

# SPRINGBOARD

LEGAL TRENDS AND ANALYSIS

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## DRILL BABY DRILL: A GUIDE TO NATURAL GAS EXPLORATION IN NEW YORK STATE

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Although the election may be over it is doubtful that we have heard the last cry of “drill baby drill” in this country. While energy prices have plummeted dramatically, concerns about climate change and the need for greater energy independence make it highly likely that the search for additional domestic energy sources – especially sources of natural gas – will continue.

While drilling may bring to mind the Artic Natural Wildlife Refuge and the American West, one potential natural gas source exists much closer to home, right here in New York State. That source is locked within the Marcellus Shale Formation, a reservoir of natural gas tightly packed deep underground, which runs from southern New York through much of western Pennsylvania and parts of West Virginia and Ohio. Although geologists have known about the formation for some time, recent technological enhancements and spiking energy costs have spurred interest in the commercial viability of natural gas well development from Marcellus Shale, and have resulted in several recent permit applications. The formation

could contain significant quantities of natural gas, from 168 trillion to 516 trillion cubic feet; New York State uses about 1.1 trillion cubic feet of natural gas a year.

This new interest in New York’s shale formation has brought a flurry of mining applications from companies seeking to recover natural gas, including applications in areas of the State where mining is unfamiliar. Natural gas recovery from the Marcellus Shale will involve horizontal drilling (the drilling of a vertical well to a depth near the target gas-bearing formation and then curving of the well so that a hole is drilled horizontally within the gas-bearing formation) and, to maximize output, high pressure injections of sand and unprecedented volumes of water to hydraulically fracture the gas-bearing formation. Sand serves to hold the fractures open, allowing more gas to flow into the well than would naturally. It is estimated that hydraulic fracturing of the Marcellus Shale will require one to five million gallons of water per well.

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The increased volume of water and other environmental concerns from this type of mining has led the New York State Department of Environmental Conservation (DEC) to commence a study of the potential impacts from these new natural gas recovery efforts. A 1992 Generic Environmental Impact Statement (GEIS) prepared by DEC provides a comprehensive review of the potential environmental impacts of gas drilling and production in New York State and the mitigation of such impacts. Under New York's regulatory scheme governing most non-shale gas well development permits, if drilling conditions are consistent with those contemplated by the GEIS, an individual EIS to address potential impacts associated with a drilling permit is not required.

However, several issues unique to Marcellus and other horizontal shale formation drilling are not adequately addressed by the GEIS, and DEC has initiated a formal public review process to supplement this GEIS to ensure that these issues are addressed generically and that the permitting process is streamlined. Notably, while the process of scoping and preparing the Supplemental GEIS (SGEIS) is ongoing, any entity that applies for a drilling permit for horizontal drilling in the Marcellus Shale and opts to proceed with its permit application will be required to undertake an individual, site-specific environmental review as per the requirements of the State Environmental Quality Review Act (SEQRA) and the state Environmental Conservation Law.

DEC recently completed a series of six public meetings on the Draft Scope for the SGEIS and is accepting written comments on it through December 15, 2008. Critical topics addressed in the Draft Scope include the potential impacts of large-volume water withdrawals from surface water bodies and groundwater sources for hydraulic fracturing, transportation of water to the well site, the use of additives in the hydraulic fracturing fluid, and removal of spent fracturing fluid from the well site and its ultimate disposition.

The next several months are critical in the environmental review process: DEC intends to produce a Final Scope by January 2009 and prepare a draft SGEIS by spring 2009. When the draft SGEIS is completed, DEC will publish a Notice of Completion, solicit public comment on the draft, and then issue a Final SGEIS by summer 2009. The SGEIS will likely be the template for Marcellus Shale mining in New York. This document, and the related Findings adopted by DEC, will determine where such mining may occur and the safeguards that must be in place. Accordingly, the time is now for stakeholders – mining companies, municipalities and environmentalists alike – to make their views known. **SPR**

## **NEW WINE IN OLD BOTTLES: COURT RULES RESIDENTS CAN BRING SUIT FOR EFFECTS OF OLD CONTAMINATION BASED ON NEW DATA**

### **Ashley Miller**

In a ruling which could have significant consequences for toxic tort plaintiffs in New York and nationwide, a New York appellate court has held that a group of residents may bring claims for property damage against General Electric (GE) from alleged toxic vapors in soil seeping into their homes.<sup>1</sup> The case is notable because the source of the vapors – contaminated groundwater underlying the homes – has been publicly known for upwards of two decades. New York State has been a nationwide leader in regulating the health concerns from vapor intrusion, and the case is significant because it arrives at a time when concerns about health effects of vapor intrusion are perhaps higher than ever. In addition, the case may revive claims based on older contamination which may otherwise have been thought too old to sue on.

