

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ULSTER

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Application of	)	
	)	
CROTON WATERSHED CLEAN WATER	)	Index No.
COALITION, INC., RACHEL TREICHLER,	)	
WILLIAM CASTLE and ROBERT APPLGATE,	)	VERIFIED PETITION
	)	and COMPLAINT
	)	
Petitioners/Plaintiffs,	)	Assigned Judge:
	)	
for a judgment pursuant to CPLR Articles 30 and 78	)	
	)	
-against-	)	
	)	
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL	)	
CONSERVATION and COMMISSIONER JOE MARTENS,	)	
	)	
Respondents/Defendants.	)	

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Petitioners/plaintiffs (petitioners) by their attorney, respectfully allege to be true upon their own knowledge or upon information and belief as demonstrated by the pleadings submitted herewith as follows:

1. This is a combined action and proceeding brought pursuant to Articles 78 and 30 of the New York State Civil Practice Law and Rules (CPLR) for a judgment;

A). to annul, vacate, and in all respects void the combined final Strategic Plan for State Forest Management (SPSFM) and Final Generic Environmental Impact Statement (FGEIS) adopted by the respondent/defendant (respondent) New York State Department of Environmental Conservation (DEC) on December 29, 2010 as the

respondent failed to take a hard look at the environmental impacts related to the action as required by the New York State Environmental Quality Review Act (SEQRA),<sup>1</sup> and;

B). declaring that industrializing State Forests with the newly proposed natural gas extraction process known as High Volume Horizontal Hydraulic Fracturing (HVHHF) is contrary to the enabling legislation authorizing the purchase of lands for State Forests and is inconsistent with the responsible stewardship of State Forests, sustainability and policies of New York State as set forth in the State Constitution, Environmental Conservation Law (ECL), and Common Law Public Trust Doctrine.

### **THE PARTIES and STANDING**

2. Petitioner Croton Watershed Clean Water Coalition, Inc. (CWCWC) is a not-for-profit open-membership corporation constituting an alliance of organizations and individuals dedicated to maintaining, protecting, and improving the quality of the waters in New York. CWCWC's membership includes 50 affiliated groups which represent over 120,000 individuals.

3. CWCWC has standing in this proceeding as one of its main goals is protecting water quality. Contrary to those goals, HVHHF will reduce the watershed protection benefits of State Forests and may result in violations of State Water Quality Standards and degradation of drinking water supplies.

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<sup>1</sup> ECL Art. 8; 6 NYCRR §617.

4. Petitioner Rachel Treichler, resides at 7988 Van Amburg Road, Hammondsport and her family's property abuts the Birdseye Hollow State Forest (BHSF) in Steuben County, New York. Ms. Treichler's residence has a clear view of BHSF and she has enjoyed hiking and camping and other recreational activities in BHSF. BHSF is a candidate for HVHHF as the County is the largest natural gas producer in the state and sits above both Marcellus and Utica shale deposits. Sections of BHSF have been leased and released for natural gas exploration and drilling purposes. The onset of HVHHF in BHSF would immediately impact Ms. Treichler's health and safety by vastly increasing levels of noise, dust and traffic. The industrialization of BHSF with drilling rigs, truck traffic and lagoon building would also terminate the quiet peaceful enjoyment of her property. Ms. Treichler is a member of CWCWC and shares CWCWC's interest in protecting New York's waters from degradation.

5. Petitioner William Castle is a member of CWCWC and resides at 6239 South Road, Belmont, New York. His 30-acre property abuts the Phillips Creek State Forest (PCSF) in Allegany County. Mr. Castle and his family operate the "Pollywogg Holler Eco-Resort" featured in New York Magazine's Spring Travel 2008. They and their guests enjoy hiking and cross-county skiing in PCSF. PCSF is a candidate for HVHHF as it sits above both Marcellus and Utica shale deposits and other gas bearing formations. Sections of PCSF have been leased and released for natural gas exploration and drilling purposes. The onset of HVHHF in PCSF would immediately impact Mr. Castle's health and safety and the health and

safety of his family and guests. HVHHF would disrupt the quiet and peaceful enjoyment of his property by increasing levels of noise, dust and traffic. HVHHF in PCSF would negatively impact his business by fragmenting the forest's ecology and serenity with drilling rigs, truck traffic, lagoon building and well pads. HVHHF would decrease his property value and jeopardize his investment in his Eco-Resort. Further, his drinking water supply would be threatened due to the millions of gallons of toxic brine required to be stored as part of HVHHF and the potential failure of upgradient holding lagoons.

