



**Testimony of:
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Assembly Standing Committee on Environmental Conservation

Revised Draft Supplemental Generic Environmental Impact Statement Governing Natural Gas Drilling

October 6, 2011

Thank you to the Assembly Standing Committee on Environmental Conservation for giving Riverkeeper an opportunity to testify on the New York State Department of Environmental Conservation's ("DEC's") revised draft Supplemental Generic Environmental Impact Statement ("SGEIS"), the document that it has prepared to guide shale gas extraction by means of horizontal drilling and hydraulic fracturing or "hydrofracking" in New York.

Riverkeeper is a member-supported watchdog organization whose mission includes safeguarding the environmental, recreational and commercial integrity of the watershed that provides New York City its drinking water. Riverkeeper is actively involved in advocacy and public education surrounding the issue of shale gas extraction via horizontal drilling and hydrofracking, in particular because of its potential impacts on New York's water supply.

I. DEC's Rush to Fracking

Chief among our concerns is that DEC continues to rush this process, seriously limiting the public's opportunity to express their legitimate concerns and have those concerns actually influence DEC's decision-making regarding hydrofracking in New York.

DEC's rush is evident from its recent actions: DEC released its SGEIS on September 7 and, on September 28, draft regulations that would govern shale gas extraction and a draft general stormwater permit for hydrofracking. It is holding a simultaneous comment period on all three documents, ending December 12.

The spirit and intent of the state's environmental review statute is for environmental reviews, like the SGEIS, to inform draft regulations. DEC fully acknowledged this in its July 1, 2011 preliminary version of the SGEIS, in which it admitted, in reference to its 1992 GEIS on oil and gas development, that a generic environmental impact statement is "not intended to serve as a substitute for all of the detailed analyses required by the State Administrative Procedures Act." In the July 2011 version, DEC also asserted that it would release regulations *after* the SGEIS process is complete because it would then "be in a position to rationally determine what additional measures or procedures should become fixed principles that would supplement and improve the Department's existing regulatory framework." Both of these statements are conspicuously absent in the September 1, 2011 version of the SGEIS, in which DEC announced that it was taking the irrational approach of issuing regulations simultaneously with the SGEIS.

By issuing regulations at the same time as the SGEIS, DEC is depriving the public of the right to have their input on the mitigation measures suggested in the SGEIS fully considered before the agency proposes the regulations that would implement them. DEC should offer a comment period for the SGEIS first and then issue draft regulations, giving those their own comment period and hearings.

The need for an adequate, separate public comment periods is particularly important since this may be the public's only chance to tell DEC how and if fracking should proceed in their communities. DEC permits for gas extraction do not allow for the same public participation as other DEC permits because these permits are not issued under the Uniform Procedures Act. The comment periods and hearings that DEC is holding for the draft SGEIS, regulations and hydrofracking general stormwater permit may be the public's last chance to communicate their views on hydrofracking. Thus, it is critical that DEC give the public adequate time to be heard by affording comment periods for each individual document.

Equally disturbing, DEC has still not committed to wait to begin permitting until regulations have been finalized. This is a backwards approach – DEC should process permit applications only after it promulgates detailed regulations that adequately protect against the environmental, public health and safety risks associated with horizontal drilling and hydrofracking.

Moreover, DEC declared in an August 16, 2011 report that it does not have the necessary regulatory and enforcement staff to implement hydrofracking successfully, i.e., in a manner that is environmentally protective and economically beneficial.¹ In that same report, DEC also admits that it does not have the funds to hire new staff that it needs and is therefore counting on the next state budget process to provide that funding. Even if it is completely successful in achieving its budget request in this fiscal climate, DEC projects that it will likely not have the necessary staff in place before January 2013, at which time it will have to begin the time consuming process of training that new staff.

In addition to DEC not having the staff in place, DEC, and the Governor, have not yet accounted for the true costs to state taxpayer and local communities of hydrofracking. State administrative law requires DEC to both assess the economic impacts of regulations, and, in developing them, “avoid undue deleterious economic effects or overly burdensome impacts . . . upon persons, including persons residing in New York state’s rural areas, directly or indirectly affected by” the proposed regulations.² We have learned from Pennsylvania that industry will not cover all of its costs -- hydrofracking would require tax dollars to repair damage to local roads and to pay the various state and local agencies charged with permitting and monitoring this industrial activity.³ Most of the taxpayers and communities asked to foot these bills would

¹ See Advisory Panel on High-Volume Hydraulic Fracturing: State Resource Needs, at 2 (August 16, 2011) (appended to this testimony).

² See State Administrative Procedure Act § 202-a.

³ See, e.g., *Marcellus truck traffic not kind to Pa. roads: N.Y. officials seek solutions before drilling starts*, The Ithaca Journal (May. 3, 2010), available at

receive no direct money from hydrofracking activities. Because of this apparent and potentially significant gap between the likely costs and possible revenues associated with hydrofracking, DEC must take the time to conduct a thorough economic analysis of its regulations and provide this information to public.

A draft New York State Department of Transportation (“DOT”) report leaked in June of this year strongly suggests that New York is not prepared for the negative economic consequences of hydrofracking-related activities.⁴ In the report, DOT concluded that “[t]he potential transportation impacts [from hydrofracking] are ominous,” and estimates that additional heavy truck trips from shale gas extraction would cause between \$121 million and \$222 million in damage to local roads and between \$90 million and \$156 million in damage to state roads each year.⁵ DOT also determined that “there is no mechanism in place allowing state and local governments to absorb these additional transportation costs without major impacts to other programs and other municipalities in the state,” while noting that “local governments lack the authority and resources necessary to mitigate such problems.”⁶ This is yet another demonstration of why it is crucial that DEC take the time to understand and communicate to taxpayers the potential fiscal impacts of hydrofracking before closing the comment period on any draft regulations.

