



October 6, 2011

ASSEMBLY STANDING COMMITTEE ON ENVIRONMENTAL CONSERVATION

ALBANY

Thursday, October 6, 2011, 9:30 a.m.

Hamilton Hearing Room B, 2nd Floor, Legislative Office Building

Revised Draft Supplemental Generic Environmental Impact Statement Governing Natural Gas Drilling.

Dear Chairman Sweeney and distinguished Assembly members:

My name is Roger Downs and I am the Conservation Program Manager for the Sierra Club Atlantic Chapter. We are a volunteer led environmental organization of 38,000 members statewide dedicated to protecting New York's air, land, water and remaining wild places. Thank you for giving us the opportunity provide our insights into the September 2011 Revised Draft Supplemental Generic Environmental Impact Statement on High Volume Horizontal Hydraulic Fracturing (HVHFF) and the associated draft regulations.

The second draft of the Supplemental Generic Environmental Impact Statement (SGEIS), released in its entirety on September 7, 2011, has shown that the DEC has done very little in the past 2 years to demonstrate that hydrofracking can be conducted safely. Instead the DEC has offered a series of mitigations that have increased protections for certain areas while permitting drilling in others- but with no underlying sense that hydrofracking will not present an unacceptable risk to our water, air or public health.

To be clear – many of the mitigation proposals are welcome – like a ban on drilling for all state forest lands, increased setbacks from drinking water sources, and mandated chemical disclosure. But the fatal flaws of the original draft study still remain – no cumulative impact assessments based upon full build out modeling, no public health risk assessments, and no clear plan for how to deal with all the drilling wastes, to name a few. In spite of these fundamental deficiencies the DEC has insisted upon pushing ahead with the creation of new drilling regulations even though they have not achieved a foundational understanding of what needs to be regulated. The Atlantic Chapter objects to this entire regulatory proposal in which the DEC is fast tracking the process within the questionable margins of what is legal. The following are some of the most contentious issues:

The DEC has initiated rule making before the SEQRA process has concluded.

The intention of the State Administrative Procedures Act (SAPA) is for the DEC to wait until the conclusion of any supporting environmental impact statement before crafting rules that are based upon the findings. In this case – with outstanding obligations to conduct public health risk assessments, cumulative impact modeling, or comprehensive waste water disposal plans – there is no way that the draft regulations can be representative of the best science-based safeguards. To add insult to this cart-before-the-horse approach, the DEC intends to combine hearings for both the SAPA and SEQRA processes. While the Cuomo administration sees this as a noble cost saving measure that cuts through unnecessary red tape, the Sierra Club views “the double dipping on hearings” as a subversion of the process, like holding the trial and the sentencing hearing at the same time. The sad undertone from this lapse in procedure is that the State has already decided to move forward on fracking- and nothing said in these public hearings is going to make any difference.

The DEC intends to issue drilling permits before rulemaking has been finalized.

Even worse than the proposal to commingle the two processes is the DEC’s intention to start permitting drilling applications before the new regulations are even completed. Commissioner Joseph Martens has publicly stated that he will be able to enforce the provisions of the SGEIS, even if they are not rooted in completed regulation. Even if we were to accept this as true, it still provides little comfort in the practical application of permitting. The DEC can choose to enforce - but they can also choose to negotiate or bend the rules and it is the public that will have little recourse without formal regulations on the books to sue the DEC for noncompliance. It is we the public that cannot enforce the non-binding SEQRA permit conditions. The first two years of permitting will be pandemonium. The new required fuels, equipment, setbacks, and procedures will inevitably be difficult to comply with. There will be messy conflicts on the well pad that will push inspectors and drillers to the edge. Without regulations on the books, mitigation standards will be relaxed or ignored and there will be unnecessary degradation - with no legal remedy for the public.

The DEC will apply the new regulatory changes only to certain natural gas wells.

The new proposed regulations will only pertain to gas wells that consume 300,000 gallons of water or more during the hydrofracking process. Gas wells that consume less than this threshold will only be subject to the permitting conditions established by the 1992 GEIS and regulations that were last updated in 1972. Since the de facto moratorium was put in place July 2008, the department has issued nearly 1000 permits to drill for oil or gas in New York State. Most of these applications were vertical wells that did not exceed the water use threshold of 80,000 gallons. The 80,000 gallon figure came from the maximum amount of water anticipated for a hydraulic fractured operation in the original 1992 GEIS. The 2011 SGEIS identifies 300,000 gallons as the minimum amount of water required for HVVHF and the starting point for new regulations. There is a significant gap between the two thresholds with no analysis of the environmental impacts of natural gas wells that use between 80,000 gallons and 300,000 thousand gallons of water. Through this action, the DEC is nearly tripling of the original threshold of what is covered by the 1992 GEIS, without any justification, and creating a two track system of regulatory controls where there is a chasm between protections. The rdSGEIS estimates that 10 percent of the gas wells developed in the future will be horizontal wells, suggesting that thousands of applications in the coming years will be allowed to use open waste

pits, undisclosed fracking chemicals, and be free of new emissions standards, set back requirements, and other improved environmental protections required of HVHWF wells. The intent of the 1992 GEIS was to create the framework for new regulations to govern oil, gas and salt solution mining in the State of New York, but that rulemaking process never took place. It would be entirely inappropriate now for the DEC to move forward with creating regulations for supplemental conditions to that document without first addressing the need for foundational regulations on which to base the supplement. The DEC needs to create one unified regulatory standard for all oil and gas development. The current regulations create a double standard that will inevitably lead to abuse and unanticipated environmental degradation.