6. For the past 12 years petitioner Robert Applegate, a member of CWCWC, and his wife have lived on a 40 acre homestead at the end of a dirt road in the hamlet of Virgil, New York sharing more than 2,000 feet of common border with the James D. Kennedy State Forest. It is a paradise. Their most visible neighbors are the deer, turkeys, coyotes, foxes, beaver, muskrats, raptors, thrushes, and warblers that emerge from the forest. From the Applegate living room they see people entering the State Forest every day to enjoy its many amenities. DEC proudly states:

James D. Kennedy Memorial State Forest is a popular area for recreational activities such as hunting, hiking, fishing, bird watching, camping, cross-country skiing, snowmobiling, trapping, and snowshoeing.<sup>2</sup>

The Applegates especially love hiking the nearby Finger Lakes Trail that runs through the State Forest. However, as many as 20 HVHHF wells could soon be

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<sup>2</sup> See Affidavit of Robert Applegate herewith sworn to on the day of April 2011.

drilled in the State Forest. That kind of industrial-scale shale gas extraction threatens Mr. Applegate's health and safety and enjoyment of his property. His property values will be negatively impacted by the HVHHF 24/7 roar of drills and the compressor stations, the forest fragmentation caused by the construction of permanent well pads, access roads, gathering lines, processing plants, pipelines, and staging areas, the thousands of 18-wheelers and pieces of heavy equipment blocking and destroying the dirt road in front of his house, the chronic spills of chemicals, of fuel and of flow-back fluid into streams and aquifers, the blow-backs, the blow-outs, the flare-offs, and fires, the fugitive emissions of methane, the underground migration of methane, the intentional venting of methane and hydrogen sulfide into the air together with the clouds of silica dust and the blue haze of diesel exhaust in the trees, all of which he will be forced to breathe.

7. The respondent DEC adopted the SPSFM/FGEIS indicating State Forests may be subjected to HVHHF and that this method of gas extraction is consistent with the Division of Lands and Forests' policies and those of DEC. Respondent Joe Martens is the Commissioner of DEC and respondents maintain its offices for Region 3 in New Paltz, New York. Region 3 includes Ulster County within which are several State Forests. These include the VerNooykill State Forest, Witches Hole State Forest and the Shawangunk Ridge Unit, portions of which are located in the Towns of Gardiner, Wawarsing, and Shawangunk.<sup>3</sup> Consequently, Ulster County is a proper venue for this matter as the Marcellus

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<sup>3</sup> <http://www.dec.ny.gov/press/33813.html>.

Shale formation underlies these State Forests<sup>4</sup> and therefore may be subject to natural gas extraction by HVHHF.

### **PROCEDURAL HISTORY**

8. State Forests were created to protect water quality and reverse hundreds of years of deforestation and unsustainable farming practices in New York. The 1929 State Reforestation Act, and the 1931 Hewitt Amendment authorized the State to acquire lands to be “forever devoted” to:

reforestation and the establishment and maintenance thereon of forests for watershed protection, the production of timber and other forest products, and for recreation and kindred purposes.<sup>5</sup>

9. Thousands of people were put to work through depression-era programs to plant seedlings in lands that had essentially become deserts. “[A]lmost nothing could grow on the ruined soil [and] [e]arly photos of some State Reforestation Areas show expanses of raw blowing sand studded with tiny conifer seedlings.”<sup>6</sup> SPSFM at 16-17.

10. In 1938, in part to support reforestation efforts, the people of the State of New York approved a new Constitution declaring that “[f]orest and wild life conservation are hereby declared to be policies of the state.”

11. As chronicled by DEC, the people of the State of New York continued to authorize the use of their tax dollars for conservation purposes:

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<sup>4</sup> <http://www.dec.ny.gov/energy/46381.html>.

<sup>5</sup> ECL §9-0501(1).

<sup>6</sup> <http://www.dec.ny.gov/lands/4982.html>.

The Park and Recreation Land Acquisition Act of 1960, as well as the Environmental Quality Bond Acts of 1972 and 1986, provided funds for the acquisition of additional State Forest lands, including inholdings and parcels adjacent to existing State Forests. All of these lands were acquired for the conservation and development of natural resources, including the preservation of scenic areas, watershed protection, forestry and recreation.<sup>7</sup> Emphasis added.

12. New York State defines a State Forest as:

[L]ands owned by the State of New York, administered by the Department of Environmental Conservation Division of Lands & Forests, and authorized by Environmental Conservation Law to be devoted to the establishment and maintenance of forests for watershed protection, the production of timber and other forest products, and for recreation and kindred purposes. These forests shall be forever devoted to the planting, growth, and harvesting of such trees.<sup>8</sup>

13. While the purpose for acquiring these lands was reforestation, the State allowed the leasing of certain lands for discovering and removing oil and gas<sup>9</sup> provided “the exercise of such leasehold rights shall not interfere with the operation of such reforestation areas for the purposes for which they were acquired and as defined in Section 3 of article XIV of the Constitution.” ECL §9-0507. Vertically drilled gas wells are the only type of wells drilled in State Forests to date.

14. In 2010, DEC undertook its first effort to develop a comprehensive management plan for the State Forests.<sup>10</sup> DEC’s Division of Lands and Forests

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<sup>7</sup><http://www.dec.ny.gov/lands/4982.html>.

<sup>8</sup> SPSFM 331-332.

<sup>9</sup> ECL §9-0507.

<sup>10</sup> State Forests also “include Reforestation Areas, Multiple-Use Areas, Unique Areas and State Nature and Historical Preserves.” SPSFM at 331-332. Id. at 5.

