

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In the Matter of the Application of

ENVIRONMENTAL WORKING GROUP,

**PETITION**

Petitioner,

For a Judgment Pursuant  
to CPLR Article 78

**INDEX NO.** 5159-12

-against-

**DATE OF FILING:**

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, and  
ANDREW M. CUOMO, AS GOVERNOR OF THE  
STATE OF NEW YORK AND AS HEAD OF THE  
EXECUTIVE DEPARTMENT AND EXECUTIVE  
CHAMBER,

09/17/2012

Respondents.

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Petitioner Environmental Working Group ("Petitioner"), for its verified petition herein, by its attorneys, Caffry & Flower, alleges as follows:

1. By separate requests made pursuant to the Freedom of Information Law, Public Officers Law Article 6 ("FOIL"), dated March 6, 2012, Petitioner requested access to certain records held by each of the respondents regarding the oil and gas industry's efforts to influence the regulation of high-volume horizontal hydraulic fracturing in New York State. The records sought consisted of correspondence and communications since January 1, 2011 among Governor Andrew Cuomo, the Governor's top aides, the Department of Environmental Conservation's ("DEC")

Commissioner and other top DEC officials, with 25 oil and natural gas companies and/or representatives of those companies.

2. Respondents granted Petitioner access to only a very limited number of the records sought and constructively denied access to the remainder of the records, without identifying the records withheld and without claiming that any of them were exempt from disclosure under FOIL.

3. In this CPLR Article 78 proceeding, Petitioner seeks to have the Court:

A. Declare null and void:

(1) the April 11, 2012 decision of respondent DEC that partially denied Petitioner's March 6, 2012 request for access to records pursuant to FOIL;

(2) the May 16, 2012 decision of respondent DEC that denied Petitioner's appeal of that decision;

(3) the April 10, 2012 decisions of respondent Andrew M. Cuomo's ("Governor") Records Access Officer that partially denied Petitioner's March 6, 2012 request for access to records pursuant to FOIL; and

(4) the June 1, 2012 decision of the Governor's FOIL Appeals Officer that denied Petitioner's appeal of that decision;

B. Declare that records were withheld by the respondents;

C. Order respondents to produce all of:

(1) the records identified by Petitioner in Petition ¶¶ 45-46;

(2) the records requested in Petitioner's follow-up FOIL requests described at Petition ¶¶ 54-55, to the extent that they are not covered by the items identified in Petition ¶¶ 45-46; and

(3) the records identified by Petitioner in Petition ¶ 73;

D. Order respondents to conduct diligent searches for additional records that are responsive to Petitioner's March 6, 2012 FOIL requests;

E. Declare that Petitioner is entitled to a hearing on whether additional responsive records exist and are within the Respondents' control, schedule such a hearing before the Court, and order production of all such additional responsive records identified in the hearing;

F. Award Petitioner its attorneys fees and other litigation expenses pursuant to Public Officers Law § 89(4)(c) and the Equal Access to Justice Act, CPLR Article 86;

G. Award Petitioner the costs and disbursements of this proceeding; and

H. Grant such other and further relief as may seem just and proper to the Court.

HIGH-VOLUME HORIZONTAL HYDRAULIC  
FRACTURING IN NEW YORK STATE

4. High-volume horizontal hydraulic fracturing ("hydrofracking") is a relatively new natural gas drilling method that gas producers have proposed to use for the purpose of releasing gas locked in the 350-million-year-old shale formation, known as the Marcellus Shale, that lies under southern New York and other states.

5. According to Petitioner's research, high-volume horizontal hydrofracking involves injecting a mix of water, sand, and chemicals (some of them toxic) under high pressure into natural gas and oil wells. The fluid breaks open underground rock formations and allows natural gas and/or oil to flow to the surface. The process often employs the use of toxic chemicals (including carcinogenic benzene, toluene, ethylbenzene, and xylene) that pose risks to drinking water.

6. High volume hydrofracking in New York is likely to involve injections of between 2.4 million and 8 million gallons of fluid per well. The process is likely to generate between 216,000 and 2.7 million gallons of wastewater per well that may contain high levels of radioactive contaminants and other toxics. This wastewater is very difficult to dispose of safely.