DSGEIS contains no comprehensive analysis of cumulative impacts beyond cumulative economic projections. As part of the SGEIS analysis the DEC commissioned a study of the Socioeconomic impacts of expanded natural gas drilling that portrays, with little nuance, gas development as a job creating juggernaut. The study, that cost the DEC a thousand dollars a page – failed to acknowledge basic economic concerns of the boom and bust cycles of extractive industries, losses to competing industries like tourism or agriculture, the lending crisis associated with gas leased properties, or the externalized costs born on communities from gas development. It did, however, do something remarkable in that it used long term predictive modeling, in several phases, to demonstrate the cumulative economic impact of drilling over three separate regions of the state for a thirty year period. For years now, the DEC has been arguing that it could never conduct a cumulative environmental impact analysis because the future course of gas well development would be impossible to predict. It would appear that if the task can be done to generate rosy economic numbers from mapping theoretical well development, it can also be employed to get a sense of how air quality will be affected, how much capacity the state will need to treat millions of gallons of frack fluid, or how much sensitive habitat and biodiversity we will lose as a result of the fragmentation coming from pipelines and well pads. DEC needs to conduct full build out modeling to understand the impact of the thousands of projected wells on our air, water, ecosystems and communities. The sole focus from DEC, at this point, remains on the impact of the individual well pad and we are missing a significant part of the picture.

DSGEIS contains no public health risk assessments. DEC must project the number of illnesses and deaths anticipated by drilling activity and commit to studying the health effects from drilling's unavoidable exposure pathways. Again, the Assembly should be commended for holding hearings on the health impacts of natural gas development- where there is a host of dire concerns and a paucity of research to demonstrate that fracking is safe.

The ban on fracking in NYC and Syracuse watersheds is a declaration of unacceptable risk. The SGEIS provides no clear scientific rationale why the decision to ban drilling from the New York City and Syracuse drinking watersheds should be separated from the protection of other drinking water resources. This new ban policy deviates from the previous Paterson administration's position that an absolute prohibition of drilling would constitute a legal takings and the State of NY would be responsible for compensating landowners and energy companies for losses on their leases and mineral rights. Syracuse and NYC's water, like much of rural New York, is so pure that it goes from reservoir to kitchen faucet, unfiltered. The EPA closely monitors the City's water quality under a permitting structure called a Filtration Avoidance Determination (FAD). If at some point in time water quality standards cannot meet public health

requirements the EPA will order that filtration plants be constructed as an alternative – a mandate that comes with a multi-billion dollar price tag. In the past year, EPA made it clear to the DEC that it will rescind the FAD if the POSSIBILITY of drilling is present in the watershed, rather than waiting for the first instance of contamination. The DEC had no choice but to ban drilling within the FAD boundaries or else incur the immediate costs of filtration. But the official justification for the ban, written in the SGEIS, is that the sum total of drilling activity – the construction of access roads, well pads, and the movement of millions of gallons of potentially hazardous wastes - presents an unacceptable risk to water quality. If that that is the case – then how can the practice be justified for any other region of the state? Millions of New Yorkers within the drilling zone get their water from their own private unfiltered water wells – but do not have the benefit of EPA monitoring or protection and no amount of mechanical filtration can adequately remediate the chemicals that are in the fracking fluids. Protection of water resources should be held to one consistent standard.

DEC refuses to study impacts of pipelines and compressor stations. Natural gas development cannot happen without the construction of supporting delivery and pressurization infrastructure that in some cases has worse long term air emissions than the gas wells they service. The DEC continues to argue that because pipelines and compressor stations fall under the jurisdiction of the Public Service Commission they are not responsible for considering the environmental impact of this infrastructure – even if it is an essential component to natural gas development. The Sierra Club continues to maintain that the DEC is confusing its obligations under SEQRA and that the Division of Mineral Resources has the responsibility to look at all direct and indirect environmental impacts stemming from an action, regardless of who has the ultimate permitting authority. To separate pipelines and compressor stations from the study constitutes unlawful segmentation and denies the public critical information on impacts.

Disposal of fracking waste in municipal waste water treatment facilities should be banned
The SGEIS fails to illustrate the sheer lack of capacity NYS has for the disposal of the anticipated millions of gallons of drilling waste. Instead of banning disposal in our already crumbling municipal wastewater infrastructure the DEC has set parameters that in most situations cannot be met by an existing publicly owned treatment work (POTW). Setting up the possibility of disposal in NY treatment plants- when the risks of failure are so great - is unacceptable.

