

44. A corrected deed dated August 7, 2008 and recorded in the Broome County Clerk’s Office on October 23, 2012 was executed to reflect that Schaefer excepted and reserved an “undivided one-half interest in all oil, gas and other minerals located on, in and under all of the premises . . . together with the right of ingress and egress for the purpose of exploring, drilling, operating, producing or marketing oil, gas and other minerals, and for the purpose of construction and maintenance of any pipeline necessary for the transporting of such oil, gas and other minerals. . . .”

45. On February 4, 2010, pursuant to its oil and gas lease with Schaefer, and with the intent to develop the Schaefer Parcel and extract natural gas therefrom, Norse filed a well permit application with the DEC for a conventional vertical well due to the existing Moratorium.

46. 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.

47. On September 16, 2010, the DEC granted Norse's well permit application. Both the permit and the lease have since expired by their terms and the Schaefer Parcel remains undeveloped.

48. Upon information and belief, if Norse or any developer had a permit to develop the Schaefer Parcel utilizing HVHF, Schaefer would have received substantial royalty payments.

49. On or about August 7, 2012, LADTM acquired 100% ownership of all of the oil, gas and minerals underlying the Schaefer Parcel as described in a Mineral Deed recorded on October 24, 2012 in the Broome County Clerk's Office at Book 2387, page 350. A true and accurate copy of the Mineral Deed is attached hereto as **Exhibit F**.

50. On or about December 6, 2012, Norse filed for relief under Chapter 11 of the United States Bankruptcy Code and converted to an action for relief under Chapter 7 of the United States Bankruptcy Code on or about October 10, 2013. Upon information and belief, Norse's bankruptcy was caused by New York's failure to permit HVHF to extract natural gas found in the Marcellus shale. *See* Verified Petition and Complaint, *Wallach v. New York Dept. of Envtl. Conser.*, Index No. 6770-2013 (N.Y. Sup. Ct., *filed* Dec. 17, 2013).

51. LADTM owns only the mineral estate in the Schaefer Parcel and does not have any rights to the surface of the property, other than those incidental to the extraction of oil and gas.

52. LADTM remains unable to lease its oil and gas estate to another developer because of the current Moratorium.

53. Upon information and belief, but for the Moratorium, LADTM would be able to lease the Schaefer Parcel and would receive substantial royalty payments if the Schaefer Parcel could be developed using HVHF.

54. Due to the Moratorium, Schaefer and LADTM have been unable to market, develop, and extract oil and gas from the Schaefer Parcel. The Moratorium has also prevented LADTM and Schaefer from finding a new lessee for the Schaefer Parcel.

55. Respondent State of New York is a state organized and maintained pursuant to the New York State Constitution with its principal office located at the State Capital, Albany, New York.

56. Respondent Andrew M. Cuomo is the Governor of the State of New York.

57. Respondent the New York State Department of Environmental Conservation is an agency of the State of New York, with its principal offices located in Albany, New York. The Department of Environmental Conservation is the Lead Agency under SEQRA, charged with completing the SGEIS Process. The Department of Environmental Conservation is further responsible for overseeing oil and gas development within the State and is the agency solely responsible for issuing oil and gas well permits “as expeditiously as possible.” ECL § 23-0501.

58. Respondent Joseph Martens is the Commissioner of the DEC. The Commissioner is appointed by the Governor. *Id.* § 3-0103. As head of the DEC, Commissioner Martens is responsible for ensuring that the DEC fulfills its duties, which includes issuing oil and gas well permits “as expeditiously as possible.” *Id.* § 23-0501.

59. Respondent the New York State Department of Health (“DOH”) is an agency of the State of New York with its principal offices located in Albany, New York. The Department of Health is charged with a variety of tasks including: (1) controlling the registration of births,

deaths and marriages; (2) supervising the reporting and control of disease; (3) conducting laboratory examinations for the diagnosis and control of disease; (4) promoting education in prevention and control of disease; (5) promoting and providing therapeutic service for maternal and child health, communicable disease, medical rehabilitation, cancer and other conditions and diseases affecting public health; and (6) maintaining and operating state hospitals, institutions, public health centers and clinics. Public Health Law § 201.

60. Respondent Dr. Nirav Shah is the Commissioner of the DOH. The Commissioner is appointed by the Governor. *Id* § 204. As head of the DOH, Commissioner Shah is charged with such tasks as: (1) supervising the work of all local boards of health; (2) supervising medical treatment of patients in state institutions, public health centers, and clinics in the DOH; (3) maintaining marriage, birth, mortality, and disease records that may be useful for the security of life in the state; (4) enforcing the public health law, the sanitary code, and the provisions of the medical assistance program; (5) establishing and operating adult and child immunization programs; and (6) establishing a list of drug products that are approved by the Federal Food and Drug Administration. *Id.* § 206.

61. For purposes of this lawsuit, each individually named respondent is sued in his official capacity.

#### **JURISDICTION AND VENUE**

62. Under CPLR §§ 7803, 7804(b), and 3001, this Court has jurisdiction to grant Petitioners' request for relief in the nature of mandamus and prohibition, as well as the declaratory relief sought, and any further relief that this Court deems just and proper.

63. Venue is proper in this Court under CPLR §§ 503, 506(b), and 509.

## RELEVANT FACTS

64. New York recognizes a mineral estate as an interest in real property, severable from the surface estate. *See White v. Miller*, 92 N.E. 1065, 1066 (N.Y. Ct. App. 1910). By its nature, a mineral estate includes the right to convey, lease, or reserve the minerals, as well as the “right to use any reasonable means to extract them.” *Frank v. Fortuna Energy, Inc.*, 856 N.Y.S.2d 322, 323 (N.Y. App. Fourth div., 2008). As real property, mineral estates are protected by the Fifth and Fourteenth Amendments to the United States Constitution.

