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Vemont

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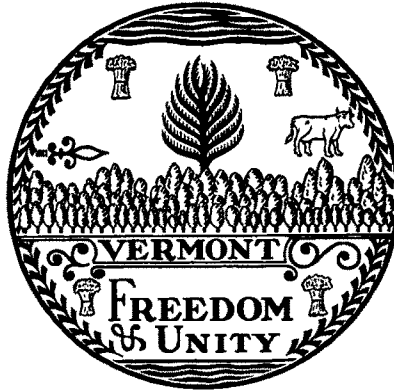
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VERMONT



By: Roman V. Sidortsov

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I. INTRODUCTION

Prior to 2012, few energy professionals would have listed Vermont as a must-watch state for emerging oil and gas law and policy. In recent years, Vermont has been known in energy circles primarily for its efficiency utility, Efficiency Vermont,¹ and for its dispute with Entergy, a Louisiana-based utility, over relicensing the Vermont Yankee

1. See, e.g., Blair Hamilton, *Florida Can Follow In Vermont's Energy-Efficiency Steps*, PALM BEACH POST, Dec. 1, 2009, at 12A (arguing for the benefits of learning from Vermont's experience with implementing sweeping energy efficiency measures on a state-wide scale).

nuclear power plant.² Yet in 2012, Vermont unexpectedly burst into national oil and gas headlines. Remarkably, it was not a major oil or gas discovery that made the news. Rather, Vermont became the first state in the Union to ban hydraulic fracturing (“fracking”).³

Currently, no oil or natural gas refining or coal mining activities take place in Vermont.⁴ Correspondingly, the Vermont legislature, state regulatory agencies, and courts have not been active in enacting, amending, promulgating, enforcing, and interpreting laws and regulations governing these activities. Thus, the fracking legislation, commonly known as House Bill 464 (“H. 464”) serves as the sole impetus for writing this Article. Vermont’s first-in-the-nation fracking ban also presents an opportunity to discuss one of the statutes that H. 464 amended and supplemented,⁵ the Vermont Natural Gas and Oil Conservation Act.⁶

This Article opens with a discussion of the Vermont Natural Gas and Oil Conservation Act. In this section, the Act’s statutory purposes, its main features and themes, and the role of the Vermont Natural Gas and Oil Resources Board are considered. The Act is examined in comparison to the 2004 Model Oil and Gas Conservation Act. The second part of this Article is devoted to H. 464. In this section, the potential for developing unconventional oil and gas resources in Vermont is discussed, along with H. 464’s legislative history and key provisions.

II. THE VERMONT NATURAL GAS AND OIL CONSERVATION ACT

A. Introduction

The existence of Vermont’s oil and gas conservation statute and fully staffed oil and gas conservation commission is a curiosity not

2. See, e.g., Dave Gram, *U.S. Appeals Court Says Vt. Late with Nuclear Appeal*, BLOOMBERG BUSINESSWEEK NEWS (June 27, 2012), <http://www.businessweek.com/ap/2012-06-27/us-appeals-court-says-vt-dot-late-with-nuclear-appeal>.

3. DemocracyNow, *Video: Vermont Becomes 1st State to Ban Fracking – Democracy Now!*, GOVERNOR PETER SHUMLIN, STATE OF VT. (May 17, 2012, 1:15 PM), <http://governor.vermont.gov/blog-video-vermont-becomes-first-state-to-ban-fracking-democracy-now>.

4. *Comprehensive Energy Plan 2011, Appendix 1—Conceptual Map of Vermont’s Energy Goals and Decision Makers*, VT. DEP’T OF PUB. SERV., 23 (Dec. 2011), http://publicservice.vermont.gov/sites/psd/files/Pubs_Plans_Reports/State_Plans/Comp_Energy_Plan/2011/2011%20CEP_Appendixes%5b1%5d.pdf.

5. H. 464, 2011–2012 Leg. Sess. §§ 2, 3 (Vt. 2012) (enacted), available at <http://www.leg.state.vt.us/docs/2012/Acts/ACT152.pdf>. Note, as of the time of writing of this Article, H. 464 has not been codified.