7. The drilling and fracking process poses inherent risks to drinking water, homes and health in the form of gas leaks,

migration of toxic fluids underground, chemical spills, explosions and even earthquakes caused by injecting wastewater underground for disposal - a longstanding and poorly-studied drilling industry practice. All of these hazards can result in decreased property values for the residences and neighborhoods affected.

8. Since 2008, the issue of whether to allow hydrofracking for shale gas has been one of the most prominent political issues in New York. On September 30, 2009, DEC released a draft Supplemental Generic Environmental Impact Statement ("SGEIS") on the potential environmental impacts in New York of horizontal drilling and hydrofracking in the Marcellus Shale, and the impacts of a new or revised regulatory program for hydrofracking.<sup>1</sup> In July 2011, DEC released a Preliminary Revised Draft SGEIS, and on September 7, 2011 it released a Revised Draft SGEIS. On September 28, 2011, DEC released corresponding draft regulations. The public comment period on the Revised Draft SGEIS, and the corresponding proposed hydrofracking regulations, ended on January 11, 2012.

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<sup>1</sup> DEC's review of permits seeking approval for high-volume hydrofracking is an "action" subject to the State Environmental Quality Review ("SEQR") Act, ECL Article 8. 6 NYCRR § 617.2(b). DEC's proposed rulemaking regarding hydrofracking is also an "action" subject to SEQR. 6 NYCRR § 617.2(b). Under SEQR, an environmental impact statement must be completed for every action that may have a significant adverse impact on the environment. 6 NYCRR § 617.9.

9. DEC received more than 66,000 public comments on its revised draft SGEIS in addition to 13,000 comments received on its SGEIS released in 2009, demonstrating the intense public interest in this issue. DEC has yet to release a final SGEIS or final hydrofracking regulations. If adopted, DEC's Revised Draft SGEIS and companion regulations could allow 50,000 gas wells in New York's portion of the Marcellus Shale.

#### THE PARTIES

10. Petitioner Environmental Working Group ("Petitioner" or "EWG") is a non-profit corporation formed pursuant to the laws of the District of Columbia. EWG is tax exempt under § 501(c)(3) of the Internal Revenue Code. Its principal office is located in Washington, D.C. EWG was founded in 1993 for the purpose of, *inter alia*, providing non-partisan research and education on a range of public health and environmental issues.

11. As part of that mission, EWG conducts original research and publishes reports on U.S. oil and natural gas drilling. EWG has given particular attention to hydraulic fracturing and the proposed use of high-volume hydraulic fracturing and horizontal drilling to extract shale gas in New York. In view of current science, EWG believes that before allowing this drilling process in the state, lawmakers and regulatory agencies need to learn

more about the risks of hydrofracking and how to manage them in a way that does not compromise water resources and public health.

12. Respondent DEC is an agency of the State of New York, within the Executive Branch, and was created pursuant to Article 3 of the Environmental Conservation Law ("ECL"). Pursuant to ECL § 3-0105, its principal office is located in the City and County of Albany.

13. Respondent Governor is the governor of the State of New York. His principal office is located in the City and County of Albany. Pursuant to Executive Law § 30, he is the head of the Executive Department. Pursuant to Executive Law § 2, his office is known as the Executive Chamber.

14. Both respondents are an "agency" subject to FOIL as that term is defined in Public Officers Law § 86(3).

#### VENUE

15. Venue is appropriate in Albany County, pursuant to CPLR § 506(b)(1), because the principal offices of the respondents are located in said county, and the actions complained of herein occurred in said county.

#### THE FREEDOM OF INFORMATION LAW

16. FOIL was adopted in 1977 and took effect in 1978. As set forth in Public Officers Law § 84, its purposes include,

*inter alia*, to protect the "people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations . . ." and to do so by providing the public with "access to the records of government."

17. As set forth in Public Officers Law § 87(2), all records held by any agency are available for public inspection and copying, unless they are exempted from disclosure pursuant to an exemption enumerated in §§ 87(2)(a) to (j).

18. There is a presumption that all agency records shall be made available to the public unless they fall squarely within one of the enumerated exceptions to FOIL.

