

# **SUMMARY OF VARIOUS LEGAL TOOLS AVAILABLE FOR ACTIVISTS CONCERNED ABOUT NATURAL GAS DRILLING**

**by Mary Jo Long**

Many activists have asked me some variation of "Isn't there a law that protects us from environmental disruption and destruction?" or "Can't we sue them [DEC, local government, gas drilling companies, etc.] to make them do what they should do?" My 31+ years as an attorney and a lifetime as a political thinker (since age 10) and activist give me some perspective on the legal, legislative and environmental situations we face. While not claiming expertise in these areas, I've prepared this summary to lay out avenues that I believe may, in some circumstances, be helpful to activists. I want to share this with other attorneys, who will hopefully add their own ideas. This is a working document.

## **INTRODUCTION**

As a general rule, the law is what judges say it is. Right now most judges are comfortable upholding the current legal system, which puts corporate privilege before environmental concern. Most laws also uphold the exploitation of natural resources — gas, water, air, forests or wildlife — while limiting the ability of communities to control how their resources are used. In New York State, that is the role of the DEC — they tell us what we can and cannot do.

An historical review shows that this is not new. We know that there were times when courts and lawyers helped to bring about change in the way our culture operated. But great changes, like the abolition of slavery, didn't result from lawsuits. Women's right to vote and to be treated equally have not been rights achieved through lawsuits. It took an amendment to the US Constitution to give women the right to vote. The 1954 Supreme Court decision, *Brown v. Board of Education*, changed "settled law," which had been that "separate but equal" did not violate the Constitution.

The Constitution had not changed but the Supreme Court came up with an opposite conclusion. Why the difference? It was not the brilliance of the lawyers, although they were smart and skilled. The civil rights movement that was growing in the South, and the hard work of the activists propelling it, deserve the credit. Any change in the government's attitude about putting people's health, environmental, cultural and political needs before "economic development" will not come about through any lawsuit.

Lawyers can be helpful to activists, but only as a tool, the way you dig up a weed with a tool. Sometimes a trowel will do the trick, sometimes you need a backhoe. But the tool cannot do it without the driver, the muscle of the people who want to achieve a goal.

I've heard lawyers say, "You can't have a moratorium" or "You can't pass a law requiring gas companies to do water testing before drilling."

That is simply not true. Our governments can pass laws that they think will serve their constituents. They may be challenged by corporation lawyers, and they may get struck down by judges, but the government *can* pass laws that protect people. An attorney's role is not to tell citizens they can't do it. She can advise that it "may" be challenged in court and it "may" lose because it's settled law.

But an attorney's role is to zealously represent the client to the best of her ability. And with our culture becoming aware that we must not use up our resources as quickly as possible, lawyers just may help to bring about change in "settled law."

But focusing on a lawsuit or legal challenge, as the prime way to protect against the negative effects of gas drilling, diffuses and weakens the political movement to achieve that goal. We must organize public support for the values of health, environment and local control over development. Lawsuits won't achieve that.

## **SOME LEGAL TOOLS**

### **1. Writ of Mandamus**

In New York State it's called an Article 78 because that's where it's located in New York's statutes. *Mandamus* is Latin for "we command." This kind of lawsuit is against a governmental body or elected official and directs that body or official to perform a particular act that is their public, official or ministerial duty, or to restore to the party bringing the lawsuit the rights or privileges of which she has been illegally deprived.

For example, when the DEC issues a Supplemental Generic Environmental Impact Statement, a plaintiff could bring an Article 78 proceeding to challenge a DEC ruling by claiming that it did not follow the requirements of the State Environmental Quality Review Act (SEQRA) in issuing the Supplemental Generic Environmental Impact Statement. National Resources Defense Council and Earthjustice have advised activists that they're planning to do an Article 78 challenging the adequacy of the review. The best possible outcome of such a lawsuit would be an order from a court that the DEC has to look at it more, which would delay the issuing of permits. An Article 78 cannot change the law — it is a tool to enforce existing law.

### **2. Moratoria in Municipalities**

The law of moratoria is not a statute like Article 78 — it's found in the common law (law established through judicial rulings rather than legislation) but is just as much a legal tool as statutory law.