<sup>1</sup> Aiken v. General Electric Co., No. 505023, Memo. and Order (3d Dept., Dec. 4, 2008).

<sup>2</sup> Id. at 3.

<sup>3</sup> Id. at 3.

<sup>4</sup> Id. at 3 (citing MRI Broadway Rental v. U.S. Min. Prods. Co., 92 N.Y.2d 421 (1998)).

Solvents in groundwater were first discovered under GE's facility in Fort Edward, NY, over twenty years ago, and since then had flowed underneath nearby residential properties owned by the plaintiffs. However, the New York State Department of Environmental Conservation (DEC) and GE had continually advised homeowners that the contamination presented no health threat inside their homes. Not until 2005, when vapor testing was undertaken, did the homeowners become aware of a threat from vapors in soil—as opposed to groundwater—in their homes. GE moved to dismiss the suit, arguing that the residents had waited too long, because their time to bring the case began to run when the groundwater contamination was first discovered. The court rejected this argument.

The decision is the latest application of New York's so-called “discovery” rule, which requires a plaintiff to sue for certain latent injuries from exposure to harmful substances within three years from the time when, “the injuries are discovered or the date that they should have been discovered by a reasonably diligent party.”<sup>2</sup> As the court phrased it, the question is “when plaintiffs should have reasonably been aware of the presence of soil vapor contamination and the threat it presented to their properties.”<sup>3</sup> This may be a difficult question when a court must determine what is factually reasonable from an objective standpoint. Prior cases on this issue have often failed to give plaintiffs clear guidance on the proper timing of a lawsuit. By characterizing the soil vapor as a distinct source of harm, the court could apply a separate time limit to the soil vapor claims, despite the fact that the vapors came from contaminated groundwater which was known long ago. This conclusion is particularly notable because other courts have avoided similar results by relying on the principle that the limitations period begins to run when “the injured party discovers the primary condition on which the claim is based”<sup>4</sup>—here defendants unsuccessfully argued the groundwater was the “primary condition” resulting in the injury.

The court's reasoning highlights the fact that for two decades the plaintiffs were assured by DEC and GE that there was no immediate health threat from the contaminated groundwater. Only after testing in 2005 was such a threat made known in the community. In this context, the court denied the GE's motion to dismiss arguing plaintiffs had waited too long to bring suit. The court said there were questions of fact as to whether the plaintiffs could have reasonably known about the vapors earlier, and thus their suit survived the motion. In essence, by relying on newly-discovered data which they couldn't have known earlier, the plaintiffs were able to save their claims.

The case raises significant issues for potential plaintiffs as well as defendants. Injured persons may not be aware that they may still bring suit for injuries from pollution which occurred years or even decades ago—this case makes such suits a real possibility. Defendants will be put at greater risk of more lawsuits for actions they may have undertaken taken long ago, and which may have been legal at the time. Moreover, potential defendants cannot rest safe in the knowledge that they are protected from suit for these past acts. All parties are put on notice that new data may bring new lawsuits, and these issues should be given careful attention going forward. SPR

## **CASE BRIEFING: TRIAL COURT ORDERS ADDITIONAL ENVIRONMENTAL REVIEW OF BRONX SCHOOLS PROJECT**

In an unusual result, the trial court in Bronx Committee for Toxic Free Schools v. New York City School Construction Authority, recently held that additional environmental review was required for the planned Mott Haven School Campus,

because the project had failed to adequately consider long term maintenance and monitoring of the project's environmental controls. The project involved construction of a new four-school campus in the Bronx including playing fields, which is to be built on a historically industrial site. The court found the environmental review of the project "extensive" with one exception, the lack of a long term maintenance and monitoring plan for the site. Such a plan would include monitoring protective mitigation measures, such as clean fill caps, vapor barriers, and subslab depressurization systems, designed to prevent exposure to underground contamination. Defendant argued that its engineering report, which by law must be submitted after implementation of the remedy, would include the required long term management plan, and further committed to allowing public comment on the plan. The court rejected this argument, stating that, "in order to ensure the public participation and or comment" the long term maintenance plan must be part of the environmental review process from the start, and therefore ordered a supplemental environmental impact statement. **SPR**

### WHAT'S NEW

SPR partners Daniel Riesel and Pamela Esterman will again be chairing the 39th Annual American Bar Association-American Law Institute Course on Environmental Law. This two day course will be held in Bethesda, Maryland on February 5-6 2009. This advanced course concentrates on the most recent developments concerning environmental law. For or a course brochure go to [www.ali-aba.org/cp036](http://www.ali-aba.org/cp036)

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