6. VT. STAT. ANN. tit. 29, §§ 501–66 (West 2012). Note that the Vermont Natural Gas and Oil Conservation Act has not been covered in the legal literature in any meaningful length.

only to most Vermonters but also many oil and gas professionals.⁷ The state has never had a producing oil or gas well within its borders and, as mentioned above, has never been viewed as having any meaningful potential for hydrocarbon development.⁸ However, several oil and gas companies drilled seven exploration wells in Vermont. Maquam Oil & Gas Development Corporation and Henderson Oil Company drilled the first well, Yandow No. 1, in 1957 and Columbia Gas Transmission Company and Delta Drilling drilled Vermont's most recent well, Burnor No. 1, in 1984.⁹

B. *Vermont's Conservation Legislation*

Despite the lack of oil and gas production, the Vermont legislature felt compelled to adopt the Vermont Natural Gas and Oil Conservation Act in 1982 (the "Vermont Conservation Act").¹⁰ This was not Vermont's first oil and gas statute, as it replaced a chapter in the Vermont Statutes entitled "Natural Gas and Oil Resources."¹¹

Similar to the 2004 Model Oil and Gas Conservation Act (the "Model Act"), promulgated by the Interstate Oil and Gas Compact Commission ("IOGCC"),¹² the Vermont Conservation Act states, "The prevention of waste of oil and gas, the promotion of conservation, and the protection of correlative rights of owners are declared to be in the public interest."¹³ The Vermont Conservation Act's purposes are similar to those of the Model Act,¹⁴ including encouragement of oil and gas development, protection of property rights, and prevention of long-term environmental harm.¹⁵ The statute provides for liberal interpretation of its provisions (in fulfillment of statutory purposes) and recognizes the superiority of local zoning and land use laws and regulations.¹⁶

C. *Vermont Natural Gas and Oil Resources Board*

To ensure due administration and enforcement of the Vermont Conservation Act, the Vermont legislature created the Vermont Natu-

7. *Boards & Commissions, Natural Gas and Oil Resources Board*, GOVERNOR PETER SHUMLIN, STATE OF VT., <https://secure.vermont.gov/GOV/boards/description.php?board=107> (last visited Sept. 22, 2012).

8. *Earth Resources – Oil and Gas*, VT. GEOLOGICAL SURVEY, DEP'T OF ENVTL. CONSERVATION, <http://www.anr.state.vt.us/dec/geo/oilandgas.htm> (last updated Mar. 29, 2012).

9. *Id.*

10. *See* § 501.

11. VT. STAT. ANN. tit. 29, ch. 13 (repealed 1981).

12. MODEL OIL AND GAS CONSERVATION ACT, declaration of purpose (Interstate Oil & Gas Compact Comm'n 2004).

13. VT. STAT. ANN. tit. 29, § 502(a) (West 2012).

14. *Compare id.*, with MODEL OIL AND GAS CONSERVATION ACT, declaration of purpose (Interstate Oil & Gas Compact Comm'n 2004).

15. § 502(b).

16. VT. STAT. ANN. tit. 29, § 566 (West 2012).

ral Gas and Oil Resources Board (the “Board”).¹⁷ The Board consists of five members who are appointed by the governor (with the consent and advice of the state senate) for three years.¹⁸ The legislature set forth a few safeguards to give the Board a degree of political independence. Board members have staggered terms (no more than two terms can expire in a given year); a board member’s term lasts a year longer than that of the governor and state legislators; and no board member can have managerial or financial affiliation with any entity that falls under the Board’s purview.¹⁹

The Vermont Conservation Act gives the Board authority “over all lands and all oil and gas resources.”²⁰ The Board has rulemaking,²¹ permitting,²² and adjudicative powers, including the power to issue subpoenas.²³ In the case of a conflict of statutory objectives, the Board must make prevention of waste its foremost priority.²⁴

D. *Key Provisions and Themes of the Vermont Conservation Act*

Unlike the Model Act,²⁵ the Vermont Conservation Act requires the Board to limit production to avoid physical and economic waste.²⁶ Pooling and unitization provisions²⁷ closely resemble those of the Model Act,²⁸ although they provide less detail. For example, the Vermont Conservation Act dedicates only three sections to unitization provisions,²⁹ including one section devoted to antitrust immunity for voluntary units³⁰ and field-wide unitization.³¹ The state’s minimalist approach to these important provisions is easy to understand—the lack of oil and gas exploration and extraction created no need for more elaborate guidelines.

Protection of both the state’s and the general public’s interests, as well as above-average protection of surface estates, represent the two distinct themes running throughout the Vermont Conservation Act’s remaining provisions. The Act sets forth specific requirements for

17. See § 502(c).

18. VT. STAT. ANN. tit. 29, § 504(a) (West 2012).

19. See § 504(a), (c), (d).

20. VT. STAT. ANN. tit. 29, § 505(a) (West 2012).

21. VT. STAT. ANN. tit. 29, § 517 (West 2012).

22. VT. STAT. ANN. tit. 29, § 541 (West 2012).

23. VT. STAT. ANN. tit. 29, §§ 511–514 (West 2012).

24. § 505(a).

