Response to DSGEIS 12/21/09

By George A. Mathewson, Esq.

Despite a yeoman effort in an epic 800 page Draft Supplemental Generic Environmental Impact Statement(DSGEIS), the DEC SHOULD CONSIDER changing course and classifying the engineering technique known as HIGH VOLUME Horizontal Hydraulic Fracking, for removal of natural gas from the Marcellus shale, as a scientifically invalidated, socially irresponsible, interim technology, which appears to be highly dangerous to both the public health of N.Y. residents as well as to the environment as a whole. By reaching the conclusion that HIGH VOLUME horizontal hydro-fracking is both dangerous and unacceptable, the DEC could continue the current moratorium on the issuance of permits for the time being. If that is too drastic to be practical, the DEC could merely find that additional time is needed to scientifically test and study the current hydro-fracking technology, and continue the moratorium on that basis.

In addition, hydro-fracking could soon be replaced by newer and safer mining techniques, such as the method mentioned by the DEC itself in the DSGEIS. As the DEC states at page 5-140 of its report, "...a new and alternative...technology recently entered the Canadian market and was also used in Pennsylvania in September, 2009. It uses liquefied petroleum gas (LPG) consisting mostly of propane in place of water-based hydraulic fracturing fluids. Using propane ...eliminates the need to source water for hydraulic fracturing, recover flowback fluids to the surface and dispose of the flowback fluids." Another new technology involving the use of laser drills to frack in rock layers containing natural gas is being developed at the U.S. Government's Argonne National Laboratory, which is also reported to offer an improved technology. Possibly this problem of how best to get gas out of the Marcellus Shale, which was created by new technology in the 1990s, could also be resolved ultimately by still newer and better technology.

The length of the Draft GEIS only serves to emphasize, indirectly, the great number of possible flaws in this hydro-fracking process, each of which had to be dealt with separately in this report, thus causing its extended length. But the report has only served to build opposition, some of which is very reputable, to the proposed form of high volume hydro-fracking. For example, Dr. Anthony G. Hay, a chemist at Cornell University, has objected in testimony before the Assembly Environmental Conservation Committee to both the large amounts of carcinogenic chemicals found in the fracking fluids elsewhere in other states, and to the lack of wastewater facilities available with which to dispose of the fracking fluid after it comes back out of the ground. Another expert, Louis W. Allstadt, a retired Executive Vice-President of Mobil Co. in charge of exploration and production, has publicly called for the rejection of the SDGEIS, and its replacement with a new GEIS.

Rather than tarnish its own reputation as perhaps the premier environmental conservation departments in the country, the DEC should concede the inevitable-- that the hydro-fracking process will likely be under-cut by the new EPA study authorized by Congress in its recent Appropriations Bill . Congress wants the EPA to re-do the B**ush era study** on the impacts of hydro-fracking. In that event, it would likely cause public demands to outlaw hydro-fracking to increase exponentially, until it is finally ruled illegal. The DEC could still act now to get off that sinking ship and protect both its own reputation as well as the health and environment of the people of New York State. The current moratorium could be continued to allow time for reasonable scientific tests to be run to test the safety of this radical engineering process, which was conceived and developed in secrecy under the cover of the exemptions obtained Federally in 2005 from the requirements of the Federal Clean Water Act and Clean Drinking Water Act.

My reasons for taking this position are stated in the following paragraphs.

Opponents of the fracking process, however, should first concede that the DEC and its Commissioner, Pete Grannis, have acted forthrightly in extending the response period twice, thus allowing a full discussion of these issues, and also in ordering hearings for the taking of SDGEIS testimony across the state, rather than just information sessions. It has also published for perhaps the first time in its report the list of toxic chemicals

generally used in the fracking process. Thus, the DEC HAS encouraged a democratic discussion of the issues. At the same time it has undoubtedly knowingly given the opponents of fracking time in which to inform and organize, and often respond by attacking the very agency which has made this discussion possible in the first place. As has been noted by others, however, the foremost weaknesses in the DEC's SDGEIS are not in what the report says, but in what has been left unsaid, or left out of the GEIS completely. For instance,