19. FOIL provides for a process whereby members of the public may request access to agency records, and the agency must grant access thereto, except as set forth in Public Officers Law § 87(2). A process for an administrative appeal of a denial of a request for access to agency records is set forth in Public Officers Law § 89(4)(a).

20. In the event that access to any record is denied, and an administrative appeal thereof is unsuccessful, Public Officers Law § 89(4)(b) provides for judicial review of the agency's action pursuant to CPLR Article 78.

21. In any such proceeding, the agency has the burden of proving that the records to which access has been denied fall within the exemptions set forth in Public Officers Law § 87(2).



22. In the event that judicial review of such an agency decision occurs, the court may order a hearing on whether additional requested documents exist and are within the respondent's control. Additionally, the court may undertake an *in camera* review of any records in question, in order to determine whether the agency has met its burden of proving that the records fall within one of the claimed exemptions.

#### INDUSTRY INTERFERENCE WITH REGULATORY DEVELOPMENTS

23. For many years, the oil and gas industry has been providing detailed information to DEC and the Governor in order to influence DEC's proposed regulations regarding hydrofracking.

24. Some of the relevant oil and gas industry companies and representatives include: Chesapeake Energy Corporation ("Chesapeake"), Cabot Oil & Gas Corporation, Anschutz Exploration Corporation, the Independent Oil & Gas Association of New York, Norse Energy Corp., and the West Firm (an Albany law firm).

25. Recently, EWG suspected that influence by members of the oil and gas industry on DEC and the Executive Chamber might explain why the revised SGEIS and companion regulations were heavily tilted in favor of drillers and contained numerous scientific gaps and inaccuracies.

26. On January 11, 2012, EWG expressed some of these concerns in official comments filed with DEC. EWG noted that,

among other problems, DEC's plan would allow drilling too close to water supplies, contained no adequate measures to safely dispose of toxic drilling wastewater and would allow drilling to proceed with too few inspectors.

27. On February 22, 2012, EWG released a report about related concerns that the U.S. Geological Survey ("USGS") expressed in official comments to DEC. The USGS highlighted among other things the risks DEC's plan would pose to drinking water wells and New York City's underground aqueducts. The agency also criticized DEC's significant undercount of natural faults that could allow toxic fluids to leach into groundwater from natural gas wells deep underground.

28. As a result of this evidence, EWG filed its FOIL requests on March 6, 2012 to learn more about whether the drilling industry was exerting undue influence on DEC's environmental review and rulemaking. The responsive documents EWG received from DEC in April showed that in 2011, DEC gave natural gas drilling industry representatives access to draft regulations for hydrofracking as early as six weeks before they were made public.

29. This access gave drilling interests an exclusive opportunity to influence the regulations behind the scenes. In at least one instance, a representative of Chesapeake, the nation's second-leading natural gas producer, used this access to

try to weaken rules restricting discharges of radioactive wastewater.

30. It is EWG's position that, while DEC may obtain cost-of-compliance information from the regulated community, DEC may not treat the regulated entities preferentially by providing them with exclusive access to the specific language of the proposed regulations and permits.

31. Moreover, while the Governor may communicate with individuals and various entities regarding the risks, and benefits of hydrofracking, and the burdens and benefits of the proposed rules for hydrofracking, these communications with private entities outside of the Governor's office must be open to the public's view.

32. Any information that was communicated to DEC or the Governor by the oil and gas industry, or by DEC or the Governor to the oil and gas industry, must be made available to the public to enable "greater . . . understanding and participation" by the public. Public Officers Law § 84.

33. The public has a "right to know" what was communicated to DEC and to the Governor by the oil and gas industry, and what was communicated by DEC or the Governor to the oil and gas industry, especially as it pertains to the risks of high-volume horizontal hydrofracking to public health, drinking water, homes, residents, and property values. Public Officers Law § 84.

34. The public's right "to review the documents and statistics" provided to, or by, DEC and the Governor "should not be thwarted by shrouding it with the cloak of secrecy". Public Officers Law § 84.

