



**STATEMENT OF THE NATURAL RESOURCES DEFENSE COUNCIL**

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
HEARING ON DRAFT SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT  
STATEMENT GOVERNING NATURAL GAS DRILLING IN THE MARCELLUS  
SHALE AND SIMILAR FORMATIONS**

**By Kate Sinding, Senior Attorney**

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**Introduction**

Good evening. My name is Kate Sinding and I am a Senior Attorney and Deputy Director of the New York Urban Program for the Natural Resources Defense Council (NRDC). NRDC is a national, non-profit legal and scientific organization that has been active on a wide range of environmental issues since the organization was founded in New York in 1970. Although we have grown to an international organization with six offices and almost 400 staff, we retain a team of lawyers, scientists and other specialists devoted exclusively to safeguarding New York's environment and to improving the quality of life for the State's residents, including our almost 100,000 members and activists who are New Yorkers.

Thank you for the opportunity to share NRDC's concerns and preliminary recommendations for the New York State Department of Environmental Conservation's draft Supplement Generic Environmental Impact Statement (dSGEIS).

NRDC does not oppose gas drilling across-the-board; rather, we recognize the potential benefits of natural gas as a transition fuel in the national effort to decrease America's reliance on coal and oil. It is also evident, however, that increased gas drilling in New York State – particularly utilizing environmentally intensive technologies such as hydraulic fracturing – must not come at the cost of our ecological resources or public health. Before it can be permitted to proceed, any new drilling in the Marcellus Shale and other similar formations must be accompanied by significantly enhanced environmental safeguards, careful oversight and vigorous enforcement of laws and rules designed to protect our State's natural resources. At present, the dSGEIS fails to provide the necessary predicates for gas drilling to proceed safely in New York State.

Most significantly, there are some areas of the state, including the New York City watershed, other lands that serve as primary drinking water supplies, and other ecologically

sensitive areas, that should simply be placed off limits to industrial gas drilling because of the inherent risks of that activity, the costs of addressing their contamination should it occur, and the fundamental long-term responsibility of government to protect public water supplies and our most ecologically important areas.

## **The Draft SGEIS Fails to Provide a Basis for Gas Drilling in the Marcellus Shale to Proceed Safely in New York State**

NRDC has been actively involved in oil and gas drilling issues across the nation. Too often, our efforts have been to evaluate and remedy adverse environmental and public health effects *after* those impacts have already occurred. Indeed, just yesterday newspapers reported the filing of a legal action by a landowner across the border in Pennsylvania claiming hydraulic fracturing has resulted in significant contamination of water and soil on his property. We view the prospect of industrial gas drilling in the Marcellus Shale within New York State as a unique opportunity to ensure that the full measure of potential impacts gets assessed and the appropriate best practices get embodied in the law *before* a single well is drilled.

Unfortunately, in its current form the dSGEIS is a deeply flawed document. Our preliminary review of the dSGEIS suggests that while some elements of the State's drilling proposal may be stronger than current rules in other states, that is not in and of itself sufficient – particularly in light of the abysmally low bar set in many other jurisdictions – and many provisions fail to provide the full measure of necessary safeguards. The inadequacy of the proposed regime is perhaps the inevitable result of the agency's failure to conduct, or insufficient attention to, many legally required analyses under the State Environmental Quality Review Act (SEQRA). As addressed further below, certain key impact categories are not addressed at all, often in improper reliance on the 1992 GEIS, which was itself flawed in many critical respects. Others are addressed in name only, lacking any true quantitative analysis such as is required under SEQRA.

Overall, we find the dSGEIS to be wanting in numerous critical respects and therefore do not believe it can serve as the basis for regulation of natural gas drilling in the Marcellus Shale absent new and/or additional analyses and significant revision.

NRDC will be submitting extensive written technical comments on the dSGEIS. I will my remaining time this evening to highlight a few of the documents' most egregious deficiencies:

### **Select Specific Deficiencies in the Draft SGEIS**

#### ***1. The dSGEIS fails to prohibit drilling in special ecological areas.***

The dSGEIS does not indicate any plans to ban hydro-fracking in areas that supply critical public drinking water supplies, including the Catskill/Delaware watersheds that provide 90% of the drinking water for 9 million New Yorkers. This water source is currently of such high quality that it is one of only five major water supply systems in the United States that do not require water filtration. If hydro-fracking were allowed to

proceed in this area, New York City could be faced with costs in excess of ten billion dollars for building and operating filtration facilities and untold additional costs if the water supply were to become contaminated with hydro-fracking chemicals. In short, because of its unique character and scale, as well as the tremendous costs associated with remediating it should it become contaminated through drilling, there is no level of risk that is acceptable in the New York City watershed.

