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## **NEW YORK**

### **FRACKING**

New York's long political debate over whether to permit extraction of the state's natural gas reserves via the use of hydraulic fracturing, or fracking, may be finally coming to an end. The state is under a Feb. 27 deadline to issue final rules on fracking. While it is possible the rules could be delayed again, should the state go ahead and put in place a regulatory framework it would mean a major shift in the balance of power between the pro and anti-fracking forces that have been at odds over the past five years, the authors write. With the rules in place and absent a political earthquake, fracking in New York would then become more a question of when, rather than if. This article traces the path the state has taken to reach this turning point in the debate over fracking.

## **New York State Faces a Turning Point in Debate Over Natural Gas Fracking**

BY SUSAN MILLINGTON CAMPBELL  
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**T**he extended political debate over whether New York state will permit extraction of the state's massive natural gas reserves via the controversial drilling practice of fracking may finally come to an end this month. More than four years after then-New York Gov.

David Paterson (D) initially signaled that New York would allow fracking pending a state environmental review to create fracking regulations, those regulations, which the state has delayed issuing again and again ever since, are finally scheduled for release by Feb. 27. If the state issues them as planned, it will effectively lift the moratorium in place since the summer of 2008 and allow drilling with the controversial technology to pro-

ceed. Alternately if the state postpones a decision yet again, fracking throughout New York state will remain on hold.

## Fracking and the Stakes at Play in New York State

Hydraulic fracturing, or fracking, is a type of drilling in which an oil and gas company typically drills first a vertical well to a level of thousands of feet under the ground and the water table, and then extends a horizontal well several thousand more feet into gas-rich shale rock. The driller then injects large amounts of sand, chemicals and water under high pressure into the horizontal well to break up the shale rock, which then releases natural gas up into the well. Fracking opponents have seized principally on the injection of these chemicals deep underground, fearing that they may leach into groundwater and drinking water supplies, while energy interests assert that these concerns are exaggerated or incorrect.

Major economic interests are at play in the New York fracking debate. Much of western and central New York state sits atop the Marcellus Shale, an enormous natural gas deposit underlying large sections of Ohio, West Virginia, Maryland, Pennsylvania and New York whose reserves a Standard & Poor's study recently placed at equal to roughly half the United States' entire existing proven natural gas reserves. In addition to the Marcellus Shale, the even deeper Utica Shale lies under broad swaths of New York as well, and petro-geologists see it too as a major natural gas play. While natural gas drilling has taken place in New York state for upwards of 50 years, until about a decade ago the view was that the huge gas deposits in the Marcellus and Utica Shales were virtually unrecoverable because they were trapped in hard-to-access rock deposits. It was only with the rise of advances in fracking and horizontal drilling that tapping these reserves became feasible, with the first fracking in the Marcellus Shale in Pennsylvania occurring just a decade ago.

Fracking has taken off across the country as energy companies have used the technology to access major deposits of oil and natural gas from Wyoming to the Dakotas, Texas, Louisiana and elsewhere in the Marcellus Shale itself such as Pennsylvania, Ohio and West Virginia. The result has been a reversal in a decades-long decline in domestic petroleum production, far lower natural gas prices, and even a plausible path to national energy independence.

Indeed, fracking has already been to a large extent a victim of its own success, as skyrocketing natural gas production has cratered the fuel's market price, which is currently down about 70 percent from its highs five years ago, leading some gas drillers to take less profitable fracking rigs off-line until prices rise again. Nevertheless, recent studies indicate that the Marcellus Shale natural gas is among the country's most profitable to produce, thanks to the economies offered by fracking and to the Shale's proximity to the huge East Coast natural gas markets stretching from the District of Columbia to New York and Boston. Indeed, it is estimated by fracking supporters that opening up fracking in New York state would create 15,000 jobs, which would be concentrated in regions of upstate New York that have been economically depressed for decades.

That prospect of a fracking-led energy boom created an initial landrush to upstate New York in the early 2000's by energy companies interested in acquiring leases to oil and gas rights on the properties located above the Marcellus and Utica shales. Many of these leases, which were written in such a way that they would expire in the absence of drilling, did in fact expire over the last several years as the fracking moratorium prevented the energy companies that had acquired them from drilling on the land. One of those companies, Norse Energy USA, filed for bankruptcy in December 2012 after having leased 133,000 acres outside Syracuse with the intention of fracking them to access the Utica Shale's natural gas reserves.