AS AND FOR A FIRST SEPARATE  
AND DISTINCT CAUSE OF ACTION  
AGAINST RESPONDENT DEC

35. Each and every allegation set forth above is incorporated in this cause of action as if set forth more fully herein.

36. By letter dated March 6, 2012, Petitioner's Assistant General Counsel, Thomas Cluderay, filed with DEC a FOIL request<sup>2</sup> seeking "[a]ll correspondence and communications since Jan. 1, 2011, among Gov. Andrew Cuomo; Marc Gerstman, DEC executive deputy commissioner; . . . Joseph Martens, DEC commissioner; . . . and/or Steven Russo, DEC general counsel, and [a list of 25] oil and natural gas companies, and/or representatives of oil and natural gas companies." A copy of said FOIL request is annexed

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<sup>2</sup> By letter, also dated March 6, 2012, EWG sent another FOIL request to both entities seeking only electronic records. This more limited request was made to allow each entity to respond to that specific request more easily and quickly. Since EWG submitted a comprehensive FOIL request for all records, including electronic records, the additional FOIL request for only electronic records should be considered merely a subset of the primary request for records "of any kind." Therefore, the two letters will be referred to as one FOIL request.

hereto as Exhibit A. By a letter signed by its Records Access Officer and dated March 14, 2012 DEC acknowledged receipt thereof on that date.

37. Thereafter, by its Records Access Officer, Ruth L. Earl, DEC provided 282 pages of documents in response to EWG's FOIL request. Letter from Ruth L. Earl to EWG's Thomas Cluderay dated April 11, 2012. A copy of said letter, along with pertinent pages of the documents released by DEC, is annexed hereto as Exhibit B. These included e-mails between oil and gas industry attorney Thomas West (The West Firm), Steven Russo (DEC), attorney Yvonne Hennessey (The West Firm), Jennifer Maglienti (DEC), Alison Crocker (DEC), Marc Gerstman (DEC), Brad Gill (Independent Oil and Gas Association of New York), Joseph Martens (DEC), Julia Tighe (DEC), and Mark Boling (Southwestern Energy Co.). Ex. B. DEC claimed that it had provided "all documents identified as responsive." Ex. B, p. 1.

38. Notably, DEC stated nothing about having performed a diligent search for documents, and it did not identify any documents that were being withheld from release.

39. The records received were very limited in depth and breadth. EWG's request covered a 14-month period of time during the height of the controversy over the proposed hydrofracking regulations and permitting scheme. See ¶¶ 8-9, supra.

40. EWG requested "information of any kind, including writings, memoranda, e-mails, text messages, letters, notes, meeting requests, calendar entries, meeting minutes, documents, drawings, graphs, charts, photographs, electronic and magnetic meeting recordings, records of telephone conversations, including cell phone records, and any other compilation of data." Ex. A. EWG also requested "records located on personal and/or political campaign computers and phones created by public officials . . . to the extent that such records were created for the purposes of conducting official state business." Ex. A.

41. Of the 282 pages provided in DEC's FOIL response, all of the records are e-mails (some with attachments included in DEC's FOIL response, others with attachments that were not included in DEC's FOIL response), except for seven memoranda, five letters, and five meeting requests. Ex. B, pp. 100-113.

42. It is inconceivable that there were not more communications between DEC officials and industry representatives during this critical 14-month time frame than what DEC released. The volume of records in response to EWG's FOIL request should have been much larger, considering that the request for records covered the communications of three top DEC officials with more than two dozen different industry representatives.

43. "There [were] no records of telephone conversations, meeting minutes, cell-phone records, notes or text messages,

despite the fact that specific phone conversations and meetings are mentioned in the records" that were released by DEC in response to EWG's broad FOIL request. Ex. C, infra, May 8, 2012 e-mail from Thomas Cluderay to Ruth L. Earl.

44. Additionally, many of the records that were provided by DEC made reference to other communications that took place or that would take place in the future, including meetings and telephone conversations, yet records related to these other communications were not released.