65. The DEC is mandated by statute to regulate all oil and gas drilling and extraction activities in New York State, which necessarily includes HVHF.

66. The public policy of the State is to develop existing oil and natural gas resources within the state in a manner that prevents waste, provides for the greater ultimate recovery of those resources, and protects the correlative rights of mineral owners. *See ECL § 23-0301*. Further, New York State agencies must conduct their affairs so as to conform to New York’s energy policy, which requires them to “foster, encourage and promote the prudent development . . . of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, . . . [and] natural gas from Devonian shale formations . . .” *See Energy Law, §§ 3-101(5), 3-103*. Notably, the Marcellus Shale formation is a Devonian shale formation holding significant natural gas resources in New York.

67. The DEC is also obligated to “take all actions required” under ECL Titles 5, 7, and 9 “as expeditiously as possible.” ECL § 23-0501(3). This obligation specifically applies to well permits before the DEC, such as the well permit application submitted by Chesapeake vis-à-vis the Kark Mineral Estate, which has been delayed pending the completion of the SGEIS Process.

68. Under SEQRA, the DEC is required to either process each oil and gas well permit application individually as an “action” or perform a generic environmental review of the DEC’s Oil, Gas and Solution Mining Law regulatory program, whereby an evaluation would be performed and a generic Environmental Impact Statement (“GEIS”) would be prepared based upon the parameters, operations, and impacts associated with drilling a typical oil and gas well.

69. In 1992, to streamline the well permitting process, the DEC prepared a GEIS (“1992 GEIS”) applicable to the operations and impacts associated with the drilling of an oil and gas well. After the GEIS was adopted, any subsequent application for the drilling of an oil or gas well within the parameters of the GEIS could be approved without any additional SEQRA review. While the 1992 GEIS was being prepared the DEC continued to review and issue oil and gas well permit applications in a timely manner. In contrast, the DEC has not issued any oil and gas well permits that consider the use of HVHF since the beginning of the SGEIS Process.

70. When the DEC prepared the 1992 GEIS hydraulic fracturing was an established technology. Indeed, hydraulic fracturing has been used effectively on natural gas wells in New York State since the 1950s.

71. By 2008, HVHF combined with horizontal drilling was prevalent in developing deep shale formations, such as the Marcellus and Utica Shale formations. Together, these technologies have been successfully utilized to develop thousands of wells in many states, including thousands of such wells in Pennsylvania – many of them just a few hundred feet from the New York border.

72. In response to the heightened interest in developing New York’s deep shale formations using HVHF combined with horizontal drilling, on July 21, 2008, then-Governor Paterson signed amendments to the ECL into law, which established new spacing requirements

for drilling units for wells utilizing multiple well pads for HVHF combined with horizontal drilling. *See L. 2008, c. 376, § 1.* These amendments were intended to streamline, simplify, and expedite the permitting process for wells utilizing HVHF combined with horizontal drilling.

73. Just two days later, on July 23, 2008, then-Governor Paterson issued a press release (the “Directive”) directing the DEC to initiate a formal public process to update the 1992 GEIS to address the potential impacts of HVHF. A true and accurate copy of this press release is attached hereto as **Exhibit G**.

74. The press release provides in relevant part:

Governor Paterson has directed [the] DEC to prepare an updated [GEIS] under [SEQRA] to ensure that all environmental impacts from drilling are addressed. The update will examine potential impacts from new horizontal drilling techniques, including potential impacts to groundwater, surface water, wetlands, air quality, aesthetics, noise, traffic and community character, as well as cumulative impacts.

\* \* \*

In addition, DEC is reviewing staff resources, existing regulations, jurisdiction over water withdrawals, permit application fees and procedures and legal and regulatory compliance that could be implicated during drilling activity.

75. SEQRA incorporates the consideration of environmental factors into agency planning, review, and decision-making so that social, economic, and environmental factors are considered together in reaching decisions on proposed activities.

76. SEQRA also requires the DEC to expedite its proceedings in the interest of prompt review and to minimize procedural and administrative delays. Pursuant to the ECL § 8-0107, all agencies must carry out the terms of SEQRA “with minimum procedural and administrative delay, shall avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and shall expedite all

proceedings hereunder in the interest of prompt review.” *See also* 6 NYCRR 617.3(h) (codifying the same).

77. In response to the Directive, in October 2008 the DEC released the draft scope for public review and comments.

78. In November 2008 and December 2008, the DEC held six public scoping meetings in the Catskills and the Southern Tier of New York. The DEC also received thousands of written comments in response to the draft scope for the SGEIS.

79. In February 2009, the DEC released the Final Scope of the SGEIS.

80. On September 30, 2009, the DEC published the Draft SGEIS and invited public review and comment until December 31, 2009. The DEC received transcripts from four additional hearings held by the New York State Assembly, the New York City Council, the City of Oneonta, and the Tompkins County Council of Governments.

81. Although it is not required to do so, the DOH assisted with and contributed extensively to the Draft SGEIS. Specifically, the Bureaus of Water Supply Protection, Toxic Substance Assessment, and Environmental Radiation Protection, among others, assisted the DEC in preparing the Draft SGEIS. Although the DOH has aided the DEC as a consulting party, its actions carry no legal significance in regard to the SEQRA Process and do not vest the DOH with any decision-making authority.

82. On October 15, 2009, then-DEC Commissioner Pete Grannis testified before the New York State Assembly, stating in relevant part: “As all of you know, the [Draft] SGEIS is not a referendum on whether the proposed drilling is good or bad – rather, it’s a legally mandated environmental assessment . . .” A true and accurate copy of Pete Grannis’ testimony is attached here to as **Exhibit H**.

83. The DEC claimed to be reviewing public comments for almost an entire year, in a purported effort to finalize the SGEIS Process.

