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29th SENATORIAL DISTRICT · NEW YORK STATE SENATE



TESTIMONY BY NEW YORK STATE SENATOR THOMAS K. DUANE
BEFORE THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
REGARDING THE REVISED DRAFT SUPPLEMENTAL GENERIC
ENVIRONMENTAL IMPACT STATEMENT
ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM

November 30, 2011

My name is Thomas K. Duane and I represent New York State's 29th Senate District, in which more than 300,000 residents and countless businesses depend on clean and safe tap water. Thank you for the opportunity to present testimony before the New York State Department of Environmental Conservation (DEC) on the revised draft *Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program – Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing in the Marcellus Shale and Other Low-Permeability Gas Reservoirs* (dSGEIS).

Before commenting on the merits of the dSGEIS, I must note my dismay at the haste with which DEC is conducting this public review process. While I appreciate that the agency heeded the call of countless advocates and elected officials to hold hearings in each of the State's ten economic development regions, I am disappointed that it refused to extend to 180 days its public comment period on the 1,500+ page document. It is also disconcerting that DEC has already released its draft regulations for high volume hydraulic fracturing, suggesting that this public review is ancillary to the agency's deliberations. These actions run counter to DEC's stated intent to ensure an open and transparent process and I continue to call on DEC to decelerate the process to ensure a fair and exhaustive review.

As you know, high-volume hydraulic fracturing, or "fracking," is a process by which millions of gallons of water and a slurry of toxic chemicals, or "frac fluids," are pumped at high-pressure into horizontal wells to access bubbles of natural gas in dense mineral formations. Among the revisions made to the first dSGEIS, which was issued in September of 2009, is a permanent prohibition on fracking in and around the New York City and Syracuse watersheds and a limited prohibition on fracking in and around primary aquifers, State-owned land and other water supplies around the State. While these changes suggest that the agency has studied the catastrophes associated with natural

gas drilling in Pennsylvania and around the nation, the proposed mitigation measures do not go far enough to ensure that New York will not suffer a similar fate. I continue to believe that all water supplies statewide must be given equal protection and that fracking should be prohibited throughout New York.

Although I have many concerns regarding the dSGEIS, which analyzes the impacts of what is arguably the most significant encroachment of industry on our natural environment and the greatest threat to our public health in decades, I will focus my testimony on a few key issues.

I am extremely concerned that fracking could irreparably contaminate New York State's many diverse water sources. According to the dSGEIS, New York has nearly 10,000 public water systems. In addition, an unknown number of households rely on privately owned, residential wells. As noted above, DEC is only proposing to permanently prohibit fracking in and around two water sources—the watersheds serving New York City and Syracuse. Moreover, DEC is proposing a buffer around these water sources of only 4,000 feet, which could be exceeded by surrounding wells' horizontal displacement—the distance drilled along the horizontal portion of the well bore—and which is therefore woefully inadequate. As a result, drilling could occur directly under these watersheds. Contamination of these unfiltered water supplies would be a disaster, imperiling the health of approximately half the State's population and crippling its primary economic engine. Likewise, even the heightened risk of contamination could threaten the Filtration Avoidance Determinations that New York City and Syracuse have received from the U.S. Environmental Protection Agency (EPA), which exempt them from having to construct and operate multi-billion dollar water filtration systems. Proposed buffers for other sources of drinking water, including primary aquifers, are even smaller. In states such as Texas, Colorado, and Pennsylvania, where such drilling has been permitted without adequate regulations, there have been alarming reports of drinking water contaminated by frac fluids and newly-exposed underground toxins. To ensure that similar incidents do not contaminate drinking water in New York State, DEC must adopt a no-risk policy—permanent prohibitions with ample buffers—with respect to fracking near all water supplies, including private water wells.