45. Records regarding the following specific events or correspondence were not included in DEC's response, but should have been:

- a. Meeting on 1/25/11 between Martens and Hinman Straub (Ex. B, p. 109);
- b. Meeting on 7/20/11 between Russo and West, and possibly others (Ex. B, pp. 2, 5);
- c. Meeting on 8/15/11 between Russo and Hennessey, and possibly others (Ex. B, p. 7);
- d. Proposed Part 560 sent to West (Ex. B, pp. 14, 17);
- e. Phone call on 8/23/11 between Gerstman and West (Ex. B, pp. 28, 30);
- f. Meeting on 9/6/11 between Martens, Gerstman and Brad Gill (Ex. B, p. 35);
- g. The "recent meetings" between Gerstman, Russo and West, referenced in 9/14/11 e-mail (Ex. B, p. 67);
- h. The "discussions" on 9/13/11 (Ex. B, p. 67);
- i. Meeting on 9/20/11 between Russo, West, Hennessey, and others (Ex. B, p. 68);

- j. Conference call on 10/3/11 between Russo, Brad Gill, Mark Boling, and others (Ex. B, p. 82);
- k. The "meeting that we just had regarding water issues" between West and Russo (Ex. B, p. 94);
- l. Meeting on 12/9/11 between Russo, West, and others (Ex. B, p. 98); and
- m. Letter dated 1/11/12 from Brad Gill to Martens (Ex. G, infra, pp. 21-27).

46. In addition, Petitioner asserts that records exist with respect to the following items, which were referenced in the records that were provided by DEC, and that these records were not included in DEC's response, but should have been:

- a. Draft General Permit sent to West (Ex. B, pp. 13, 16, 18, 21);
- b. Cost of compliance information, and any other analysis, provided by West (Ex. B, pp. 7, 15-16, 30, 31);
- c. Regulatory Flexibility Analysis information sent by West (Ex. B, p. 21);
- d. A "high level meeting" between Gerstman and West (Ex. B, p. 30);
- e. The "shape files that include GIS data" sent to West (Ex. B, pp. 31, 33);
- f. The "technical meetings" regarding the draft stormwater general permit, and air issues (Ex. B, p. 67);
- g. The "early December" meeting between Russo, West, and possibly others (Ex. B, p. 94); and
- h. Modeling files, and other data, sent to West (Ex. B, pp. 71, 98).

47. After reviewing the documents and noting the shockingly small volume of records that was produced, as well as the clear



gaps in the records (as shown above at ¶¶ 45-46), EWG's Assistant General Counsel, Thomas Cluderay, wrote an e-mail to DEC "to confirm that the documents on the CD represent the full universe of records located in the DEC in response" to the FOIL request, and "that no other records, or portions of any records, were withheld." May 4, 2012 e-mail from Thomas Cluderay to Records Access Officer. A copy of the e-mail correspondence between Thomas Cluderay and the Records Access Officer is annexed hereto as Exhibit C.

48. DEC's Records Access Officer stated that "all documents identified as responsive" were sent to EWG, and that "[n]o responsive documents were withheld." Ex. C, May 7, 2012 e-mail from Ruth L. Earl to Thomas Cluderay.

49. Again, DEC provided no certification of having conducted a diligent search for the requested records.

50. Thereafter, since DEC's FOIL response included "no records of telephone conversations, meeting minutes, cell-phone records, notes, or text messages, despite the fact that specific phone conversations and meetings are mentioned in the records sent by the DEC," Mr. Cluderay again requested confirmation that "no records were withheld" and also requested confirmation that "a diligent search was in fact conducted." Ex. C, May 8, 2012 e-mail from Thomas Cluderay to Ruth L. Earl.

51. No response to that e-mail was ever received by EWG.

52. As a result, and due to the likelihood that the Cuomo administration was withholding documents, based upon reports in the Albany Times Union about Governor Cuomo's poor record of complying with FOIL requests (see "Delay Hurts Public Access," *Albany Times Union*, Jimmy Vielkind, March 11, 2011<sup>3</sup>), EWG, pursuant to Public Officers Law § 89(4)(a), filed an administrative appeal of DEC's "partial constructive denial" of its FOIL request because DEC "failed to produce documents responsive" to the request. Letter from Thomas Cluderay to Ruth L. Earl dated May 10, 2012. A copy of said appeal is annexed hereto as Exhibit D. Said appeal (Ex. D) was filed in a timely manner.

53. The appeal to DEC outlined the various records that DEC did not provide, including meeting minutes, telephone records or any other documents related to at least seven different specific meetings that were identified in the documents that DEC did provide.