84. On December 13, 2010, then-Governor Paterson issued Executive Order No. 41 directing the DEC to conduct further environmental review to ensure that all environmental and public health impacts are mitigated and avoided, and to publish a revised draft SGEIS by June 1, 2011. A true and accurate copy of Executive Order No. 41 is attached hereto as **Exhibit I**.

85. Executive Order No. 41 confirmed the Moratorium and further provided “that pursuant to SEQRA, *no permits* may be issued prior to the completion of the Final SGEIS . . . .” *Id.* (emphasis added).

86. On January 2, 2011, Respondent Governor Cuomo issued Executive Order No. 2 (“Order 2”), which continued former Governor Paterson’s Executive Order No. 41. A true and accurate copy of Order 2 is attached hereto as **Exhibit J**.

87. On June 30, 2011, prior to releasing its preliminary, revised draft SGEIS (“First Revised Draft SGEIS”), the DEC issued a press release regarding its SEQRA review of HVHF providing that the First Revised Draft SGEIS “strikes the right balance between protecting our environment, watersheds, and drinking water and promoting economic development.” A true and accurate copy of the press release is attached hereto as **Exhibit K**.

88. The June 30, 2011 DEC press release further provides:

In preparing the new recommendations, the DEC engaged independent consultants to perform research, sought further information from the gas drilling industry, considered more than 13,000 public comments and studied other states’ regulations and experience, including site visits by Commissioner Martens and DEC officials to Pennsylvania incident sites. Since September 2009, DEC staff has spent approximately 10,250 hours updating the document. The 2011 version contains more than 900 pages, including more than 150 additional pages of data and analysis compared to the 2009 version.

The [DEC's] extensive review has resulted in recommendations for rigorous and effective controls on high-volume fracturing on private lands.

89. The next day, Commissioner Martens appointed twelve members to a Hydraulic Fracturing Advisory Panel (“Advisory Panel”) to provide recommendations to the DEC regarding oversight, monitoring, enforcement, mitigation of impacts and fee structures related to HVHF. The Advisory Panel purportedly met several times, but has not convened since December 2011 and never produced any formal recommendations. A true and accurate copy of the DEC’s press release announcing the Advisory Panel is attached hereto as **Exhibit L**.

90. On July 1, 2011, the DEC released the Executive Summary of the First Revised Draft SGEIS.

91. At a press conference the same day, Commissioner Martens stated that the DEC would accept well permit applications after the Final SGEIS is completed in several months, but it was highly unlikely that any permits would be issued in 2012. A true and accurate copy of a news article quoting Commissioner Martens is attached hereto as **Exhibit M**. This statement confirmed the Moratorium that had been made official by Executive Orders from two different Governors would remain in place until the SGEIS Process was completed.

92. Commissioner Martens also stated that “[w]ith all of the precautions that we have built in to the process, I believe [HVHF] can be done safely.”

93. On July 8, 2011, the DEC issued the First Revised Draft SGEIS.

94. Concurrent with the release of the First Revised Draft SGEIS, Commissioner Martens stated “[w]e’ve deliberated, we’ve considered comments, we have looked at what’s gone on in other states . . . and at the end of this stage of deliberations, we’ve concluded that [HVHF] can be undertaken safely, along with strong and aggressive regulations.”

95. Despite this statement by Commissioner Martens and the DEC's extensive, three-year scoping, drafting, and review process, in July 2011, the DEC hired an independent consultant to review the socioeconomic, community character, visual, noise, and transportation impacts associated with HVHF. *See* DEC's June 30, 2011 Press Release, **Exhibit K**.

96. On September 7, 2011, over three months past its deadline, the DEC issued a Second Revised Draft SGEIS, which included new proposed mitigation measures for the recently completed independent consultant review.

97. That day, the DEC opened the public comment period for the Second Revised Draft SGEIS and published notice of the comment period in the DEC Environmental Notice Bulletin and other sources, including via press release. The DEC noted that it would issue its proposed HVHF regulations in early October 2011 while simultaneously moving forward with the Second Revised Draft SGEIS.

98. The Executive Summary of the Second Revised Draft SGEIS provides in relevant part:

Since the issuance of the 2009 draft SGEIS, the department has gained a more detailed understanding of the potential impacts associated with horizontal drilling from

(i) the extensive public comments from environmental organizations, municipalities, industry groups and other members of the public;

(ii) its review of reports and studies of proposed operations prepared by industry groups;

(iii) *extensive consultations with scientists in several bureaus within the New York State Department of Health (NYSDOH);*

(iv) the use of outside consulting firms to prepare analyses relating to socioeconomic impacts, as well as impacts on community character, visual, noise and traffic impacts; and,

(v) its review of information and data from the Pennsylvania Department of Environmental Protection (PADEP) and the Susquehanna River Basin Commission (SRBC) about events, regulations, enforcement and other matters associated with Revised Draft SGEIS 2011, Executive Summary, Page 3 ongoing Marcellus Shale development in Pennsylvania.

(emphasis added). A true and accurate copy of the relevant portion of the Second Revised Draft SGEIS is attached hereto as **Exhibit N**.

99. On September 28, 2011, the DEC released the proposed HVHF Regulations (“Regulations”), based upon the mitigation measures proposed in the Second Revised Draft SGEIS.

100. The public comment for the Second Revised Draft SGEIS and Regulations was combined and set to expire on December 12, 2011. It was later extended to January 11, 2012.