25. MODEL OIL AND GAS CONSERVATION ACT § 8 (Interstate Oil & Gas Compact Comm’n 2004).

26. VT. STAT. ANN. tit. 29, § 521 (West 2012).

27. VT. STAT. ANN. tit. 29, §§ 522–526 (West 2012).

28. MODEL OIL AND GAS CONSERVATION ACT §§ 9–28 (Interstate Oil & Gas Compact Comm’n 2004).

29. §§ 522, 524–525.

30. § 524.

31. § 525.

management of state oil and gas resources,³² including requirements for leasing state lands for oil and gas development.³³ The Vermont Conservation Act requires advance notice to the general public of the state's intent to lease its lands.³⁴ The public's interests are further protected by a provision allowing the Board to "dedicate" all natural gas produced from state lands "for the use and benefit of the people of the state."³⁵ Finally, the state specifically reserves its mineral rights on state lands, the surface rights of which (e.g., timber) are leased.³⁶

As noted above, the Vermont Conservation Act contains several provisions serving as safeguards for surface estate owners. Notable safeguards include well-abandonment provisions,³⁷ merger of oil and gas interests into the surface estate in cases where such interests are abandoned,³⁸ and protection of the appraisal value of agricultural and forest lands under oil and gas development for preferential tax status.³⁹ Aside from provisions setting forth statutory objectives,⁴⁰ competency areas of board members,⁴¹ and protection of fresh water resources,⁴² the Vermont Conservation Act does not specifically mention environmental protection standards.

The Vermont Conservation Act also authorizes the state's governor to join an interstate compact to conserve oil and gas.⁴³ Vermont governors have passed on this opportunity, and given the enactment of the sweeping legislation banning hydraulic fracturing in the state, Vermont's chances of becoming a compact's signatory and IOGCC member appear to be slim.⁴⁴

Despite being, for all practical purposes, a "dead" law, the Vermont Conservation Act should draw interest from oil and gas law scholars. Frozen in time (the Vermont Legislature made only one modern amendment to the statute in 2003), the Act represents a historic snapshot of "just-in-case" legislation enacted in a state not known for hydrocarbon production.⁴⁵

32. See VT. STAT. ANN. tit. 29, § 531 (West 2012).

33. See VT. STAT. ANN. tit. 29, § 532 (West 2012).

34. VT. STAT. ANN. tit. 29, § 533 (West 2012).

35. See VT. STAT. ANN. tit. 29, § 534 (West 2012).

36. VT. STAT. ANN. tit. 29, § 535 (West 2012).

37. See VT. STAT. ANN. tit. 29, § 544 (West 2012).

38. VT. STAT. ANN. tit. 29, § 563 (West 2012).

39. See VT. STAT. ANN. tit. 29, § 564 (West 2012).

40. VT. STAT. ANN. tit. 29, § 502(b)(3) (West 2012).

41. VT. STAT. ANN. tit. 29, § 504(b) (West 2012).

42. VT. STAT. ANN. tit. 29, § 505(b)(3)(C) (West 2012) (establishing the Board's authority to require operators to prevent pollution of fresh water resources).

43. VT. STAT. ANN. tit. 29, § 565 (West 2012).

44. See *Member States*, INTERSTATE OIL & GAS COMPACT COMM'N, <http://iogcc.state.ok.us/member-states> (last visited Sept. 22, 2012).

45. See VT. STAT. ANN. tit. 29, §§ 501–566 (West 2012).

III. HOUSE BILL 464

A. *Introduction*

House Bill 464, signed into law on May 16, 2012, ensured that the Vermont Conservation Act would remain a dormant piece of legislation and the Vermont Natural Gas and Oil Resources Board would remain a symbolic entity for the foreseeable future. The law banned outright the use of the only commercially available technology, hydraulic fracturing, for extracting shale gas and oil, which are the only hydrocarbon resources that Vermont may have.⁴⁶ Although the Vermont legislature had a solid reason—potential contamination of the drinking water supply—for regulating the use of fracking in the state, the extreme means of achieving the regulatory goal drew criticism from the industry.⁴⁷ The effect of H. 464 is likely to be minimal for hydrocarbon development in the state because questions exist about the presence of economically recoverable resources in Vermont.⁴⁸ However, the indirect effect of H. 464 outside Vermont should not be underestimated. In states concerned with shortages and contamination of the drinking water supply, like-minded legislators and voters may look to H. 464 as a guide.