54. On June 28, 2012, EWG submitted 10 new FOIL requests to the Executive Chamber and to DEC to obtain some of these missing documents, which it has been able to identify through the records that DEC did produce, that should have been provided in response to the original FOIL request dated March 6, 2012.

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<sup>3</sup> This article is available at <http://www.timesunion.com/local/article/Delay-hurts-public-access-3397188.php>.

55. So far, DEC has provided only one document in response to these new FOIL requests. A copy of the remaining nine FOIL requests are attached hereto as Exhibit E.

56. In response to EWG's appeal (Ex. D), DEC stated that it "did not deny access to any records." Letter from Deborah W. Christian to Thomas Cluderay dated May 16, 2012. A copy of said decision is annexed hereto as Exhibit F and incorporated herein.

57. However, DEC's determination that it "did not deny access to any records" is now particularly suspect since it has subsequently provided, pursuant to EWG's new FOIL requests, an additional document that was part of a record<sup>4</sup> released in response to EWG's original FOIL request.

58. EWG filed this Article 78 Petition to challenge the DEC's determination regarding the partial denial of its FOIL request and the denial of its FOIL appeal.

59. The records that were released by DEC do not satisfy Petitioner's intended purpose in filing said FOIL request, that of learning about the oil and gas industry's efforts to influence DEC's regulation of high-volume horizontal hydraulic fracturing.

60. Respondent DEC has not met its burden of proving that it conducted a diligent search. It never certified, in

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<sup>4</sup> The additional document was attached to an e-mail communication that was provided by DEC in response to the original FOIL request. Notably, some attachments to other e-mails provided by DEC in response to the original FOIL request were released, and other attachments were not released.

accordance with Public Officers Law § 89(3)(a), that it did not have possession of the requested records, or that it could not find the requested records after a diligent search.

61. The action of respondent DEC in denying Petitioner access to records related to the communications and correspondence of DEC's Commissioner and other top DEC officials with individuals outside the agency was arbitrary and capricious, was affected by error of law and was a failure to perform a duty enjoined upon it by law.

62. DEC lacked a reasonable basis for denying Petitioner access to the requested records. Accordingly, pursuant to Public Officers Law § 89(4)(c), Petitioner should be awarded its reasonable attorney's fees and other litigation costs.

AS AND FOR A SECOND SEPARATE  
AND DISTINCT CAUSE OF ACTION  
AGAINST RESPONDENT GOVERNOR

63. Each and every allegation set forth above is incorporated in this cause of action as if set forth more fully herein.

64. By letter dated March 6, 2012, Petitioner filed with the Governor's office ("Executive Chamber") a FOIL request requesting "[a]ll correspondence and communications since Jan. 1, 2011, among Gov. Andrew Cuomo; . . . Howard Glaser, director of state operations for Gov. Cuomo; Robert Hallman, N.Y. deputy

secretary of energy and the environment and former attorney at Cahill Gordon & Reindel; . . . Lawrence Schwartz, secretary to Gov. Cuomo; . . . and [a list of 25] oil and natural gas companies, and/or representatives of oil and natural gas companies." A copy of said FOIL request is annexed hereto as Exhibit A. By a letter signed by its Records Access Officer and dated March 13, 2012, the Executive Chamber acknowledged receipt thereof.

65. By letter dated April 10, 2012, the Executive Chamber's Records Access Officer, Justin C. Levin, responded to said FOIL request by providing a copy of one electronic communication. A copy of said decision is annexed hereto as part of Exhibit G at pp. 1-2. The single electronic record was an electronic calendar entry for a meeting, on March 1, 2012, with Chesapeake, presumably regarding high-volume horizontal hydraulic fracturing. Ex. G, p.7. No other records regarding this particular meeting, such as an agenda, attendance list, notes or meeting minutes, or follow-up communications, were released.