101. On October 11, 2011, as part of this public comment period, Commissioner Martens participated in an electronic town hall meeting where he answered questions pertaining to the potential health impacts associated with HVHF. Commissioner Martens stated:

[The] DEC has fully considered the impact [HVHF] could potentially have on public health and our communities. . . . We examined the history of spills and other problems in other states where the process was used. Most importantly, DEC carefully considered every possible way that people could be exposed to those chemicals and consulted with the State Dept. of Health about how to prevent that exposure. . . . That is why DEC has designed the most stringent set of requirements in the nation – to prevent contamination of our natural resources and thus eliminate human exposure pathways

A true and accurate copy of the transcript of the electronic town hall meeting is attached hereto as **Exhibit O**.

102. Public hearings were held on the Second Revised Draft SGEIS and Regulations in Dansville, New York; Binghamton, New York; Loch Sheldrake, New York; and New York City

during November 2011. The DEC received over 80,000 public comments during the comment period. The last public hearing was held on November 30, 2011.

103. Under section 202(2)(a)(ii) of the State Administrative Procedure Act (“SAPA”), the DEC was required to finalize the Regulations by November 30, 2012, one year from the final public hearing. Prior to the adoption of the Regulations, SEQRA review must be completed. Namely, the SGEIS Process or an equivalent review was required to be completed prior to or no later than the adoption of the Regulations.

104. On or about December 2, 2011, Commissioner Martens said the DEC would likely finish its review of HVHF in late spring of 2012. A true and accurate copy of a news report containing this comment is attached hereto as **Exhibit P**.

105. In January 2012, the DEC published a Fact Sheet indicating that it would issue the Final SGEIS and final Regulations that year. A true and accurate copy of the Fact Sheet is attached hereto as **Exhibit Q**.

106. On February 7, 2012, Commissioner Martens testified at a joint budget hearing and was asked about the finalization of the SGEIS Process. Commissioner Martens stated that “there are months, not years, worth of more work to do.” Commissioner Martens further testified that “[w]ith proper oversight and state-of-the-art regulations, I believe [HVHF] can be done safely.” A true and accurate copy of a news article quoting Commissioner Martens’ testimony at the budget hearing is attached hereto as **Exhibit R**.

107. In 2012, numerous reports indicated that the Final SGEIS was imminent and that it would be completed before the November 2012 election.

108. The DEC announced in early 2012 that it had concluded that the potential health risks associated with HVHF would be preventable under the proposed guidelines and had determined that significant adverse impacts were unlikely. *See Id.*

109. A DOH Health Report from February 2012, which was only discovered in early 2013 by investigative journalism, provided that the DOH had concluded any health risks associated with HVHF would be preventable under the proposed guidelines set forth in the Revised Draft SGEIS and that “significant adverse impacts on human health are not expected from routine HVHF operations.” A true and accurate copy of the New York Times article containing experts from what is believed to be the 2012 DOH Health Report is attached here to as **Exhibit S.**

110. Upon information and belief, this February 2012 DOH Health Report was not provided to the public at the request of Respondent Governor Cuomo.

111. Upon information and belief, in September 2012, the SGEIS was complete and the DEC was prepared to complete the SEQRA Process by issuing the Final SGEIS and its SEQRA findings.

112. Upon information and belief, in September 2012, Respondent Governor Cuomo unlawfully directed the DEC and Commissioner Martens to further delay the release of the Final SGEIS until after the 2012 Election Day for political reasons and in disregard of the requirements of SEQRA, the ECL, and the Energy Law.

113. On September 17, 2012, journalist Frederick Dicker reported that Cuomo Administrator insiders confirmed that the Final SGEIS would not be released until after the 2012 November election.

114. On September 20, 2012, Commissioner Martens announced that he had requested that Commissioner Shah assess the impact of HVHF on public health (“DOH Review”). This request was made notwithstanding the fact that the DEC and Commissioner Martens had already worked extensively with the DOH, including reviewing potential impacts on public health, throughout the SGEIS Process. A true and accurate copy of the DEC’s press release making this announcement is attached hereto as **Exhibit T**.

115. Commissioner Martens further requested that Commissioner Shah convene an outside panel of “experts” to advise him on the DOH review.

116. By reason of the foregoing, the *de facto* Moratorium that began in July 2008, which became official through Executive Order No. 41 and Order 2, continued in full force and effect.

117. On November 28, 2012, after receiving and processing over 66,000 individual public comments on the Regulations, the DEC filed a Notice of Continuation with the New York State Department of State to extend the rulemaking process by 90 days in order to give Commissioner Shah extra time to complete his purported review. This ultimately extended the deadline to finalize the Regulations to February 27, 2013. A true and accurate copy of the DEC’s announcement is attached hereto as **Exhibit U**.

118. On January 29, 2013, Bill Schwarz, a spokesman for the DOH stated: “The State Health Commissioner and three external consultants are reviewing the data and information regarding potential public health impacts included in the DEC’s draft environmental impact statement.” A true and accurate news report including statements by Bill Schwarz is attached hereto as **Exhibit V**.

119. The next day while testifying at a legislative budget hearing, Commissioner Shah testified that the majority of the material he was reviewing as part of the DOH review was available on the DEC website and that the results of the DOH review would be released within “a few weeks.” A true and accurate copy of a news report including Commissioner Shah’s testimony is attached hereto as **Exhibit W**.

120. On February 4, 2013, while testifying at a legislative hearing Commissioner Martens stated that the DOH review would be complete within “a few weeks.” A true and accurate copy of the new article containing Commissioner Martens’ testimony is attached hereto as **Exhibit X**.

121. Upon information and belief, by late January or February 2013, the SGEIS was complete and the DEC was ready to issue the Final SGEIS, SEQRA findings and the Regulations.

122. Upon information and belief, in early 2013 Governor Cuomo directed Commissioner Martens to delay the issuance of the SGEIS further and ordered the additional DOH review by Commissioner Shah putatively in an attempt to justify the continued delay.

123. True to these reports, on February 12, 2013, Commissioner Shah sent a letter to Commissioner Martens stating that the DOH now needed additional time to complete the DOH review. A true and accurate copy of Commissioner Shah’s February 12, 2013 letter is attached hereto as **Exhibit Y**.