High Volume Horizontal Hydraulic Fracturing and the 2012-13 Budget

The SGEIS remains the most pressing forum for whether hydrofracking is safe enough to be permitted in New York – but the real proving ground will be the 2012-13 budget process. The DEC does not currently have the staff or the funding to oversee any competent regulatory program and these financial constraints serve as a huge roadblock to any future development. The Cuomo administration will want to see massive augmentation of DEC staffing, perhaps as many as 226 new inspectors as a means to advance this new wave of drilling, and will try to create a severance tax structure on natural gas revenue and increased permit fees to pay for it. For those of us that have been fighting to save DEC staffing positions for years, the challenge will be to support that goal without creating a gas well permit mill. The cost of establishing the regulatory infrastructure will initially have to come from the general fund and it is uncertain whether any of these expenses – that could be as much as 25 million dollars in the next budget

cycle- can be recouped anytime soon. The Legislature has an important role to play in blocking any funding for the Division of Mineral Resources until the following conditions are met:

1. The SGEIS is finalized and comprehensive – including, but not limited to - analysis of cumulative impacts, health risks, and wastewater disposal plans.
2. A proper rulemaking process is conducted after the conclusion of the SGEIS process that is compliant with the intent of the State Administrative Procedures Act and inclusive of all oil and gas activity, not just HVVHF.
3. That the funding provided creates proportional augmentation of DEC staff across all divisions instrumental in protecting NY’s resources – not just those issuing permits to drill.

End drilling’s unfunded mandate on upstate communities through the budget process

Energy companies have secured the mineral rights to millions of acres of private land from the Catskills to Lake Erie, and will start drilling high volume horizontally hydrofracked wells as soon as the Department of Environmental Conservation completes the SGEIS. Municipalities within this zone of development are scrambling to prepare for the fallout of natural gas development - thousands of truck trips, massive local water withdrawals, new pipelines, harmful air emissions and potential accidents ranging from well fires to chemical spills. The economic burden on host communities saddled with gas fields can be tremendous – from accelerated road maintenance to increased demand on public services, housing and emergency response.

But to date, the New York State Department of Environmental Conservation and energy development companies have told local governments that NY’s Environmental Conservation Law supersedes all local ordinance and they have little control over the process and the costs incurred to the community by this new wave of drilling. Under this interpretation an oil or gas well can be sited anywhere without local oversight, regardless of how incompatible it is with established zoning - so long as the well is in compliance with state established setbacks and spacing requirements. Currently, it is perceived that NY communities in drilling districts cannot enforce zoning, noise ordinances, moratoriums or other planning measures deemed necessary to protect unique local assets. In the most profound sense the burden of oil and gas development is an unfunded mandate to New York’s upstate communities if they are not allowed to use the most basic land use planning tools like zoning and ordinance power to protect their economic assets. We ask the legislature to include in the 2012-13 budget- clarification language, as can be found in Assemblywoman Lifton’s bill A3245, which establishes that municipalities have the power to engage in land use decisions involving oil and gas development so that they can manage and offset the negative economic consequences of drilling.

Apply hazardous waste generator tax to hydraulic fracturing fluids

In 2010, Environmental Protection Fund (EPF) related legislation (S7988) found 2 million dollars in new revenue in a revamped hazardous waste generator fee that contributes money to the EPF based upon the tonnage of hazardous waste produced by an individual entity. But the state is not capturing all the possible revenue from those that produce hazardous waste. Inexplicably, federal and state laws shield drilling and hydraulic fracturing fluids from a hazardous waste designation in spite of the fact that flowback water from natural gas drilling sites consistently meets the hazardous definition.

Chemicals found in the flow back can include significant amounts of benzene, toluene, ethylbenzene, xylene, and a host of other dangerous chemicals as well as radioactive particles. By simply updating the state's current arbitrary regulations we can ensure that any hydraulic fracturing wastes that meet the definition of 'hazardous' wastes will not only be subject to all hazardous waste generation, transportation, and disposal laws but also to the hazardous waste generator tax that can both contribute to the EPF and serve as a deterrent to the use of harmful chemicals in the hydraulic fracturing process.

While it may appear that the “fix is in” with the SGEIS on HVVHF and the process is being railroaded, the antidote is still public participation and leadership from the Legislature. Even though the DEC seems to be forging a predetermined path towards expanded natural gas development in NY, we have the opportunity to turn things around, but it will require thousands of citizens providing their own input on the SGEIS and lawmakers doing their part to put a halt to premature approvals of flawed policies. The Atlantic Chapter deeply appreciates all this committee has done to highlight the issue of hydrofracking and we look forward to working with you coming months to set the SGEIS process straight.

Thank you,

A handwritten signature in black ink that reads "Roger Downs". The signature is written in a cursive, flowing style.

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