(DLF) spearheaded the SEQRA review seeking to produce a “strategic plan for all the state's forest holdings... outlining a vision for sustainable management, [and]... provid[ing] a template for state foresters to develop individual unit management plans for dozens of forest units over the next decade.”<sup>11</sup>

15. DEC identified the plan’s “key goals”, i.e. to “focus on ecosystem health and diversity, economic benefits, recreational opportunities, forest conservation and sustainable management.”<sup>12</sup>

This Plan describes how State Forests will be managed in a sustainable manner by promoting ecosystem health, enhancing landscape biodiversity, protecting soil productivity and water quality. In addition, State Forests will continue to provide the many recreational, social and economic benefits valued so highly by the people of New York State. NYS DEC will continue the legacy which started 80 years ago, leaving these lands to the next generation in better condition than they are today.<sup>13</sup>

16. DEC released the Draft Generic Environmental Impact Statement (DGEIS) on September 1, 2010, held public hearings and accepted public comments until October 29, 2010.

17. DEC received thousands of comments (3,700), many expressing concern as to why HVHFF should be allowed in State Forests given the new technology’s unprecedented environmental impacts.

### **High Volume Horizontal Hydraulic Fracturing (HVHFF)**

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<sup>11</sup> <http://www.dec.ny.gov/press/68400.html>.

<sup>12</sup> <http://www.dec.ny.gov/lands/64567.html>.

<sup>13</sup> SPSFM at iii.



18. HVHHF is a new gas extraction technology in New York differing significantly from vertical drilling in terms of the long and short term impacts to the environmental and the scope of damage that may result. See herewith Kiviat Affidavit.

19. While both methods require access corridors to be cut through state forests for roads and pipelines, the well pad for HVHHF is more than twice the size required for a vertical well. Bacon Affirmation.

20. While a vertical well requires about two acres of clearing, HVHHF requires well pad disturbances require 5 or more acres. In total, approximately 30 acres of forest may be disturbed for a HVHHF well pad hosting two wells.<sup>14</sup> According to the SPSFM, there can be up to 160 well pads per square mile.<sup>15</sup>

21. HVHHF requires seven to twenty-seven more times the water (3-8 million gallons of water) for a single well as compared with a vertically drilled

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<sup>14</sup> The Audubon Society reports that:

“Researchers in PA took aerial photos of 242 well pads in forested areas in the Marcellus shale of Pennsylvania. They digitized the images and measured how much land was cleared for well pads, access roads, pipelines, and water impoundments. They found, on average, that 3.1 acres were cleared for each well pad, and that an additional 5.7 acres were cleared for the associated structures around that well pad (roads, etc.). Then, using well-established research that most edge effects extend at least 330 feet into a forest from the edge, they calculated the additional area disturbed indirectly as 21.2 acres per pad. Thus, each well pad disturbed at least 30 acres! Although Marcellus shale well pads are expected to eventually host 6 to 8 or more wells, these pads only hosted 2 wells, on average, so the disturbance is likely to be much greater in the future.”

<sup>15</sup> One square mile is 640 acres and the SPSFM identifies that the maximum permitted density would be no greater than one well pad per 40 acres. Id. at 234 ¶2.

well. HVHHF's water is combined with toxic chemicals to be pumped under high pressure (15,000 psi)<sup>16</sup> a mile or more underground to open fissures in the shale to facilitate extraction. Rose Affidavit ¶5. The gas industry does not have to disclose chemical components which are protected as trade secrets. Id. at ¶16.

22. The flow back water also contains radioactive water contaminated with 226 radium. DEC has tested wastewater taken from thousands of feet underground finding radioactivity thousands of times above the limit allowed for drinking water. Id. at ¶19. The United States Environmental Protection Agency has stated that open lagoon storage of radioactive water at those levels could threaten the safety of those within a 50-mile radius. Id. at ¶21.

23. Of special concern are impacts upon vulnerable populations such as children and expectant mothers as well as contamination of dairy supplies. Id. at ¶22-23.

24. Because 226 radium has a half-life of 1159 years, there is a critical need to understand how that material will be kept out of harm's way for 60 generations. Id. at 24

25. HVHHF will cause accidents and spills. Pennsylvania Department of Environmental Protection records indicate a total of 1,614 violations of state laws due to gas drilling or other earth disturbance activities related to natural gas extraction from the Marcellus shale in a 2.5-year period. The Pennsylvania

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<sup>16</sup> <http://www.pump-zone.com/upstream-pumping/frac-pumps/the-evolution-of-hydraulic-fracturing-and-its-effect-on-frac-pump-technology.html>

Land Trust Association identified 1,056 of these violations as having or likely to have an impact on the environment. Kiviat Affidavit Appendix C.

26. HVHHF also presents significant threats to wildlife and State forests, exposing the forest to increase disease and pest infestation. Kiviat Affidavit.