Many citizens and municipalities are just beginning to realize they want to have a say in the way we're affected by the gas drilling industry moving into our area. Environmental Conservation Law § 23-0303(2) says that the DEC has exclusive regulatory authority over gas drilling *except* that municipalities retain their rights over local roads and real property taxes.

There are also many areas of gas drilling that the DEC does *not* regulate, such as emergency medical procedures and firefighting services; tracking contaminated soil and small water withdrawals from private sources; and seismic testing.

A moratorium is a law passed by a local government, e.g., a town board, to temporarily halt a particular kind of land use. For example, many town boards in Chenango County voted in local laws that temporarily prohibited the construction of high voltage electric transmission lines when New York Regional Interconnect (NYRI) announced its proposal to build high voltage lines through their towns. Some communities have passed moratoria on gas drilling.

This halting of a particular land use is to provide time to consider impacts and change laws, such as zoning and land use laws, which in turn allows the community to plan carefully and comprehensively rather than realizing after the fact that there could have been a better way. If the municipal government waits until the changes have happened, its ability to channel and alter the project's land use, or health and safety impacts, will be too late.

A moratorium is passed by a town board by preparing a local law (usually by the town attorney) for several reasons. Such a law

- says why the activity is being temporarily banned; for example, the town needs time to study, in a careful manner, the proposed activity and be in a position to adopt a comprehensive local law relating to the proposal,
- must give the effective period for the moratorium to last, which must be a reasonable time frame to conduct the investigation, and
- allows consideration of the health, safety and/or general welfare of the community (there's one that's been upheld that preserves a town's aesthetic character).

It is also recommended that such a local law include a provision dealing with hardship by which the town board could vary the application of the moratorium if it determines there is an unnecessary hardship if the local law is strictly applied. Courts will invalidate a moratorium that does not have a hardship provision. Courts will also invalidate a moratorium if it is passed solely because of public opposition to the project.

After it is prepared, there must be notice and a public hearing before a town can pass a local law.

If a committee hasn't already started work on the impacts, once a moratorium is passed, it should be set up to conduct investigations, hold more hearings and gather any other needed information. This will allow the community time to consider the impact of a project before it happens.

### **3. Freedom of Information requests**

The federal Energy Act of 2005 exempted the oil and natural gas production industry from the disclosure requirement of the Emergency Planning and Community Right-to-Know Act (EPCRA). **[[is it worth mentioning any of the other acts the industry is exempted from? Clean Water, Clean Air, etc?]]**

The New York State Freedom of Information Law (FOIL) can be read at [www.dos.state.ny.us/coog/findex.html](http://www.dos.state.ny.us/coog/findex.html). It is codified in Public Officers Law, Article 7, especially §§ 84–90. Regulations are at 21 NYCRR (New York Code of Rules & Regulations), Part 1401. This summary is to help you prepare and follow through on information requests to agencies. There are different rules for a request of records from the legislature, which can be found at Section 88 of the Public Officers Law.

#### ***Time Frames***

Section 89 contains general provisions, including time frames. The agency or government entity must respond within five business days of receiving the written request. Business days are Monday through Friday, excluding all holidays. It's difficult to know when the FOIL request has been received. The five days means that the agency can respond on the fifth day, which leaves additional time for it to be received by the requester. A valid agency response can be that the request has been forwarded to another person, who will respond by an approximate date, usually 20 business days later.

If there's no timely response or there's a denial within 30 days, the requester must appeal in writing to the chief executive or governing body of the entity or person designated by the agency as the appeal officer. If this appeal is denied or ignored, then the requester has the right to file a lawsuit in Supreme Court (the trial level court in New York State).

The lawsuit is called an Article 78 and must be filed within four months of the denial. An Article 78 is a Writ of Mandamus, which means that the plaintiff is asking the court to order a government official to follow the law. Courts can order the agency to pay the requester's attorney fees if the court rules in the requester's favor.

#### ***General Advice on How & What to Request***

An agency is required to make all records available for public inspection and copying. It is not

required to prepare a document that doesn't already exist unless it's stored in an electronic medium, such as a computer, and can be generated using software that the agency already possesses on that system. If you want the document in electronic form, say so. Explicitly ask the agency to advise if it's withholding any files. If it is, ask for an itemization of materials withheld and why they're being withheld. Agencies are not required to give you an itemized list nor are they required to tell you the reason why a document is withheld, but they frequently will. This information makes an appeal much easier.