## Fracking as Political and Legal Football in New York

The promises and perils of fracking were apparent back in 2008, when New York's then-Gov. Paterson announced that New York was moving toward approving fracking. But approval was held up pending environmental review by the New York State Department of Environmental Conservation to determine if it could be done safely, and if so, how best to regulate it to make it safe. The Environmental Department's judgment will be particularly consequential because federal authority to regulate fracking is limited, leaving much of the regulatory field to the states. EPA is prohibited from regulating fracking through the underground injection control program authorized by the Safe Drinking Water Act except where diesel is used. The federal agency under the Clean Water Act can regulate wastewater associated with fracking and is working on regulations governing the pretreatment of wastewater from shale gas wells before the water goes to a publicly owned wastewater treatment plant.

Among the flashpoints in the fracking debate that New York state has had to weigh as it develops fracking regulations include:

- whether energy companies should be forced to disclose the chemicals they inject into the ground, or whether they can keep them confidential as trade secrets;
- to what degree wastewater from fracking has to be treated, and under what conditions it can be released;
- how close to city and town drinking water reservoirs should fracking be permitted; and
- what health effects, if any, fracking would cause to nearby residents.

Indeed, it is the difficulty of these sorts of questions, which necessarily require scientific and political judgment calls and cost-benefit analyses, that undoubtedly has delayed the release of final fracking regulations.

In response to Gov. Paterson's 2008 order for a study and rules on fracking, New York's DEC released its first draft fracking regulations in September 2009 for public comment. That draft proposal was silent on the issue of requiring disclosure of chemical compounds injected into the ground via fracking and also on the issue of public reservoirs, and it drew 13,000 public comments. More than a year after the 2009 draft proposal's release, in December 2010, public opinion remained restive over the issue, and Gov. Paterson ordered the Department of

Environmental Conservation to further study fracking and issue a revised set of fracking regulations.

Ten months later, in September 2011, the Environmental Department released its revised set of draft regulations.<sup>1</sup> These draft regulations differed from the prior ones in that they required public disclosure of fracking chemicals and prohibited fracking within the watersheds of the New York City and Syracuse drinking water reservoirs. But the moves to address environmental concerns did not tamp down the controversy. Following the release of the September 2011 draft regulations, 66,000 public comments were received by the close of the comment period in February 2012, a New York state record. Also in 2012, a number of municipalities in upstate New York unilaterally banned fracking within their city limits, bans which courts have mostly upheld.

Following the uproar over the September 2011 draft fracking regulations, release of New York's final regulations was again delayed. Last November, when the draft regulations were scheduled to become final, a move that would have paved the way to the issuance of fracking licenses, the state obtained a 90-day extension to Feb. 27 to issue the final rules.<sup>2</sup> Importantly, by opting last November to extend its time to approve the current regulatory framework, rather than scrapping that framework altogether and starting from scratch again, the state retained for itself the option of moving quickly to approve fracking as soon as this month. Recognizing that possibility, anti-fracking groups mobilized in the wake of the November 2012 extension to try to forestall any quick approval by submitting what they claimed were more than 200,000 comments to the state before the Jan. 11 cut-off of the comment period. The state is legally required to consider the comments before any final decision.

Now, in the run-up to the Feb. 27 deadline, the various pro- and anti-fracking factions have been reduced to reading tea leaves to guess where and when the state will land on the issue. Many fracking advocates saw it as a good sign that in early January an internal 2012 state fracking study which had concluded that fracking could be safely done in New York was leaked, although the state denied at the time that the study was indicative of anything. On the other hand, anti-fracking advocates appeared to take heart in Gov. Andrew Cuomo's (D) recent submission of an annual budget to the state

Legislature that contained cuts to the state Department of Environmental Conservation. Anti-fracking groups saw the cuts as an indication that fracking is not imminent, because if it is, the thinking goes, the governor's budget would have requested big increases in the department's staff to handle the upsurge of work associated with licensing fracking wells. Gov. Cuomo has dismissed those suggestions and kept the state's fracking intentions extraordinarily close to the vest.

## Next Steps

However, with the next fracking deadline just weeks away, the state will soon have to take action of some kind. The years of delays have obscured the fact that by extending consideration of the existing proposed regulations rather than scrapping them altogether, the state has kept on the table the option of a rapid approval of fracking in New York, even as soon as later this month. Even were the state to move so quickly, fracking would likely not arrive immediately in New York. Instead, as Gov. Cuomo himself has conceded, lawsuits opposing such a move are sure to materialize and bring further delay. Nevertheless, the state's approval would mean a major shift in the balance of power between the pro and anti-fracking forces. With a regulatory framework in place and absent a political earthquake, fracking in New York would then become more a question of when, rather than if.

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*The opinions in this article do not represent the views of Bloomberg BNA, which welcomes other points of view.*

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<sup>1</sup> See 189 DEN A-2, 9/29/11.

<sup>2</sup> See 229 DEN A-1, 11/29/12.