B. *History of Developing Unconventional Oil and Gas Resources in Vermont*

During a recent conversation with the Author, a prominent Vermont environmental law expert compared the need for regulating hydraulic fracturing in Vermont to regulating sand quarries in the North Pole. The conventional wisdom is that there are no economically recoverable oil and gas resources in Vermont. Thus, in the absence of a regulated natural resource, there is nothing for the state to regulate. However, this popular belief may not be true based on an assessment conducted by the Vermont Geological Survey.⁴⁹ The assessment notes, “Vermont stratigraphic and structural relations are consistent

46. H. 464, 2011–2012 Leg. Sess. § 3 (Vt. 2012) (enacted), available at <http://www.leg.state.vt.us/docs/2012/Acts/ACT152.pdf>.

47. Reid Porter, *API: Misguided Vermont Legislature Ignores Energy Demand, Need for Jobs and Government Revenue*, AM. PETROLEUM INST. (May 4, 2012), <http://www.api.org/news-and-media/news/newsitems/2012/may-2012/api-misguided-vermont-legislature-ignores-energy-demand.aspx>.

48. Technical Advisory Committee for the Vt. Agency of Natural Res., Approved Meeting Minutes 1 (Jan. 10, 2012), available at <http://www.anr.state.vt.us/dec/www/protection/TAC2002/2012-01-10TACMinutes.pdf> [hereinafter ANR Minutes].

49. Laurence R. Becker et al., *Northern Vermont Southern Quebec: Utica Shale Equivalents, Stratigraphic and Structural Relations*, VT. GEOLOGICAL SURVEY, <http://www.anr.state.vt.us/dec/geo/pdfdocs/VT%20and%20Quebec%20Potential%20OOG-A3.pdf> (last visited Oct. 9, 2012) (describing the potential for hydrocarbon resources in the state based on the similarities of the geological formations of Southern Quebec and Northern Vermont).

with Quebec fairway maps.”⁵⁰ Given the fact that Quebec has three wells with “good shale gas shows,” there exists a possibility that similar results can be achieved in Northern Vermont.⁵¹ Furthermore, according to the lead author of the assessment, Vermont State Geologist Laurence R. Becker, certain areas of Vermont have potential for hydrocarbon development if natural gas prices are sufficiently high.⁵²

Because no oil or gas is currently produced in Vermont and the possibility of commercially scalable production is uncertain, the *probability* of such activities contaminating the drinking water supply appears to be very low. However, because two-thirds of the state’s population directly or indirectly depends on underground aquifers for their drinking water, the *severity* of the impact of even minor and rare contamination may be high.⁵³ Thus, the following statement by Vermont Governor Peter Shumlin, made upon signing H. 464 into law, is based on defensible risk assessment grounds:

This bill will ensure we do not inject chemicals into groundwater in a desperate pursuit for energy. It is a big moment. I hope other states will follow us. The science on fracking is uncertain at best. Let the other states be the guinea pigs. Let the Green Mountain State preserve its clean water, its lakes, its rivers and its quality of life.⁵⁴

C. Legislative History of House Bill 464

While considering H. 464, both houses of the Vermont legislature relied on testimony from a wide spectrum of experts representing the industry, environmental organizations, and the scientific community.⁵⁵ The Agency of Natural Resources (“ANR”), the state regulator that

50. *Id.*

51. *Id.*

52. ANR Minutes, *supra* note 48, at 1.

53. Evan Mulholland, *Groundwater Quantity Regulation in Vermont: A Path Forward*, 8 VT. J. ENVTL. L. 1, 1 (2006–2007).

54. DemocracyNow, *supra* note 3.

55. See *An Act Relating to Hydraulic Fracturing Wells for Natural Gas and Oil Production: Hearing on H. 464 Before the H. Comm. On Fish, Wildlife & Water Res.*, 2011–2012 Leg. Sess. (Vt. 2012), <http://www.leg.state.vt.us/database/leghist/details.cfm?Session=2012&MeetingID=%20%20%20%20%209533> (last visited Sept. 22, 2012) (featuring testimony from a Vermont State Geologist); *An Act Relating to Hydraulic Fracturing Wells for Natural Gas and Oil Production: Hearing on H. 464 Before the H. Comm. On Fish, Wildlife & Water Res.*, 2011–2012 Leg. Sess. (Vt. 2012), <http://www.leg.state.vt.us/database/leghist/details.cfm?Session=2012&MeetingID%20%20%20%20%209534> (last visited Sept. 22, 2012) (featuring testimonies from representatives of the Vermont Natural Resources Council, Vermont Public Interest Research Group, and Cornell University Extension Service); *An Act Relating to Hydraulic Fracturing Wells for Natural Gas and Oil Production: Hearing on H. 464 Before the H. Comm. On Fish, Wildlife & Water Res.*, 2011–2012 Leg. Sess. (Vt. 2012), <http://www.leg.state.vt.us/database/leghist/details.cfm?Session=2012&MeetingID%20%20%20%20%209535> (last visited Sept. 22, 2012) (featuring testimonies from representatives of the American Petroleum Institute and Catskill Mountain Keeper).