124. In his letter, Commissioner Shah states “I anticipate delivering the completed Public Health Review to you within a few weeks, along with my recommendations. *Id.*

125. Commissioner Shah’s letter also indicates that before the Health Report can be completed, he needed to review three studies. Two of these studies remain incomplete and have

not been fully funded and at least one of the studies is designed to be ongoing for more than a decade. *Id.*

126. There is no legal or rational justification for delaying the SGEIS Process based upon studies that may or may not be funded or completed.

127. On February 12, 2013, Commissioner Martens confirmed receipt of Commissioner Shah's letter and reiterated Dr. Shah's statement that the DOH review would be completed within a few weeks. A true and accurate copy of Commissioner Martens' February 12, 2013 statement is attached hereto as **Exhibit Z**.

128. Commissioner Martens also confirmed that if "the DOH Public Health Review finds that the SGEIS has adequately addressed health concerns" then the DEC could accept, process, and issue permits for HVHF without the need to finalize the Regulations.

129. Upon information and belief, the February 12, 2013 letter from Commissioner Shah and the response by Commissioner Martens were coordinated and controlled by Governor Cuomo to further delay the completion of the SGEIS Process for reasons that have never been disclosed to the public.

130. On February 27, 2013, the draft Regulations expired because the DEC failed to complete the SGEIS Process or otherwise comply with SEQRA and finalize the Regulations as required under the deadlines is the SAPA.

131. On or about March 11, 2013, Commission Shah again indicated that his DOH review would be done in the next few weeks and that he did not plan on waiting for the studies referenced in his February 12, 2013 letter to finalize his report. A true and accurate copy of a news article containing Commissioner Shah's expected end date for the DOH review and quotes from Governor Cuomo is attached hereto as **Exhibit AA**.

132. When asked about the DOH review, Governor Cuomo stated: “Nobody ever said that we were waiting for the studies to be finished . . . . The [DOH] was going to be looking at those studies and see if there was anything constructive in those studies . . . . Maybe they are useless, in which case they are useless.” *Id.*

133. More than a month later, while being interviewed on public radio program “The Capitol Pressroom,” Governor Cuomo was asked to give an update on the SGEIS Process. He responded: “There is nothing new there . . . . We’re still waiting for the [DOH] to make their decision.” A true and accurate copy of a news article reporting the deadlines promised by Commissioner Shah and also containing quotes from Governor Cuomo is attached hereto as **Exhibit BB.**

134. On May 22, 2013, months after Commissioner Shah stated the DOH review was merely weeks from completion, when questioned about the timing of the SGEIS, Governor Cuomo stated to the Syracuse Post Standard Editorial Board that he “expected it to be completed already.” Governor Cuomo further indicated that he expected Commissioner Shah’s DOH review to be completed within the next several weeks. A true and accurate copy of this news article is attached hereto as **Exhibit CC.**

135. In October 2013, Commissioner Martens stated that the completion of the DOH review should not be expected anytime soon. Commissioner Martens added that after more than five years of SEQRA review, “[w]e don’t feel that there’s a great urgency” for completing the SGEIS. A true and accurate copy of a news report quoting Commissioner Martens is attached hereto as **Exhibit DD.**

136. This statement is inconsistent with SEQRA’s overarching directive for prompt review and minimal procedural and administrative delay, as well as the mandate that the DEC

process oil and gas permits “as expeditiously as possible.” ECL § 23-0501(3). Commissioner Martens’ statement further conflicts with the stated oil and gas, and energy policies of New York State to promote the greater recovery of the resource, protect the correlative rights of mineral owners, and promote the development of the Devonian shale resources in New York State. *See* ECL § 23-0301 and Energy Law §§ 3-101(5), 3-103.

137. Confirming all of the above, on Monday December 16, 2013, Governor Cuomo held a public Cabinet Meeting with members of his cabinet including Commissioner Shah. Following the meeting, Commissioner Shah was extensively questioned by the press regarding his DOH review. According to the Albany Times Union, the Health Report is the only thing standing between the DEC’s completion of the five-and-a-half year SGEIS Process. A true and accurate copy of this news report is attached here to as **Exhibit EE**.

138. The news report provides an account of the questions journalist Jon Campbell asked of Commissioner Shah and Commissioner Shah’s responses, as follows:

**Question:** You’ve had the fracking review in your hands for close to 15 months now. You said as far back as January that something was coming in a few weeks. Can you update us on the status of your report, and give some sort of reason why there have been these delays—why you haven’t been able to put your work out?

**Answer:** Well, for the last few months, I’ve said that as the science evolves, we will reflect the science in my recommendations. And as recently as a month ago we got new data from Texas and Wyoming. And until I’m comfortable with the state of the science, I’m withholding my recommendations.

**Question:** Can you give some example of what you’ve learned from Wyoming, from Texas, from your meetings with other regulators?

**Answer:** It’s all out in the public record. There are studies out there, and we use the same studies that everyone has access to.

**Question:** Do you feel you’ve been sufficiently transparent with your review? We haven’t seen any sort of scoping document, we don’t have any sort of time frame. Have you been transparent enough?

**Answer:** You know, science needs to be done in a sacred place where we can, with objectivity, understand both sides of the issue, understand the science, dissect it and then at the end come with the recent conclusion. So the process needs to be transparent at the end—not during.