### ***Exemptions***

Section 87 of the Public Officers Law (POL) lists the exemptions to Freedom of Information requests. They include items of personal privacy, trade secrets, ongoing law enforcement investigations, etc. If the agency claims that the information sought is a trade secret or commercial information and its disclosure would cause substantial injury to the competitive position of the business, or there's another claim of exemption, there is then a procedure for challenging that claim. That procedure is at § 89(5)(b). The business whose information is being disclosed has the right to appeal or, if the agency agrees with the business, the requester has the right to appeal.

Sometimes an agency will have records from a business and the agency has agreed to a pledge of confidentiality. That information may still be accessible. See *Washington Post v. Insurance Department*, 61 NY 2d 557 (1984). A mere claim that the release of certain records would cause substantial injury to the competitive position of the subject is insufficient for an agency to deny a FOIL request. The party seeking exemption must present specific persuasive evidence that disclosure will cause it to suffer a competitive injury. It cannot rest merely on a speculation that disclosure might cause harm (*Markowitz v. Serio*, 11 NY 3d 43 (Court of Appeals, 2008)).

However, the state Freedom of Information Law (Public Officers law § 86(3)) applies to information that the state receives from permit holders. If, e.g., the DEC requires a permit applicant to disclose the chemicals used in fracking fluids, that permit applicant will have to disclose those *unless* it can prove that disclosure will cause it to suffer a competitive disadvantage. See *Markowitz v. Serio* (2008 NY Slip Opinion 5775 Court of Appeals, June 26, 2008).

### **4. The Environmental Conservation Law (ECL)**

The ECL has penalty provisions for violating laws that include criminal penalties (i.e., time in jail as well as monetary fines) and civil penalties (i.e., money).

While some ECL prohibitions are supposed to be enforced by the DEC and some by the attorney general of New York, there are some that can be enforced by local district attorneys. For example, ECL § 71-3503 makes it a misdemeanor to “throw or deposit gas tar or refuse of a gas house or gas factory, offal, refuse or any other noxious, offensive, or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters.”

Similarly ECL § 71-3501 states: “A person, who deposits, leaves or keeps, on or near a highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or establishes, maintains or carries on, upon or near a public highway or route of public travel, either on the land or on the water, any business, trade or manufacture which is noisome or detrimental to public health, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months, or both.”

When people observe such violations, we can pressure district attorneys in those counties to file charges against this criminal conduct.

### **5. Anticipatory Nuisance lawsuits**

Such suits allow local boards of health, under Article 13 of the NYS Public Health Law, to investigate activities that may be harmful to the public's health. They also have the power to order

clean-up and abatement of the health hazard. Section 1303 requires any public health official to investigate any complaint made by any citizen concerning nuisances that might cause danger or injury to health within the district. This could be a very useful tool for local action.

#### **6. Criminal defense of trespass charges**

Some people have been asking what would happen if they saw, smelled or heard something that could be a gas hazard and went onto private land to investigate. Are they trespassing? What would happen? If the owner asks the visitors to leave and they do not, then they can be charged with criminal trespass. The owner would have to press charges for that to upheld. If people are arrested, they have to appear in court and plead guilty or not guilty.

A person can plead guilty and then later change her mind after consulting with an attorney or thinking about it. If she pleads not guilty, then the judge will schedule a date to come back to court for a trial. She can ask for a jury trial. The burden of proving that a person is guilty of trespass is on the prosecuting attorney and must be “beyond a reasonable doubt.” If the person was investigating a dangerous condition, a prosecutor may not want to prosecute. Or the owner and/or gas drilling corporation may not want a public trial that could reveal dangerous conditions this person was looking into.

#### **7. Rights of Nature**

A few municipalities in Pennsylvania and New Hampshire have passed municipal laws that declare that (1) nature has rights and (2) individuals in their town can bring lawsuits to protect the rights of nature. This approach is contrary to current “settled” law, which gives corporations the rights of persons but does not give nature the rights of persons. Just something to think about. For more information on this approach, see [www.celdf.org](http://www.celdf.org)

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