For these reasons, NRDC has called for the New York City watershed and all other similarly ecologically vulnerable sources of public drinking water supplies within the State to be placed permanently off-limits to industrial gas drilling. In addition, there may be other special locations within the State that, because of their exceptional hydrological or ecological value, warrant similar protection. Every effort should be made to identify all such areas and place them off-limits to drilling through the environmental review process.

It is important to note that the recent announcement by Chesapeake Energy that it will not develop its currently held leases in the watershed, while welcome, does nothing to reduce the need for a formal prohibition by the State. Chesapeake's announcement amounts to a temporary, non-binding, non-enforceable commitment by but one of the many companies looking to operate in the Marcellus in New York. What is needed is a permanent, legally-binding ban that applies to all companies seeking to operate in the New York City watershed and similarly vulnerable areas.

## **2. *The dSGEIS fails to consider the cumulative impacts of drilling throughout the Marcellus.***

For a statewide regulatory program such as is proposed for the Marcellus Shale, the law requires that the dSGEIS contain an assessment of the cumulative impacts associated with full development of the resource across the State. Only by performing such an assessment can DEC identify the full measure of potential significant adverse impacts and propose necessary mitigation to minimize or eliminate them.

But the dSGEIS fails utterly to consider cumulative impacts, claiming, in essence, that it is impossible to predict how rapidly, or where, development will occur. Instead, it largely ends its analysis with the potential impacts from developing a single well pad. This is insufficient as a matter of law. It is well established that where the full build-out scenario is unknown, the agency must use available data to develop a reasonable worst-case scenario upon which to assess cumulative impacts. This is the appropriate means of letting the public know what the maximum, reasonably likely potential impacts of drilling across the Marcellus will be, and how those impacts will be addressed.

The dSGEIS' failure to properly consider cumulative impacts extends throughout the document. To name just two examples among many, the document fails to consider regional ozone impacts, although it is well documented that even rural regions in other states in which similar technologies are being employed (such as Texas and Wyoming) are observing first-time violations of national ozone emission standards. The dSGEIS

also fails to consider the potential cumulative water quality impacts from stormwater discharges from land clearing at multiple drilling sites (and associated access roads and feeder pipelines) within a single watershed.

This failure to properly consider cumulative impacts, which runs throughout the document, alone renders the dSGEIS legally deficient.

**3. *The dSGEIS fails to evaluate readily predictable induced growth.***

Similar to the lack of any meaningful cumulative impacts assessment is the dSGEIS' failure to evaluate the impacts of readily ascertainable induced growth, as is required by law. Thus, the document fails to evaluate the impacts of the significant pipeline development that will be necessitated by drilling in the Marcellus Shale on the pretext that authority to regulate such pipelines falls within another agency's jurisdiction. But lack of regulatory authority does not excuse an agency from analyzing and disclosing the potential impacts from secondary development that will flow from the primary activity that is within its jurisdiction.

Likewise, while acknowledging the severe dearth of treatment capacity for the vast quantities of contaminated wastewater that would be generated by drilling in the Marcellus, the dSGEIS fails to evaluate the potential impacts associated with the inevitable development of new treatment capacity within the State.

Again, the failure to consider the impacts of growth that will necessarily be induced by the proposed regulatory program for the Marcellus Shale represents a fatal flaw.

**4. *The dSGEIS contains an inadequate consideration of alternatives.***

One of the most fundamental requirements under SEQRA is that an agency consider a range of alternatives to the proposed action and select the alternative with the fewest unmitigated significant adverse environmental impacts. However, the dSGEIS contains no meaningful consideration of alternatives, essentially on the basis that it is "too hard" to do so. This is unacceptable.

As discussed, using a reasonable worst case scenario would permit the department to assess the likely cumulative impacts of a full build scenario; this, in turn, would provide the necessary information for DEC to determine whether phased – or even capped – development in some or all regions would be appropriate mitigation for identified significant impacts. Indeed, it is precisely the failure to conduct a proper assessment of cumulative impacts that had led to the concomitant failure to properly analyze reasonable alternatives that could result in fewer unmitigated impacts as is required under SEQRA.

In addition, DEC should use its power as a regulatory authority to compel the disclosure of information regarding so-called "green" or non-toxic drilling and fracturing fluids sufficient to determine whether use of such fluids should be compelled or if there are particular chemical constituents that should be prohibited from use in New York.

