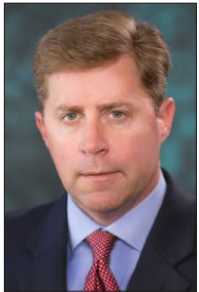


Environmental Law: Energy policy and the fracking battle in the November election



By GEORGE S. VAN NEST

With the presidential election less than three weeks out and the pandemic hitting the state, questions about energy policy and fracking are popping up in various ways. Although it has been a few years since this column has addressed fracking or hydraulic fracturing in New York, a means of oil and natural gas development, the practice has been widely used in other states. Notably, our neighbor

Pennsylvania has tapped into the Marcellus Shale formation to produce natural gas and create thousands of industry jobs, spin-off industry and economic activity. The fracking boom has also benefitted Ohio, West Virginia and Midwestern states like the Dakotas.

Hydraulic fracturing is a method of obtaining oil and natural gas from shale rock in which drillers bore deep wells to reach the shale and then directionally drill laterally to open veins of shale containing the resources. After drilling, well production crews inject water and sand mixtures to create fractures in the shale formations. Fracking has raised concerns based on the chemicals used in the well development process, as well as the large quantities of fracking water that needs to be recycled from the process. The potential for spills, discharges or improper recycling has raised concerns from various opponents of the practice.

In simple economic terms, fracking has led to a boom in oil and natural gas development in the last decade or so, to the extent that the United States has become the largest oil and gas producer in the world. This has led to record low energy prices and the ability for the country to export rather than import resources. A recent Wall Street Journal article notes that since 2018 nearly 90% of the oil and gas drilling projects have been horizontal drilling to support fracking, rather than traditional vertical drilling. Hence, any significant change to fracking regulation will dramatically impact energy development and access to oil and natural gas.

New York effectively shut down fracking in the state based on a Department of Environmental Conservation environmental impact review in 2015. The economic impacts are still being felt. Pennsylvania's Marcellus Shale natural gas development has virtually exploded from around

3 trillion cubic feet in 2013 to 6.2 trillion cubic feet in 2018. As a result, our neighbor state produces about one-fifth of the nation's natural gas and has seen substantial new economic development, as well as well-head impact fees which benefit local communities. In contrast, according to an Institute for Energy Research report, New York produces less than one percent of the natural gas that it consumes, forcing the import of the majority of the gas for consumption. Since the state cut off hydraulic fracturing in the Marcellus it eliminated access to 12 million acres of natural gas resources. Consequently, according to an Energy Information Administration review of New York natural gas consumption, in 2018 of \$10.77 billion in gas purchased, \$10.67 billion was imported from outside the state.

The 2020 COVID-19 pandemic has dramatically impacted the state budget and led to an estimated \$14 billion budget gap. Although circumstances would seem to call for an evaluation of all potential economic development and revenue sources, that has not been the case. As part of the 2021 NYS Budget Gov. Cuomo included legislation which permanently banned fracking. The governor's press release suggested that since banning fracking in 2015, areas of the Southern Tier — where the Marcellus Shale would have been developed — have instead experienced a clean energy boom of some 4,100 jobs since 2017. Unfortunately, this strict adherence to a clean energy agenda in Albany ignores the fact that New York sends billions out of the state to purchase natural gas that is accessible within its own boundaries. Further, the fracking ban prevents the development of industry and spinoff jobs, support services and local economic development across much of New York.

On the national level, fracking has been mentioned numerous times on the presidential campaign trail and at debates. The Trump administration has implemented a market-based approach to energy policy, encouraging sound development of energy resources across the country. The expansion of United States oil and natural gas resources has led to a boom in the industry, job growth and reduction in energy prices. The president has also pointed to a substantial decrease in oil and gas imports as a key means to strengthen the economy and maintain independence from foreign sources. Hence, the Trump Administration does not support a ban on fracking to obtain oil and natural gas resources.

Vice President Biden has been a bit more nuanced in his position on fracking and energy development. In gen-

eral, his campaign position has called for a limited ban on fracking on federally controlled lands, suggesting this is an initial step to reduce production and address climate change concerns. Further, while on the campaign trail in Pennsylvania in recent weeks, he has argued that he will not ban fracking. While a political season certainly brings campaigns to take liberties with positions, this recent position seems to be at odds with his policy and prior statements. The Biden campaign website states that "the Green New Deal is a crucial framework for meeting the climate challenges we face." Among other things, the Biden plan intends to "[e]nsure that the US achieves a 100% clean energy economy and reaches net-zero emissions no later than 2050." Further, when pressed on the issue of fracking in a March 2020 Democratic Presidential candidate debate, Vice President Biden agreed with Sen. Bernie Sanders' opposition to fracking, saying "[n]o more, no new fracking."

If Vice President Biden wins the election in November and proceeds to implement his energy plan, along the lines of the Green New Deal, it has the potential to dramatically impact the nation's energy landscape. First, due to the overwhelming percentage of hydraulic fracturing wells developed, a ban on the practice would effectively shutter the oil and natural gas industry. This would cause a significant loss of industry jobs, ancillary support services and jobs, as well as local development supporting the fracking process. In addition, regardless of the intent to transition to a fossil-fuel free energy plan in the long term, in the near term it would naturally cause the country to shift to other sources of oil and natural gas, likely from other nations. This would cause consumers to bear higher energy prices as well as the risk of market sources outside of the country.

Regardless of one's perspective on the presidential candidates, the policy choices on energy use and development are in stark contrast. While President Trump is interested in maintaining fracking for oil and natural gas, Vice President Biden is likely to restrict the practice in significant ways. With one debate left, perhaps the moderator can ask substantive questions so voters can get a clear understanding of the differences that exist in this critical energy area.

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