Riverkeeper applauds the Assembly for passing a moratorium last term, A.7400, which would have forced DEC to suspend permitting until June 2012. We urge the Assembly to consider another moratorium suspending permitting until at least January 2013, so that DEC can finalize its regulations and increase its staff before and if hydrofracking moves forward in New York.

II. Preliminary Flaws with the SGEIS

Riverkeeper will work over the next few months to develop a comprehensive set of formal comments on the SGEIS, while advocating DEC to address the procedural flaws identified above. In the meantime, turning to substance, our preliminary criticisms are:

- **DEC proposes inadequate protections for water supply infrastructure.** Much of New York City’s water supply infrastructure is west-of-the-Hudson and falls outside of the City’s watershed itself. Despite the well-known susceptibility of this aging and already leaking infrastructure, DEC has proposed virtually no protection – the revised SGEIS still calls for only a site-specific review for any well pad proposed within a 1,000-foot wide corridor surrounding a water tunnel or aqueduct. Riverkeeper fears that these tunnels will be threatened by vibrations and shaking from drilling activities and

<http://www.theithacajournal.com/article/20100503/NEWS01/5030372/Marcellus-truck-traffic-not-kind-Pa-roads>.

⁴ A copy of the leaked report, entitled “Transportation Impacts of Potential Marcellus Shale Gas Development,” is available at <http://www.un-naturalgas.org/NYS DOT%20Transportation%20Impacts%20Paper.pdf>.

⁵ DOT Report at 3.

⁶ DOT Report at 3.

susceptible to contamination from migrating fracking fluids. The City's Department of Environmental Protection ("DEP"), which is responsible for this infrastructure, has previously called for a buffer of seven-miles to protect this water supply infrastructure, based on analysis of its own scientists. It is crucial that DEC prohibit drilling anywhere near all infrastructure that falls outside watershed limits to adequately protect the drinking water supply of the citizens of New York City.

- **As Commissioner Martens admitted in an August interview, New York currently does not have any wastewater treatment plants equipped to treat wastewaters from hydrofracking operations.**⁷ The SGEIS remains unacceptably vague on how the tens of millions of gallons of toxic wastewaters that will be produced in New York if fracking operations move forward will be disposed of without contaminating New York waters in the same way that Pennsylvania's have been.

Last term, the Assembly passed a very important bill, the hazardous waste loophole bill, A.7013, which would have ended the exemptions that exclude oil and gas waste from the definition of "hazardous waste" under DEC regulations. This bill would have ensured that drilling and hydrofracking wastewater that is "hazardous" in nature be treated as such, rather than being delivered as typical industrial waste to New York's wastewater treatment plants or landfills. We urge you to pass this critical legislation again to, at a minimum, ensure that New York wastewater treatment plants and landfills do not receive hydrofracking wastes that they are not equipped to handle.

III. Budget-Related Hydrofracking Legislation

Finally, we urge you to take action on two issues that we believe that you may be able to address as part of the budget process.

First, a growing number of municipalities are exercising their municipal rights by amending their zoning ordinances to limit hydrofracking, but then being slapped with industry lawsuits that they have minimum funds to defend. We thank the Assembly for passing the home rule bill (A.3245) last term, which would have clarified that under local zoning laws, municipalities can dictate where oil, gas, and solution mining is a permissible use within their boundaries, regardless of the state's regulatory program. We urge you to pass such a bill again, as part of the budget cycle, to ensure that the law is not interpreted in a way that imposes an unfunded mandate on municipalities by forcing them to accept hydrofracking operations, and all of the costs associated with them, within their borders.

Second, regardless of whether hydrofracking goes forward in New York, what is apparent is that natural gas extraction is a dangerous activity that can potentially poison local water supplies, pollute the air and leave us with a waste management nightmare. Comptroller Napoli proposed a contamination response and compensation program, offered for introduction by

⁷ Abrahm Lustgarten, N.Y. Enviro Commissioner Expects Little From EPA Fracking Study, ProPublica, August 9, 2011, <http://www.propublica.org/article/new-york-environment-commissioner-expects-little-from-epa-fracking-study/single>.

Assemblyman Sweeney as A.8573, which would apply to current drilling operations as well as to proposed hydrofracking operations. DiNapoli's proposed program, which is similar to the state's current Oil Spill Fund, would:

- Impose strict liability on owners or operators of drilling sites that cause contamination;
- Empower the DEC to order immediate clean-up by owner or operator or take over sites for immediate clean-up or;
- Impose a surcharge on drilling permits to create the Natural Gas Damage Recovery Fund similar in structure to the existing Oil Spill Fund;
- Require oil and natural gas companies to post surety bonds to cover any shortfall between Fund resources and remediation costs.

We urge the Assembly to pass this bill as another important means of ensuring that the environmental and social costs of hydrofracking are not shifted to the taxpayers of New York.

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Riverkeeper thanks the Assembly for the opportunity to participate in today's hearing and for the important role that it continues to play on the issue of hydrofracking in New York State. We look forward to continuing to work with the Assembly on this area of significant environmental concern.

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