**Question:** And when do you expect that end, when can the public expect to see some of your work?

**Answer:** When I'm done.

*Id.*

139. The same news report includes direct quotations from Governor Cuomo about the timing of the SGEIS Process. When asked whether he still intends on making a decision before the 2014 elections, Governor Cuomo stated: “My timelines is whatever Commissioner Shah needs to do it right and feels comfortable . . . and whatever Commissioner Martens feels to be comfortable . . . . And I don’t want to put any undue pressure on them that would artificially abbreviate what they’re doing.” *Id.*

140. More recently, while testifying at a legislative budget hearing on January 27, 2014, Commissioner Martens stated that it is “extremely unlikely” that any permits for HVHF would be issued before the *end of March 2015*. Commissioner Martens further explained that the DEC would not be issuing permits during the current fiscal year because the proposed executive budget does not grant the agency any funds to do so. A true and accurate copy of a news article quoting Commissioner Martens’ statements to reporters in explanation of his testimony at the budgetary hearing is attached hereto as **Exhibit FF**.

141. Since Governor Cuomo has taken office, the SGEIS Process has lacked transparency and the DEC, DOH, and Commissioners Martens and Shah have essentially been under pseudo gag-orders instituted upon information and belief by Governor Cuomo. Despite the lengthy five-and-a-half year SGEIS Process, little information has been made available to the

public regarding the substance of what the Respondents have actually been doing to progress the SGEIS Process.

142. This deliberate lack of transparency contradicts the principles of SEQRA, which require transparency and encourage public participation throughout the SEQRA process.

143. The lack of transparency has also forced Petitioners to rely heavily on journalists' accounts of the status of the SGEIS Process.

144. Upon information and belief Commission Shah has finalized his Health Report and is not engaging in any meaningful review of public health impacts. Instead he is reviewing publically available information while traveling around the country at great expense to the taxpayers of New York State to meet with individuals and agencies involved with ongoing public health studies to give the perception that he is doing something meaningful.

145. Upon information and belief, the DEC has improperly delegated its responsibilities both as to the substantive issues and as to compliance with procedural deadlines, by giving the DOH total control over the timing of the completion of the SGEIS Process despite the fact that the DOH has no formal role in the SGEIS Process.

146. The Moratorium continues now and the SGEIS remains incomplete after five-and-a-half years.

147. During the Moratorium, states like Ohio, Illinois, Pennsylvania, West Virginia, and California have allowed HVHF permits to move forward while simultaneously developing regulations that address the HVHF process.

148. New York remains on the sidelines during what is arguably one of the most significant energy revolutions this country has ever seen.

149. Among the various deadlines that have been exceeded, the following represent a few of the most egregious deadlines:

- a. The Final SGEIS is now approximately two years past due, as the DEC was obligated to issue the Final SGEIS 45 days after the close of the last public hearing, which was held on November 30, 2011. 6 NYCRR 617.9(a)(5)
- b. The DEC was obligated to complete the Second Revised SGEIS by June 1, 2011, pursuant to Executive Orders No. 41 and 2, but failed to complete the Second Revised SGEIS until September 7, 2011, more than three months late.
- c. The DEC was obligated to issue a Final SGEIS within 45 days of the close of the last public hearing on the Draft SGEIS, but because of Executive Orders No. 41 and 2, approximately four years have elapsed since the last public hearing on the Draft SGEIS.

A complete list of the applicable SEQRA timelines and relevant exceedances is attached hereto as **Exhibit GG**.

150. By reason of the foregoing, the DEC has failed to conduct a prompt review, complete the SGEIS Process, and has failed to minimize the concomitant procedural and administrative delays.

151. Upon information and belief these failures by the DEC are at the direction of Governor Cuomo.

152. Upon information and belief, the DEC is and has been ready, willing and able to issue the Final SGEIS, complete the SGEIS Process, and begin processing permits for HVHF.

153. Upon information and belief, however, each time the DEC was prepared to finalize the SGEIS and complete the SGEIS Process, Governor Cuomo directed the DEC to delay issuing the Final SGEIS for his own political expediency or other reasons that have not been disclosed to the public.

154. Upon information and belief, Governor Cuomo directed Commissioner Martens to improperly delegate the DEC's Lead Agency Responsibility to Commissioner Shah with respect to the DOH review in an effort to further delay the SGEIS Process.

155. The DOH was never declared an Involved or Interested Agency as defined by SEQRA, and in fact, DOH has no authority to approve, fund or undertake an action that is the subject of review of the SGEIS. As such, it does not qualify to be an Involved Agency.

156. Upon information and belief, for political reasons, Governor Cuomo has arbitrarily, capriciously, and unlawfully prevented the DEC and Commissioner Martens from issuing the Final SGEIS, completing the SEQRA Process, and granting permits for HVHF.

157. Upon information and belief, Commissioner Shah and the DOH have delayed issuing the DOH review at the request of Governor Cuomo.

158. Nevertheless, upon information and belief, the DOH is ready, willing and able to issue the DOH review.

159. Upon information and belief, Governor Cuomo has arbitrarily, capriciously, and unlawfully prevented the DOH and Commissioner Shah from issuing the DOH review

160. Upon information and belief, Governor Cuomo is controlling the SGEIS review and intentionally holding up the finalization of the SGEIS and completion of the SGEIS Process for political reasons unrelated to the merits of the SGEIS Process.

161. Upon information and belief, Governor Cuomo has acted as an Interested Agency.

162. Upon information and belief, Governor Cuomo has acted outside his authority as Governor by directing and controlling the SGEIS Process.

163. The failure of the DEC and Commissioner Martens to finalize the SGEIS and complete the SGEIS Process has prevented Petitioners from developing their mineral estates in New York or otherwise leasing or conveying their mineral estate, all of which has been detrimental and contrary to environmental and energy policies in the State of New York and the guarantees found in the Fifth and Fourteenth Amendments to the United States Constitution.

164. The Respondents' conduct delaying the SGEIS Process is in conflict with, and violates legal non-discretionary duties imposed upon Respondents by the laws of this state.