While the dSGEIS' stringent frac fluid disclosure standards are a positive step, I am concerned that DEC's proposed new regulations fail to categorically prohibit the use of certain chemicals known to be particularly dangerous. For example, the use of benzene in fracking has been linked to air and water contamination in Texas and Wyoming. The EPA has determined that the maximum contaminant level goal—the level of drinking water contamination at which no adverse health effects are likely to occur—for this carcinogenic chemical is zero. The spillage or migration of this or other highly toxic chemicals into waterways could cause unspeakable damage to human health. I have co-sponsored legislation that would prohibit the use of chemicals that pose a risk to human health including, but not limited to, fluids that are persistent, bioaccumulative and toxic or are known mutagens. Regrettably, this legislation has not yet passed; it is therefore incumbent upon DEC to prohibit through regulation the use of such chemicals.

I am likewise concerned that DEC has not identified existing or planned wastewater treatment plants in New York that would be able to handle the unprecedented quantities of toxic flowback that would be created by the industry. The agency's assurance that "industrial facilities could be constructed or converted [by private companies] in New York to treat flowback water" is of no comfort. Moreover, as the dSGEIS notes, such facilities would require a full analysis and approval before they would be permitted to accept flowback, and it is not clear that DEC has the staff and resources to adequately monitor their construction and operation. I am also concerned that these facilities, if constructed, could become a burden on their communities after the drilling companies leave. The final SGEIS must include specific plans demonstrating the capacity of wastewater treatment infrastructure that either already exists or will exist prior to the issuance of fracking permits to accept the highest estimated projections of total wastewater.

Given the extreme caution required to safely store and transport both injection fluids and wastewater, I am also very concerned about the prospect of fracking in floodplains. While I appreciate that DEC would not issue any permits for fracking within a 100-year floodplain, environmental advocates report that the agency's floodplain maps are out of date and, further, that in the last decade flooding has exceeded 100-year levels. Flooding of drilling sites could cause the spread of frac fluids into ecologically sensitive areas, including aquifers and watersheds that are nominally safeguarded from drilling. I urge DEC to withhold all fracking permits at least until the agency updates its floodplain map.

Reports of significant damage wrought by heavy truck traffic on State, county and local roads in Pennsylvania and other states with large-scale natural gas development raise the question of how transportation agencies at all levels of government will be able to monitor and address impacts on traffic and infrastructure, especially in these times of budget cuts and layoffs. At the very least, I urge DEC to withhold permits for wells for which operators have not entered into road use agreements with local governments. The dSGEIS gives operators the choice of entering in such agreements or bypassing community engagement altogether and appealing exclusively to DEC. The latter option is unacceptable; operators must be ultimately accountable to the people who will be most immediately impacted by their actions. I also urge DEC to establish a standard process by which local governments could exact compensation from the industry for all costs associated with these and other impacts.

I am also concerned that DEC, after sustaining a series of budget and staff cuts, will be unable to effectively enforce its proposed rules and regulations. In its analysis of gas migration, frac fluid releases and other fracking accidents in Pennsylvania, the dSGEIS recounts a number of instances in which improper drilling operations and well construction were at fault. Each incident is used to illustrate the ways in which New York would regulate fracking differently. While some of these incidents demonstrate the inadequacy of Pennsylvania's regulations, others point to a failure of enforcement. In fact, Pennsylvania has far more inspectors directly overseeing fracking than New York would likely be able to afford. I therefore object to DEC's dismissal of phased permitting as an alternative action; the dSGEIS deems it "arbitrary" and "not practical." On the

contrary, establishing sensible limits on permits—e.g. a permit-to-inspector ratio—could help to allay concerns that DEC does not have the staff and resources to properly review permit applications, inspect well sites, and oversee drilling operations. It would also enable DEC to explore whether existing wastewater treatment facilities have sufficient capacity to safely receive and process the enormous quantities of wastewater that will inevitably be produced by the industry. I urge DEC to reconsider this option.

While there is no substitute for on-the-ground inspectors, DEC should maximize its resources by establishing criminal penalties for both intentional frac fluid releases and acts of negligence. Drilling companies must not be allowed to simply absorb civil penalties for cutting corners as the cost of doing business. The prospect of criminal prosecution could deter reckless behavior. Such penalties should be established prior to the issuance of fracking permits.

I thank DEC for holding this hearing and I look forward to continuing to work with the agency to ensure that the proposed drilling for natural gas in New York does not proceed until and unless the technology improves to a point at which it can be guaranteed to do no harm to our precious natural resources and public health.