27. Further, because HVHHF extracts far more natural gas than vertical drilling it is becoming widespread. In Pennsylvania, HVHHF wells increased from 27 in 2007 to 1386 in 2010.<sup>17</sup>

28. Additionally, a HVHHF well pad may produce gas for decades while a vertical well's commercial use is 10 years maximum. Bacon Affirmation. For example:

The long term yield of Marcellus Shale wells is uncertain. Some in the industry believe that they will produce lower but profitable quantities of gas for decades. It is also possible that many wells will be refractured in the future with improved technologies. The same drilling pad might be reused in the future to drill multiple horizontal wells in different directions. Marcellus Shale drilling pads have many future options.

When the yield of Marcellus Shale wells start to decline, new wells might be drilled down to the Utica to continue a stream of natural gas production. Drilling for the Utica will be more expensive because of the greater depth, however, the infrastructure of drill pads, right-of-ways, pipelines, permit data and other investments will reduce development costs for Utica Shale wells.<sup>18</sup>

29. Up to ten HVHHF wells may be drilled from a single HVHHF well pad extending the forest fragmentation and environmental impacts of a well pad

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<sup>17</sup> <http://geology.com/articles/marcellus-shale.shtml>.

<sup>18</sup> <http://geology.com/articles/marcellus-shale.shtml>.

and its pipelines, access roads and brine lagoons beyond 100 years. Bacon Affirmation.

**Division of Forestry's SEQRA Review**

30. DEC's DLF released its final SPSFM on December 29, 2010.

31. The final plan did not address HVHHF's impacts upon State Forests.

Instead, it stated that it will defer any review and determination as to whether to allow HVHHF in State Forests until after DEC's Division of Mineral Resources (DMR) and the United States Environmental Protection Agency (EPA) complete their respective HVHHF environmental reviews. Specifically:

The decision whether or not to allow HVHHF on State Forests will be made after the DEC's [DMR's] Supplemental GEIS for Hydraulic Fracturing and the EPA study on hydraulic fracturing have been completed.<sup>19</sup>

32. Petitioners commenced this combined proceeding and action because as set forth below, DEC failed to take a "hard look" at HVHHF as required under SEQRA when it released its FGEIS/SPSFM and because HVHHF in State Forests is contrary to the ECL, the New York State Constitution and the Public Trust Doctrine.

**AS AND FOR THE FIRST CAUSE OF ACTION**

33. Petitioners repeat and reallege the allegations of paragraphs 1 through 32 as if they were fully set forth herein.

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<sup>19</sup> Page 350, ¶6, SPSFM.

34. Respondent, as lead agency, failed to comply with a number of requirements of the State Environmental Quality Review Act (SEQRA).

35. DEC received over 3,700 comments on the DGEIS many of which demonstrated that HVHHF presented the potential to significantly impact human health and State Forests, was inconsistent with the stated goals of the SPSFM, and the public policy underlying the purpose of State Forests and inconsistent with the purposes of the ECL and New York State Constitution.

36. State Law identifies DEC's Division of Lands of Forests as the sole administrator of State Forests with the Bureau of State Land Management (BSLM) particularly responsible for day to day operations.

37. Specifically, the BSLM:

manages more than 780,000 acres of State Forests, which include Reforestation Areas, Multiple-Use Areas, Unique Areas and State Nature and Historical Preserves, throughout New York State. These lands are highly valued for the recreational opportunities they provide and for their contributions to ecosystem health. Over 475 miles of formal recreational trails are available for camping, hiking, mountain biking, snowmobiling, horse riding, snow shoeing and cross country skiing. These properties are also enjoyed by hunters and trappers as well as by orienteering and geocache enthusiasts. On some of these lands, timber management is used as a tool to enhance biodiversity and to create habitat features that might be lacking in the landscape. Other portions are managed to protect and enhance rare, threatened or endangered species.<sup>20</sup>

38. The FGEIS recognizes the unique role of professional foresters managing State Forests stating:

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<sup>20</sup> <http://www.dec.ny.gov/about/27748.html>.

State Forests play a unique role in New York's landscape because they: are managed under public ownership by professional foresters; allow for the sustainable use of natural resources; are open to recreational use; provide watershed protection; and cover large land areas throughout the state. From the beginning, State Forests were set aside to offset widespread trends of agricultural abandonment and deforestation and restore the land's ability to support vegetation. (FGEIS Pg. 5).

39. However, the FGEIS states it "is not intended to serve as the environmental review for this [HVHFF] activity" (At 351, ¶1) and that DLF will undertake no review until DEC's Division of Minerals and USEPA complete their respective reviews.

**Improper Delegation/Deferral of Lead Agency's SEQRA Review**

40. Delegating environmental review to another agency or deferring substantive environmental review violates SEQRA as it is the lead agency's responsibility to assess and craft appropriate mitigation strategies for every identified adverse environmental impact related to the action.

41. DEC's determination to delegate lead agency environmental review responsibilities to another one of its divisions and USEPA was reversible error.

**HVHFF must be assessed as part of the FGEIS**

42. "Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action. Considering only a part or segment of an action is contrary to the intent of SEQR." 6 NYCRR §617.3(g)(1).

43. Here, the DGEIS (at 32) defines the action stating:

The proposed action to be analyzed in this section is the development and implementation of this Strategic Plan for State Forest Management...