would have been charged with implementation and enforcement of the statute (as it was introduced), followed a similar balanced approach while forming its position on the bill as it was being drafted.⁵⁶ Thus, it was rather surprising to see the bill, as it was introduced in the House, impose an outright ban on fracking activities when it was introduced in the House.⁵⁷ The bill utilized ANR's power to regulate discharges into state waters and prohibited the issuance of discharge permits "for conventional or enhanced recovery of natural gas or oil."⁵⁸

The House subsequently amended the bill, taking a more even-handed approach. The outright ban was replaced with a three-year moratorium on issuing discharge permits for oil and gas extraction.⁵⁹ According to Vermont Speaker of the House Shap Smith, the three-year moratorium term would give the Vermont Department of Environmental Conservation (an ANR's subdivision) enough time to incorporate the results of a United States Environmental Protection Agency report, due in 2014, into revised groundwater permitting regulations.⁶⁰ The amended legislation did in fact require ANR to develop underground injection control rules.⁶¹ However, this more balanced approach was short lived, as the Vermont Senate introduced another amendment, rejecting the moratorium and pushing the legislation toward an even more elaborate ban.

D. Key Provisions of House Bill 464

As noted above, H. 464 prohibits the following: (1) hydraulic fracturing activities and (2) the collection, storage, and treatment of wastewater from hydraulic fracturing.⁶² The statute also amends the state water quality law.⁶³ Namely, it proscribes discharge of any waste from hydraulic fracturing.⁶⁴

Instead of setting a timeframe for reconsideration of H. 464, the Vermont legislature opted for the ban to continue indefinitely. The statute instructs ANR's Secretary to submit two reports to the legisla-

56. See ANR Minutes, *supra* note 48, at 1, 2 (expressing a wide range of opinions regarding the use of hydraulic fracturing for oil and gas extraction).

57. H. 464, 2011–2012 Leg. Sess. § 2 (Vt. 2012) (as introduced by H. Comm. On Fish, Wildlife & Water Res., Jan. 3, 2012), available at <http://www.leg.state.vt.us/docs/2012/Bills/Intro/H-464.pdf>.

58. *Id.*

59. H. 464, 2011–2012 Leg. Sess. §§ 2–4 (Vt. 2012) (as passed by House, Feb. 1, 2012), available at <http://www.leg.state.vt.us/docs/2012/bills/House/H-464.pdf>.

60. Press Release, Shap Smith, Vt. Speaker of the House, House Approves Fracking Moratorium (Jan. 31, 2012), http://speaker.vermont.gov/press_releases/Fracking.

61. H. 464, 2011–2012 Leg. Sess. § 5 (Vt. 2012) (as passed by House, Feb. 1, 2012), available at <http://www.leg.state.vt.us/docs/2012/bills/House/H-464.pdf>.

62. H. 464, 2011–2012 Leg. Sess. § 3 (Vt. 2012) (enacted), available at <http://www.leg.state.vt.us/docs/2012/Acts/ACT152.pdf>.

63. *Id.* § 4.

64. *Id.*

ture. In the first report, which is due by January 15, 2015, ANR must elaborate on how fracking should be regulated in the state.⁶⁵ In the second report, which is due a year later, the agency must report to the legislature regarding the safety of hydraulic fracturing, including whether it recommends lifting of the ban.⁶⁶ Finally, pursuant to H. 464, ANR must amend its rules regarding discharging waste into injection wells to bring them into compliance with applicable federal regulations and to cover newly emerged technologies.⁶⁷ The legislature is not required to act on the ANR reports, as H. 464 does not create an obligation for the legislature to consider repeal or amendment of the statute.⁶⁸

IV. CONCLUSION

For a state that has never had a producing oil or gas well, Vermont made a sizable ripple in the energy pool by enacting legislation banning hydraulic fracturing. It remains to be seen if other states, especially those with more certain prospects for shale gas and tight oil production, will follow suit. It is possible that because of the extreme means of achieving its regulatory goal, H. 464 will have as little practical effect outside Vermont as the Vermont Conservation Act has had within the state.

65. *Id.* § 5.

66. *Id.* § 6.

67. *Id.* § 7.

68. *See id.* §§ 5–6.