**5. *The dSGEIS contains numerous undisclosed impacts for which mitigation cannot be developed and other proposed mitigation is inadequate.***

Our review of the dSGEIS indicates that it contains numerous undisclosed impacts in various impact categories. For some of these impact categories, including noise and traffic, the issue stems from the failure to perform a required quantitative analysis. For others, including air quality and hazardous wastes, it stems from reliance on faulty assumptions or improper application of quantitative models. Failing to disclose the full measure of potential significant adverse impacts necessarily results in a failure to identify legally required mitigation measures.

For other impact categories, the dSGEIS does identify potential impacts, but the proposed mitigation falls short of properly addressing those impacts. As just one example, the dSGEIS does propose a new groundwater monitoring protocol for drilling in the Marcellus to address the potential for contamination of drinking water supplies. NRDC will be providing detailed comments as to the inadequacies of that proposed protocol, but based on our initial review we believe its shortcomings include the lack of provision for drilling where no private water wells exist within 2,000 of the proposed gas well; insufficient sampling duration; proposed sampling for indicators rather than actual chemical constituents; and, particularly troubling, improper reliance on cash-strapped county health departments to conduct most if not all investigation and remedial oversight.

As we continue to work with our technical consultants over the coming weeks to thoroughly review the dSGEIS, we expect to have numerous additional comments and recommendations as to the sufficiency of its analyses and proposed mitigation measures.

### **Procedural Infirmities**

**1. *DEC must propose new regulations rather than relying on permit conditions.***

A major misconception about the dSGEIS is that the mitigation it identifies is being proposed as new regulations governing gas drilling in the Marcellus Shale. But in fact DEC is proposing instead to “implement” the mitigation measures through form filings and permit conditions. This is wholly inadequate, particularly in light of the fact that, for the most part, DEC’s existing gas drilling regulations date back to 1985 – seven years before even its last, faulty GEIS was issued.

Only through legally enforceable regulations can the public be assured that gas companies are being held to the new requirements being proposed by DEC. Without formal promulgation, DEC would retain discretion as to which requirements to include in any particular permit issued under the new regulatory program. And the public would be forced to attempt to obtain through freedom of information requests each individual permit granted by the agency to determine precisely which requirements are being imposed and whether they are being enforced.

DEC cannot claim that it is proposing the most comprehensive, stringent regulatory regime in the country unless that regime is made both transparent and legally binding through a formal rulemaking process. There is simply no other reliable means for the public to understand, evaluate and weigh in on the specific regulatory requirements being proposed.

## **2. *Inadequate Public Comment Period***

On a final note, while we appreciate the recent month extension of the time to provide public comments, the comment period remains inadequate and should be extended by an additional 60 days. DEC initially provided the public with only 60 days to review and comment on this massive, poorly organized document. Yet this is the *last opportunity* the public has to weigh-in on a major new industrial activity that has the potential to contaminate our water supplies, air and land if not properly managed.

The dSGEIS appears to have been rushed out of the door in an effort to get drills into the Marcellus as quickly as possible. The document is disjointed and difficult to follow, lacking even an Executive Summary, a standard component of any carefully prepared environmental impact statement. As just one example, even NRDC's highly experienced technical experts have been unable to clearly ascertain precisely what is being proposed in the critical area of wastewater surface impoundments.

Moreover, troubling information about gas drilling in New York State continues to come to light. Toxics Targeting, Inc., just yesterday released a list of 270 spill incidents – reported to and by DEC, and kept in DEC's hazardous substances spills database – under DEC's existing natural gas permitting program. Also yesterday, several newspapers reported on recent findings by the State Department of Health concerning levels of radium in drilling wastewater over 260 times the limit safe for discharge (to say nothing of drinking) for which adequate mitigation has not been proposed. The more closely we look at the dSGEIS and at hydraulic fracturing, the more information we uncover about the risks.

The public simply must be afforded adequate time to wend its way through this massive document before the most significant new industrial activity proposed in New York in a generation is allowed to proceed. We therefore call for an additional 60 days to be added to the comment period – until February 28<sup>th</sup> – to allow for the most probing public review and to help make New York State the leader in safe and effective gas drilling regulation.

## **Conclusion**

NRDC is committed to ensuring that no drills are permitted to begin operations in the Marcellus Shale unless and until the many serious shortcomings in the dSGEIS are properly addressed. Thank you for the opportunity to testify this evening, and we look forward to continuing to work with the Department to ensure that gas drilling in New York State occurs only in appropriate areas and only with the utmost protections for public health and the environment.