The GEIS in this plan establishes BMPs for each category of forest management actions included within. These BMPs are designed to ensure that future management actions and UMPs [Unit Management Plans] avoid or mitigate detrimental environmental impacts to forests to the maximum extent practical.

44. As above, no BMPs or UMPs are suggested or discussed for HVHHF as the FGEIS states it “is not intended to serve as the environmental review for this activity.” At 351, ¶1.

45. The FGEIS discussed no details of HVHHF impacts, issued cursory responses to public and expert comments on HVHHF and discussed no mitigation for HVHHF. Consequently, DEC admittedly failed to take the required “hard look” at the entire action relating to the potentially significant environmental impacts of HVHHF.

#### **The FGEIS Failed to Consider Alternatives**

46. The Environmental Impact Statement’s review of alternatives and mitigation measures is “the heart” of the SEQRA process.

47. SEQRA requires alternatives to be discussed in the scoping process [6 NYCRR §617.8(f)(5)] and in the EIS. The EIS must “evaluate all reasonable alternatives” and include “a description and evaluation of the range of reasonable alternatives to the action that are feasible... at a level of detail sufficient to permit a comparative assessment of the alternatives discussed.” Id. at §617.9(b)(1),

(5)(v). The analysis also “must include the no action alternative” and may include alternative technology. Id.

48. Similarly, to complete the SEQRA process the lead agency must issue findings certifying that:

[C]onsistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.<sup>21</sup>

49. DEC has referred to alternatives analysis as “one of the fundamental objectives” of SEQRA. *In re Pyramid Crossgates Co.* (DEC Comm’r Decision, Sept. 18, 1981).

50. However, DEC failed to consider alternatives to HVHHF in all respects – the no action alternative, alternative technologies, limitations on siting as well as the benefits of not leasing State Forests. The no action alternative would best sustain ecosystem functions (e.g., water filtration and soil stability), maintain biodiversity, and protect intact habitat and natural areas to support recreation and other uses which are at the core of the SPSFM’s purposes.

51. Because DLR is the only state agency charged with State Forest management, it cannot shirk its SEQRA duty to examine significant environmental impacts and public policy issues of state-wide importance raised by the specter of HVHHF on public lands. Since the establishment of the State

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<sup>21</sup> 6 NYCRR §617.11(5).



Forests, there has been no greater threat to their existence and their public and environmental benefits than the industrialization and fragmentation now presented by HVHHF. It is irrational and arbitrary and capricious for the SPSFM to address other obnoxious uses stating that commercial mining, wind turbines, communications towers, utilities lines are improper industrial uses to be banned while deferring judgment on HVHHF. In sum, DEC's failure to consider HVHHF as part of its SEQRA review of its State Forest management plan is contrary to the plain language of the regulations as well as case law requiring judicial annulment of the SPSFM/FGEIS.

#### **AS AND FOR THE SECOND CAUSE OF ACTION**

52. Petitioners repeat and reallege the allegations of paragraphs 1 through 51 as if they were fully set forth herein.

53. The industrialization of State Forests with HVHHF is contrary to the New York State Constitution.

54. To counter past industrial practices, the State adopted the 1929 State Reforestation Act, and the 1931 Hewitt Amendment, authorizing the State to acquire lands to be "forever devoted" to "reforestation and the establishment and maintenance thereon of forests for watershed protection, the production of timber and other forest products, and for recreation and kindred purposes. ECL §9-0501(1).

55. The deforestation also contributed to the adoption of a new Constitution in 1938 which established forest and wildlife conservation as New York State policy.

56. Article XIV §3(1) of the New York State Constitution provides:

Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation.

57. In pursuing that policy, the State has acquired and rehabilitated hundreds of thousands of acres. Due to the State's depression-era work programs, taxpayer funded initiatives and volunteer efforts over many decades, State Forests are now one of New York's most treasured assets.

58. The SPSFM (at pg. 1) recounts the transformation of wastelands to a highly valued public resource drawing thousands of visitors each year:

At their inception, the State Forests were set aside to offset widespread trends of agricultural abandonment and deforestation and restore the land's ability to support vegetation. In addition, they also provide a positive impact on water quality and ecosystem health, a proving ground for innovative forestry, an example to private landowners, and a balance to management driven by short term goals that sometimes occurs on private lands. State Forest lands are also highly valued for the recreational opportunities they provide. Over 2,446 miles of trails and forest roads are available for public recreation.

59. Over time, the public resource value of State Forests will only increase:

The 786,329 acres of State Forests addressed by this management plan represent 2.6% of the state's total land area, and about 4.0% of

the state's total forest cover. State Forests provide relatively large blocks of undeveloped land, and as such provide unique habitat and open space for people, plants and animals. Given the projected urbanization of the state, the importance of State Forests in New York State as protected open space, working demonstration forests, recreational areas and core wildlife habitats, along with the ecosystem services they provide, will undoubtedly continue to grow over time. SPSFM (at 45-46).