165. Petitioners are suffering and will continue to suffer irreparable harm if the Moratorium is permitted to remain in place and Petitioners are continually precluded from developing their oil and gas estates.

**FIRST CLAIM FOR RELIEF**  
(Article 78)

**(Failure Of DEC And Commissioner Martens To Complete The SGEIS Process)**

166. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 164 as fully set forth herein.

167. Under CPLR § 7803(1), a proceeding may be brought to compel a body or officer to perform a nondiscretionary duty.

168. Respondents the DEC and Commissioner Martens are bodies or officers as described by CPLR Article 78.

169. For purposes of completion of the SGEIS Process, the DEC is the Lead Agency under SEQRA.

170. SEQRA mandates that the DEC expedite the proceedings relevant to the SGEIS in the interest of prompt review and that the agency minimize any procedural and administrative delays.

171. SEQRA mandates that the DEC and Commissioner Martens issue the Final SGEIS in a timely manner.

172. The completion of the SGEIS Process is not a discretionary function. The DEC and Commissioner Martens are duty-bound to issue the Final SGEIS and complete the SGEIS Process by issuing a Finding Statement and making an ultimate determination of whether and under what circumstances HVHF will be permitted in New York State.

173. The five-and-a-half-year Moratorium on HVHF and the protracted delays associated with the SGEIS Process violate SEQRA's express timing provisions (6 NYCRR § 617.9[a][5]) and its general directive mandating prompt review with minimal procedural and administrative delays. ECL § 8-0107; 6 NYCRR § 617.3[h].

174. The five-and-half-year Moratorium on HVHF and the protracted delays associated with the SGEIS Process violate the policies in ECL § 23-0301, which require the DEC to regulate in a manner that provides for greater ultimate resource recovery, prevents waste and protects the correlative rights of all owners.

175. The five-and-a-half-year Moratorium on HVHF and the protracted delays associated with the SGEIS Process violate the directive in ECL § 23-0501(3) that the DEC must take all action respecting, *inter alia*, well permits "as expeditiously as possible."

176. The five-and-a-half-year Moratorium on HVHF and the protracted delays associated with the SGEIS Process violate the Energy Law § 3-101(5) declaring it to be State policy to promote development of indigenous resources, including Devonian shales and Energy Law § 3-103 mandating that every agency of the State (hence, the DEC) "conduct its affairs so as to conform to the state energy policy," including promoting resource development.

177. Accordingly, pursuant to CPLR § 7803(1), Petitioners seek an order compelling completion of the SGEIS Process under SEQRA, i.e., the issuance of the Final SGEIS and the related Findings Statement as soon as possible and by a court ordered deadline.

178. Alternatively, if the Court determines that any issue of fact exists with respect to this claim for relief, the Petitioners request an immediate hearing pursuant to CPLR §§ 7804(h), 410 to be heard by a jury, such that Commissioner Martens and Commissioner Shah will be compelled to testify as to why the SGEIS has not been completed in the last five-and-a-half years, or why it cannot be completed forthwith, as well as a corresponding issuance of a subpoena *duces tecum* upon each of the Respondents for all records related to the SGEIS Process since Governor Cuomo took office.

179. Petitioners duly issued a demand that Respondents complete the SGEIS Process, to which they received no response. *See* Demand Letter, **Exhibit A**.

180. There are no further administrative steps available to Petitioners to obtain the relief requested and pursuing any such administrative relief would be futile.

181. Petitioners have a clear legal right to the relief sought pursuant to the SEQRA, ECL article 23, the Energy Law, and the common law.

182. This proceeding is ripe for review as there are no administrative remedies to be exhausted.

**SECOND CLAIM FOR RELIEF**  
**(Article 78)**  
**(Improper Delegation of Authority to Department of Health)**

183. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 182 as if fully set forth herein.

184. For purposes of completion of the SGEIS Process, the DEC is the Lead Agency under SEQRA.

185. The DOH has been extensively involved in the SGEIS process since its inception on a consulting basis.

186. The DOH participated in the preparation of both the 2009 Draft SGEIS, the First Revised Draft SGEIS, and the Second Revised Draft SGEIS, also on a consulting basis.

187. By reason of the foregoing and pursuant to 6 NYCRR § 617.2(t), the DOH is, at most, an Interested Agency, which “has the same ability to participate in the review process as a member of the public.”

188. Both the Draft SGEIS and the Second Revised Draft SGEIS evaluated public health impacts to the full extent required by SEQRA.

189. As Lead Agency in the SEQRA Process, the DEC cannot delegate its decision-making authority to the DOH as an Interested Agency, a consulting agency, or a member of the general public.

190. The DEC’s September 2012 referral to Commissioner Shah and the DOH to conduct the DOH review—more than one year after release of the Secord Revised Draft SGEIS and after years of consultation with the DOH throughout the SGEIS Process—was arbitrary, capricious, and an abuse of discretion.

191. Nevertheless, upon information and belief, the DOH review conducted by Commissioner Shah and the DOH has been completed and therefore, the purported ongoing review by the DOH constitutes an excuse to further delay finalization of the SGEIS and completion of the SGEIS Process.

192. To the extent that Respondents the DEC and Commissioner Martens continue to defer to the DOH and Commissioner Shah and refuse to finalize the SGEIS Process, such action is also arbitrary, capricious, and amounts to an improper delegation of the DEC's Lead Agency responsibilities to a party that has no formal role in the SGEIS Process.

193. To the extent that Respondent the DEC has treated the DOH as an Involved Agency (albeit unlawfully), the DOH's records regarding the SGEIS Process must be provided for public review.

194. Accordingly, pursuant to either CPLR §§ 7803 or 3001, Petitioners seek a determination that the DEC's September 2012 referral to the DOH and Commissioner Shah was arbitrary and capricious, an abuse of discretion, and amounts to an improper delegation of the DEC's Lead Agency responsibilities.