66. By a second letter dated April 10, 2012, the Executive Chamber also produced 85 other pages of records, and a DVD video. A copy of said decision, along with pertinent pages of the documents released by the Executive Chamber, is annexed hereto as part of Exhibit G at pp. 3-27. These records included:

testimony before the New York State Senate by Chesapeake's Paul Hartman regarding drilling wastes, a letter from

Chesapeake's Mike Brownell to Commissioner Martens regarding the state's plan for regulating high-volume hydraulic fracturing, a memo with a partially redacted title about local governments' ability to regulate oil and gas drilling, a memo from Chesapeake opposing proposed legislation to regulate drilling waste, an article from *Oil & Gas Journal* about the economic benefits of developing the Utica Shale, Chesapeake's comments to the DEC regarding the state's plan for regulating high-volume hydraulic fracturing, similar comments from the Independent Oil & Gas Association of New York, several fact sheets about drilling from Chesapeake that appear similar to those available on the company's web site and a DVD about natural gas drilling in the Marcellus Shale produced by Chesapeake. Ex. I, infra.

67. The Executive Chamber claimed that it had "performed a diligent search" and did not identify any documents that were being withheld from release. Ex. G, pp. 2, 4.

68. Nevertheless, the extent of these records was extremely limited in depth and breadth and cannot possibly comprise the full universe of records responsive to EWG's broad FOIL request.

69. EWG requested "information of any kind, including writings, memoranda, e-mails, text messages, letters, notes, meeting requests, calendar entries, meeting minutes, documents, drawings, graphs, charts, photographs, electronic and magnetic meeting recordings, records of telephone conversations, including cell phone records, and any other compilation of data." Ex. A. EWG also requested "records located on personal and/or political campaign computers and phones created by public officials . . . to the extent that such records were created for the purposes of conducting official state business." Ex. A.

70. The request covered the communications of the Governor and three of his top aides over a period of 14 months when the proposed regulations and permit process regarding hydrofracking were extremely controversial. See ¶¶ 8-9, supra.

71. It is "simply inconceivable" that there were not more communications between the Governor's office and industry representatives during this critical 14-month time frame than what the Executive Chamber released. Ex. I, infra.

72. The volume of communication records in response to EWG's FOIL request should have been much larger, considering that the request for records covered the communications of the Governor and three of his top officials, with more than two dozen different industry representatives.

73. Additionally, upon information and belief, the following specific records were not included in the Executive Chamber's response, but should have been:

- a. Letter dated 9/2/11 from Brad Gill to Martens, copy to Cuomo (provided in DEC's response at Ex. B, pp. 36-66);
- b. Letter dated 10/17/11 from West to Martens, copy to Cuomo (provided in DEC's response at Ex. B, pp. 91-92);
- c. Correspondence regarding the "Governor's High-Volume Hydraulic Fracturing Advisory Panel" (see Ex. B, pp. 99-103);
- d. Correspondence regarding "opposition" groups (e.g., "Withdraw Revised Draft SGEIS Coalition", and Marion Karl), considering that Mr. West communicated to other Executive Chamber officials, and DEC, regarding such groups (see Ex. B, pp. 28, 99-101); and

- e. Correspondence from Thomas West to Robert Hallman considering that there were communications from Mr. West to Mr. Hallman's predecessor, Thomas Congdon, from August to October 2011, and considering Mr. West's meeting with Mr. Hallman on March 1, 2012 (see Ex. B, pp. 28, 90).

74. Since the response contained so few records, on such a high-profile issue that should have generated hundreds, if not thousands, of records in the Governor's office, EWG sent an e-mail to the Executive Chamber asking for confirmation that no records were withheld, and that "a good faith, diligent search for records was conducted." E-mail from Thomas Cluderay to Records Access Officer dated May 8, 2011. A copy of the e-mail correspondence between Thomas Cluderay and the Executive Chamber's Records Access Office is annexed hereto as Exhibit H.

75. EWG received no response to this e-mail.

76. Due to the lack of records, and the likelihood that the Cuomo administration was withholding documents, based upon reports in the Albany Times Union about Governor Cuomo's poor record of complying with FOIL requests (see "Delay Hurts Public Access," *Albany Times Union*, Jimmy Vielkind, March 11, 2011<sup>5</sup>), Petitioner then appealed the "partial constructive denial" by the Executive Chamber pursuant to Public Officers Law § 89(4)(a). Letter from Thomas Cluderay to Justin C. Levin, dated May 18,

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<sup>5</sup> This article is available at <http://www.timesunion.com/local/article/Delay-hurts-public-access-3397188.php>.