60. Given that context, DEC correctly has opposed industrializing State Forests by prohibiting commercial mining, wind turbines, cellular phone towers, power lines and most All-Terrain Vehicles (ATVs). For example:

The placement of new communications towers (for purposes other than DEC administrative use), wind turbines or other utilities should be avoided and for ecological purposes would be more appropriately placed on private lands which have already been fragmented... [and]

State Forests are not an appropriate setting for industrial - scale wind farms that would require permanent clearing of land.<sup>22</sup>

[and]

Current Department policy is to decline any commercial mining application(s) pertaining to State Forest lands, as the impacts from these activities are not compatible with the purposes for which Reforestation Areas were purchased.<sup>23</sup>

61. Similarly, HVHFF is inconsistent with forest and wildlife conservation and the practice thereof. See Affidavit of Erik Kiviat.

62. Like other industrial uses, HVHFF has the potential to permanently impact conservation resources by the siting of well pads, gas pipelines, access roads and lagoons to hold millions of gallons of toxic and radioactive flow-back

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<sup>22</sup> Pg 167-168 SPSFM.

<sup>23</sup> SPSFM at 240.

brine for decades and as long as a century. The accompanying radiation may last for generations.

63. Moreover, in addition to clearing forests to accommodate HVHHF, potential accidents, such as lagoon break-out, the spread of radioactive material and explosions, are likely to occur based upon the gas industry's record involving HVHHF in Pennsylvania and other states. Kiviat Appendix C.

64. DEC recognized and listed those additional threats to water quality when it determined to conduct a supplemental generic environmental review of the extraction process. DEC explained:

“In 2008, the Department determined that some aspects of the current and anticipated application of horizontal drilling and high-volume hydraulic fracturing warrant further review in the context of a Supplemental Generic Environmental Impact Statement. [SGEIS] This determination was based primarily upon three key factors: (1) required water volumes in excess of GEIS descriptions, (2) possible drilling in the New York City Watershed, in or near the Catskill Park, and near the federally designated Upper Delaware Scenic and Recreational River, and (3) longer duration of disturbance at multi-well drilling sites. These factors and other potential impacts were listed in a publicly vetted Scope for the SGEIS.<sup>24</sup>

65. Therefore, HVHHF is inconsistent with Article XIV of the New York State Constitution and should be prohibited from State Forests.

66. Article I §11 of the New York State Constitution further provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

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<sup>24</sup> Draft SGEIS 9/30/2009, Page 1-4 and see: [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/ogdsgeischap1.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/ogdsgeischap1.pdf).

67. As above, the State of New York has determined that the industrialization of State Forest is contrary to the practice of forest conservation.

68. For that reason, the State prohibits commercial mining, wind turbines, power lines, communications and other utilities and uses from being sited in State Forests.

69. This has advanced the public health and welfare in New York State by providing the public with camping, hiking, mountain biking, snowmobiling, horse riding, snow shoeing, cross country skiing, hunting, trapping and outdoor educational opportunities.

70. Timber management is permitted but it is only “used as a tool to enhance biodiversity and to create habitat features that might be lacking in the landscape.”<sup>25</sup>

71. The State’s stewardship of these lands has also engendered public appreciation for the environment and fostered businesses such as petitioner Castle’s Eco-Resort. The Resort depends not only upon the upon the miles of trails in State Forests to draw guests but also the pristine surroundings which also serve to protect his drinking water and the water supply serving his Town.

72. The equal protection clause of the New York Constitution guarantees that laws and policies be enforced equally.

73. The State’s prohibition of target shooting, paint ball, limiting ATVs and ban on commercial mining, wind turbines, communications towers, utilities

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<sup>25</sup> <http://www.dec.ny.gov/about/27748.html>.

and utility rights-of-way, all serve to protect petitioners Castle, Treichler and Applegate from the use of State Lands as a nuisance. Allowing an influx of HVHHF into State Forests, would place an unequal burden upon these petitioners subjecting them to nuisances that are contrary to the purposes for which the State Forest lands were acquired.

74. As above, HVHHF causes forest fragmentation, loss of wildlife functions, loss of recreation and poses a significant threat to surface and groundwater quality. Kiviat Affidavit

75. A single HVHHF well-pad may be sited for decades disrupting State Forests with fragmentation, access roads, pipeline construction, soil compaction and other short and long-term environmental impacts. Id. Those activities will negatively impact petitioners health, safety, property values and economic stability. Affidavits of Robert Applegate and William Castle.

76. Therefore, HVHHF is fundamentally inconsistent with setting aside a small fraction of the State's lands that were to be forever devoted to reforestation, watershed protection, recreational opportunities and promoting ecosystem health.

77. In sum, enforcing these constitutional provisions in prohibiting HVHHF from being sited in State Forests which comprise 2.6% of the area of New York State is consistent with the Constitution which authorized the State to acquire lands for the "practice of forest or wild life conservation." Article XIV, §3(1).

## AS AND FOR THE THIRD CAUSE OF ACTION

78. Petitioners repeat and reallege the allegations of paragraphs 1 through 77 as if they were fully set forth herein.

79. HVHHF is contrary to the purposes for which state lands were purchased and contrary to the Environmental Conservation Law (ECL).