195. Alternatively, under CPLR §§ 7903 and 3001, Petitioners seek a determination that the continued delay of completing the SGEIS Process and/or the continued deferral by Respondents the DEC and Commissioner Martens to DOH relative to the DOH review is arbitrary, capricious, an abuse of discretion, and amounts to an improper delegation of the DEC's substantive and procedural Lead Agency responsibilities as set forth under SEQRA.

196. Pursuant to CPLR § 7803, Petitioners further seek an order determining that Respondents the DOH and Commissioner Shah are proceeding without, or in excess of their jurisdiction by causing the SGEIS Process to be delayed solely because of the DOH review, together with an order prohibiting the Respondents from taking further action to obstruct completion of the SGEIS Process.

**THIRD CLAIM FOR RELIEF**  
**(Article 78)**  
**(Governor Cuomo's Actions Exceed His Authority)**

197. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 196 as if fully set forth herein.

198. Upon information and belief, since taking office in January of 2011 Governor Cuomo has directly controlled the entire SGEIS Process.

199. Upon information and belief, since taking office in January 2011 Governor Cuomo has directly controlled if and when the SGEIS Process will be completed and whether or not HVHF will be allowed in New York.

200. The anticipated economic benefits associated with HVHF are statewide.

201. Upon information and belief, since taking office in January 2011 Governor Cuomo has exerted the broadest governmental powers over the investigation of the impacts associated with HVHF, as he has controlled the SGEIS review process and orchestrated the corresponding delay in the finalization of the SGEIS Process.

202. Accordingly, the Petitioners seek a determination that Governor Cuomo is an Interested Agency under SEQRA with respect to the SGEIS and therefore, he has no authority to direct, control, or otherwise make decisions relative to the SEQRA Process.

203. By reason of the foregoing, Petitioners seek: (1) a determination that Respondent Governor Cuomo has acted without, or in excess of his jurisdiction by orchestrating the delay in the SGEIS Process and interfering with and precluding the DEC, as Lead Agency, from independently exercising its discretionary decision-making authority; and (2) an order prohibiting Respondent Governor Cuomo from further interfering with the SGEIS Process or further delaying issuance of the Final SGEIS pursuant to CPLR § 7803(2).

204. Petitioners seek a determination that, to the extent Respondent Governor Cuomo has interjected himself into the SGEIS Process and acted as an Interested Agency, Governor Cuomo's records that relate to the SGEIS Process must be made available for public review.

205. Petitioners further seek on the return date of the Petition pursuant to CPLR § 7804(e) that official copies of all documents referenced herein including, but not limited to all documents generated by Respondents the DOH and Commissioner Shah relative to the evaluation of public health impacts associated with HVHF when conducted pursuant to the rigorous standards set forth in the Second Revised Draft SGEIS be part of the return for this proceeding, as well as all internal communications among the Respondents relative to the SGEIS Process.

#### **PRAYER FOR RELIEF**

WHEREFORE, Petitioners respectfully request that this Court issue an Order and/or Judgment:

1. Compelling finalization of the SGEIS Process pursuant to CPLR § 7803(1), or, alternatively, if the Court finds that issues of fact exist, setting this matter down for an immediate hearing and jury trial pursuant to CPLR §§ 7804(h), 410 and requiring Respondent Commissioners Martens and Shah be compelled to testify as to why the SGEIS remains incomplete after over five-and-a-half years and/or why it cannot be completed forthwith, as well as providing for the issuance of a subpoena *duces tecum* upon each Respondent-Defendant for all records relating to the SGEIS Process since Governor Cuomo took office;

2. Determining and declaring that Respondents the DEC and Commissioner Martens acted arbitrarily and capriciously, abused their discretion, and improperly delegated their Lead

Agency responsibilities to the DOH and Commissioner Shah by the late referral relating to the DOH review;

3. Determining that all records of Respondent the DOH relevant to the SGEIS Process must be made available for public review;
4. Prohibiting Respondents the DOH and Commissioner Shah from further obstructing the SGEIS Process;
5. Determining that Respondent Governor Cuomo is an Interested Agency and requiring that his records regarding the SGEIS Process and Health Review be made available for public review;
6. Determining that Respondent Governor Cuomo acted in excess of his jurisdiction in interfering in the SGEIS Process;
7. Prohibiting Respondent Governor Cuomo from further obstructing the SGEIS Process; and
8. Such other and additional relief that the Court deems just and appropriate.

Dated: February 14, 2014  
Vestal, New York

Respectfully submitted,



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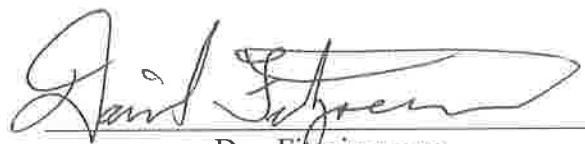
\*Motions for Admission Pro Hac Vice to be Filed

## VERIFICATION

STATE OF NEW YORK    )  
                          ) SS:  
COUNTY OF ALBANY    )

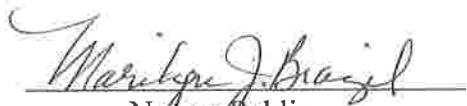
**Dan Fitzsimmons**, being duly sworn deposes and says that deponent is the President of the Petitioner-Plaintiff Joint Landowners Coalition of New York, Inc, in the within action; that deponent has read the foregoing Petition and Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes them to be true.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: review of records, correspondence and other writings furnished to deponent.



Dan Fitzsimmons

Sworn to before me this  
11 day of February, 2014



Marilyn J. Brazil  
Notary Public

MARILYN J. BRAZIL  
Notary Public, State of New York  
No. 01BR5019805  
Qualified in Broome County  
Commission Expires 11/01/2017