2012. A copy of said appeal is annexed hereto as Exhibit I. Said appeal (Ex. I) was filed in a timely manner.

77. In addition to the minimal amount of records provided, EWG questioned, in its FOIL appeal, why there were no e-mail records or records of telephone calls from Thomas West to the Executive Chamber when the DEC's response included numerous e-mails from Thomas West, and the Executive Chamber's own response included a record of Thomas West meeting with Robert Hallman of the Governor's staff. Ex. G, p. 7.

78. Additionally, EWG's FOIL appeal questioned why the Executive Chamber's response included a variety of materials from Chesapeake (Ex. G, pp. 8-13, 17-20), yet included not a single record from any of the other drilling companies (see ¶24, supra) identified in EWG's original FOIL request. Ex. A.

79. By letter dated June 1, 2012, the Executive Chamber upheld the initial decision by the Executive Chamber and denied EWG's FOIL appeal by stating that it had "already certified to having done a diligent search" and that "[n]o responsive records were withheld." June 1, 2012 letter from Seth Agata to Thomas Cluderay. A copy of said decision is annexed hereto as Exhibit J.

80. EWG filed this Article 78 Petition to challenge the Executive Chamber's determination regarding the partial denial of its FOIL request and the denial of its FOIL appeal.

81. The records that were released by the Executive Chamber do not satisfy Petitioner's intended purpose in filing said FOIL request, that of learning about the oil and gas industry's efforts to influence the Governor's position on the regulation of high-volume horizontal hydraulic fracturing.

82. The action of respondent Governor in denying Petitioner access to records related to the communications and correspondence of the Governor and his top aides with individuals outside the agency was arbitrary and capricious, was affected by error of law and was a failure to perform a duty enjoined upon it by law.

83. The Governor lacked a reasonable basis for denying Petitioner access to the requested records. Accordingly, pursuant to Public Officers Law § 89(4)(c), Petitioner should be awarded its reasonable attorney's fees and other litigation costs.

AS AND FOR A THIRD SEPARATE  
AND DISTINCT CAUSE OF ACTION  
AGAINST RESPONDENTS GOVERNOR AND DEC

84. Each and every allegation set forth above is incorporated in this cause of action as if set forth more fully herein.

85. Petitioner is a "party" as defined in CPLR § 8602(d).

86. Respondents are each the "State" as defined in CPLR § 8602(g).

87. The position of respondents in denying Petitioner access to records requested by Petitioner pursuant to FOIL was not substantially justified, and there are no special circumstances that would make an award, to the Petitioner and against the respondents of fees and other expenses, unjust.

88. Therefore, Petitioner is entitled to an award against respondents DEC and the Governor of its legal fees and expenses pursuant to CPLR Article 86, the Equal Access to Justice Act.

WHEREFORE, Petitioner requests that judgment be made and entered in its favor as follows:

A. Declare null and void:

(1) the April 11, 2012 decision of respondent DEC that partially denied Petitioner's March 6, 2012 request for access to records pursuant to FOIL;

(2) the May 16, 2012 decision of respondent DEC that denied Petitioner's appeal of that decision;

(3) the April 10, 2012 decisions of respondent Andrew M. Cuomo's Records Access Officer that partially denied Petitioner's March 6, 2012 request for access to records pursuant to FOIL; and

(4) the June 1, 2012 decision of the respondent Andrew M. Cuomo's FOIL Appeals Officer that denied Petitioner's appeal of that decision;

B. Declare that records were withheld by the respondents;

C. Order respondents to produce all of:

(1) the records identified by Petitioner in Petition ¶¶ 45-46;

(2) the records requested in Petitioner's follow-up FOIL requests described at Petition ¶¶ 54-55, to the extent that they are not covered by the items identified in Petition ¶¶ 45-46; and

(3) the records identified by Petitioner in Petition ¶73;

D. Order respondents to conduct diligent searches for additional records that are responsive to Petitioner's March 6, 2012 FOIL requests;

E. Declare that Petitioner is entitled to a hearing on whether additional responsive records exist and are within the Respondents' control, schedule such a hearing before the Court, and order production of all such additional responsive records identified in the hearing;

F. Award Petitioner its attorneys fees and other litigation expenses pursuant to Public Officers Law § 89(4)(c) and the Equal Access to Justice Act, CPLR Article 86;