80. The ECL sets forth the policy of New York State regarding the environment:

The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.<sup>26</sup>

81. Concerning lands of the State, DEC has the express duty to:

Exercise care, custody and control of the several preserves, parks and other state lands described in this article.

[and]

[A]dminister and manage the real property under the jurisdiction of the department for the purpose of preserving, protecting and enhancing the natural resource value for which the property was acquired or to which it is dedicated, employing all appropriate management activities.<sup>27</sup>

82. Regarding lands acquired by the State for reforestation:

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<sup>26</sup> ECL §1-0101(1).

<sup>27</sup> ECL §9-0105(1), (2).

In order to provide for the acquisition of lands outside of the Adirondack park and the Catskill park as defined by subdivisions 1 and 2 of section 9-0101, which are adapted for reforestation and the establishment and maintenance thereon of forests for watershed protection, the production of timber and other forest products, and for recreation and kindred purposes, the department may acquire in the name of the state, by gift, purchase or appropriation, reforestation areas which shall consist respectively of not less than five hundred acres of contiguous lands, which shall be forever devoted to the planting, growth and harvesting of such trees as shall be deemed by the commissioner best suited for the lands to be reforested.<sup>28</sup>

83. Under this section, the State has acquired over 700,000 acres of lands and has worked diligently over the last eighty years to reforest those acres and provide responsible stewardship.

84. Indeed, DEC proudly identifies New York's "Green Certified State Forests" stating:

762,000 acres of New York's green certified State Forests shine among the gems of the State's public land holdings. DEC's sustainable management of these lands [adds] multiple benefits including clean water, timber, recreation, wildlife and scenic beauty."<sup>29</sup>

85. Though contradictory to those goals, in recognizing former leaseholds, the State grandfathered oil and gas removal in lands acquired for reforestation and permits the leasing of lands for such purposes. ECL §9-0507.

86. However, ECL §9-0507 prohibits gas removal activities where they interfere with the purposes of forests and wildlife conservation as set forth in the

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<sup>28</sup> ECL 9-0501(1).

<sup>29</sup> <http://www.dec.ny.gov/lands/40672.html>.



Constitution or with the purposes for which they were acquired, e.g., forever devoted to “the planting, growth and harvesting of such trees.”<sup>30</sup>

87. The contradiction inherent in placing HVHHF in State Forests has been recognized by DEC. The Bureau of State Land Management (BSLM) states:

While BSLM is not in control of mineral leasing rights, they have rarely recommended the granting of these leases.<sup>31</sup>

88. The SPSFM recognizes that:

Much of the legislation authorizing acquisition of State Forest lands has specifically prohibited DEC from entering into any long term leases or selling any real property rights, including utility rights of ways. This demonstrates the intent to minimize development or fragmentation of these lands...

Generally speaking, DEC will resist the establishment of new utility ROWs to limit future fragmentation of the forest. (SPSFM at 168).

89. While vertical drilling for gas and oil is arguably incompatible with State Forests, HVHHF is clearly incompatible.

90. As above, a single HVHHF well with access roads, pipeline routes and one or more lagoons, causes significant short and long-term environmental impacts upon forests and wildlife, including forest fragmentation and the use and

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<sup>30</sup> Additionally, natural gas is not identified as a “forest product” by the ECL.

<sup>31</sup> “Forest Management and Stump-to-Forest Gate Chain-of-Custody Certification Evaluation Report for the: New York State Department of Environmental Conservation (DEC), Division of Lands and Forests, Bureau of State Land Management (BSLM) Conducted under auspices of the SCS Forest Conservation Program SCS is an FSC Accredited Certification Body” [http://www.dec.ny.gov/docs/lands\\_forests\\_pdf/gcfscaudit12808.pdf](http://www.dec.ny.gov/docs/lands_forests_pdf/gcfscaudit12808.pdf) at pg 37.

conversion of millions of gallons of water to a toxic, radioactive brine with no known disposal method in New York.

91. Finally, certain leases would allow lessees conducting HVHHF to take a significant amount of water from State Forests (3-8 million gallons of water per well). Bacon Affirmation. That use is certainly inconsistent with the use of State Forests for watershed protection, especially when that water will be contaminated by HVHHF.

92. Therefore, concerning the siting of HVHHF in State Forests, petitioners respectfully request a declaration that HVHHF is inconsistent with the purposes of the ECL and therefore must be prohibited.

#### **AS AND FOR THE FOURTH CAUSE OF ACTION**

93. Petitioners repeat and reallege the allegations of paragraphs 1 through 92 as if they were fully set forth herein.

94. As a matter of law, HVHHF is contrary to ECL §9-0507 as HVHHF will interfere with the operation of State Forests and HVHHF is contrary to the purposes for which State Forests were acquired and as those lands are defined in Section 3 of article XIV of the Constitution and by the ECL.

## AS AND FOR THE FIFTH CAUSE OF ACTION

95. Petitioners repeat and reallege the allegations of paragraphs 1 through 94 as if they were fully set forth herein.

96. Use of State Forests for HVHFF is a violation of the Public Trust Doctrine.

97. Since their inception, State Forests have been used by the public as parkland, with the full knowledge and encouragement by New York State.

98. The State advertises State Forests as a haven for outdoor camping, hiking, mountain biking, snowmobiling, horse riding, snow shoeing, cross country skiing, orienteering as well as hunting and trapping.

99. For example:

[The] James D. Kennedy Memorial State Forest is a popular area for recreational activities such as hunting, hiking, fishing, bird watching, camping, cross-country skiing, snowmobiling, trapping, and snowshoeing.<sup>32</sup>

100. New York State Forests also host the Finger Lakes Trail (FLT), a 558-mile foot trail stretching from the Pennsylvania-New York border in Allegany State Park to the Catskill Forest Preserve.<sup>33</sup> The trail is maintained by the volunteers who log in approximately 15,000 hours of trail work. Id.

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<sup>32</sup> <http://www.dec.ny.gov/lands/8192.html>.

<sup>33</sup> “The main FLT is 558 miles long. There are six branch trails and 29 loop trails and spur trails that extend from the main FLT. These branch, loop and spur trails currently total 400 miles. Including the Main Trail and all branch, loop, and side trails, the Finger Lakes Trail System offers 958 miles of hiking.” <http://www.fltconference.org/trails/hike-the-trail/about-the-trail/>.

101. At no time have State Forests been posted or otherwise marked with “no trespassing” signs.

102. Indeed, State Forests have been treated as public parkland with regard to their use and enjoyment by the public.

103. As noted above and incorporated herein, the New York State Constitution and ECL repeatedly indicate that New York State must be a responsible steward of its State Forest resources. As noted by SEQRA:

[I]t was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

104. Therefore, the requirement that DEC hold State Forests as stewards and trustees for the people of the State of New York is not only part of the Common Law Trust Doctrine, but is mandated in both the New York State Constitution and the ECL.

105. State Forests have been used by the public, with the knowledge of the State of New York, throughout their existence as publicly held parkland. As previously indicated, with the approval and encouragement of the State of New York, camping areas, hiking, horseback riding and snowmobile trails have been built and maintained on State Forests and used by the public for a myriad of other recreational purposes. As such, State Forests are a “de facto park” and before they can be alienated, approval of the legislature of the State of New York is necessary.

106. Again, while vertical drilling is conditionally allowed by ECL §9-0507 and may be contrary to the Constitution and other provisions of the ECL, HVHHF is clearly inconsistent with the purposes for which State Forest lands were acquired, i.e. watershed protection and reforestation. The incompatibility becomes more striking when compared with the ever-increasing promotion and demand of State Forests as a sanctuary for public recreation, use and enjoyment.

107. The legislature of the State of New York has never approved the alienation of State Forests for HVHHF.

108. Therefore, petitioners respectfully request judgment that the use of State Forests for HVHHF would be a violation of the Common Law Public Trust Doctrine prohibiting their use for HVHHF and that to use State Forests for HVHHF and their de-facto alienation, would require approval by the New York State Legislature.

### **AS AND FOR THE SIXTH CAUSE OF ACTION**

110. Petitioners repeat and reallege the allegations of paragraphs 1 through 109 as if they were fully set forth herein.

111. The use of State Forests as leverage to take the mineral rights from owners of private property adjacent to the State Forest is unconstitutional.

112. By adopting the final SPSFM, DEC has brought the possibility of twenty industrial-scale HVHHF well sites being sited in the Kennedy State Forest surrounding petitioner Applegate's home.

113. In so doing, DEC has brought the probability that some of those wells will actually be drilled under the Applegate property against petitioner Applegate's wishes.

114. By permitting State Forests to be used for HVVHF, DEC is allowing the potential seizure of petitioner Applegate's mineral rights through compulsory integration - on the basis that DEC's leased acreage (Kennedy State Forest) vastly out numbers petitioner Applegate's acreage.

115. The use of State Forests to leverage private or foreign<sup>34</sup> interests in obtaining mineral rights lying beneath neighboring property owners is an unlawful seizure of property, is contrary to the purposes for which the Kennedy State Forests was acquired and contrary to the New York State Constitution and ECL.

**WHEREFORE**, as no similar relief has been sought or granted by any Court, petitioners respectfully request this Court to render a judgment pursuant to Articles 30 and §7806 of the CPLR:

(1) annulling, vacating, and voiding in all respects the New York State Department of Environmental Conservation's combined final Strategic Plan for State Forest Management and Final Generic Environmental Impact Statement issued December 29, 2010 as respondent's adoption of same violated the State Environmental Quality Review Act and was therefore arbitrary, capricious and an abuse of discretion, and;

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<sup>34</sup> The gas drilling rights for Kennedy State Forest are control by the Norwegian State-run oil and gas corporation. See Applegate Affidavit ¶4.

(2) declaring that High Volume Horizontal Hydraulic Fracturing in New York State Forests is inconsistent with the New York State Constitution, Environmental Conservation Law and Public Trust Doctrine with respect to the acquisition, uses and purposes of State Forests and contrary to the property rights of neighbors adjacent to State Forests;

(3) for such other and further relief as to this court may seem just and proper.

Dated: April 28, 2011

By their attorney

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