1. HYDROFRACKING IN THE MARCELLUS SHALE MAY RESULT IN REDUCED

   REAL PROPERTY VALUES:

   Insufficient attention has been given IN ITS REPORT to the possibility that the granting of drilling permits may ultimately result in reduced real estate values and assessments, not only on the property being fracked, but also on the neighboring properties. In addition, it may be that the mere signing of a lease may result in reduced property values in the neighborhood. The rationale is that it may be difficult or impossible to obtain future mortgages on leased or drilled properties, and also in obtaining future property insurance, generally known as homeowners insurance. For instance, HUD, a leading federal lender has a regulation which states, "No existing dwelling may be located closer than 300 feet from an active or planned drilling site. Note that this applies to the site boundary, not the actual well site." HUD Handbook 4150.2, page 2.7. It also applies where there is only a lease, and drilling is only "planned" for the future.

   In addition an upstate Federal Credit Union now states its policy regarding refinancing on properties on which there are gas leases (as opposed to active gas wells)), as "l. If there is an oil and gas lease on your property, Visions will not give you a mortgage loan secured by your property. ..If you presently have a mortgage with Visions Federal Credit Bureau and you subsequently enter into an oil or gas lease after September 14, 2009, then Visions Federal Credit Union, may require you to pay the balance of the loan in full pursuant to the terms of the existing note and mortgage. Please note that Visions Federal Credit Union will not sign a Subordination Agreement or other consent to lease with an oil or gas company."

   Obviously that particular Federal Credit Union, after an extended study of the coming hydro-fracking in the Marcellus Shale, has decided that it will not offer mortgages on any property where there is a gas well lease. Furthermore, it has the right to "call in" any mortgage where the owner later enters into a gas well lease. It has clearly decided the question of what effect drilling of gas wells will have on future property values in the negative, as has the Federal Department of Housing and Urban Development, generally known as HUD.

   And for anyone trying to sell property in leased or drilled areas, if the buyers cannot obtain mortgage financing, this will eliminate 90% of the potential purchasers. And if the demand for the property drops drastically as a result of the unavailability of mortgages, then the price will also drop accordingly. Ironically, the new horizontal technology involved in drilling in the Marcellus Shale, which is touted as a great economic benefit by its defenders, may have the effect of rendering many homes in drilling areas unsalable at profitable prices, thus having a much greater downward effect on neighboring real estate values than heretofore in drilling areas.

   The hydro-fracking technology, which involves a much larger drilling unit than previously required in New York, consisting of 640 acres, could also cause widespread REJIGGERING OF banks' EXISTING MORTGAGE LENDING POLICIES in the Marcellus Shale area, causing them to follow the lead of Visions Federal Credit Union and HUD. This could create a strong possibility that in the longer term, the property values of both businesses and individuals will be forced down in gas leasing and drilling areas, causing the real estate business in general to be adversely affected by gas well leasing as well as gas well drilling. Clearly, at least, this is a complicated issue which would benefit from further study.

This downward effect on property values might also be enhanced if existing home owners also have difficulty in obtaining home-owners insurance on properties on which there are already gas wells, as stated by local insurance brokers. Further problems in home values could also result if the insurance can still be obtained, but only at much higher rates, as has also been predicted.

2. THE DSGEIS MAY ONLY CREATE A MIRAGE OF FUTURE ENFORCEMENT:

It appears to be generally conceded by knowledgeable observers that the DEC does not currently have enough trained staff (only 19 inspectors in Mineral Resources Division)-(Syr. Post Standard ,12/13/09) to enforce the sometimes stringent permitting standards espoused in the SDGEIS. This conclusion was specifically reached by a Water Law Clinic at Cornell Law School, after carrying out a pro bono study for the Town of Danby. The Adjunct Professor working with the Clinic concluded that "there is no way that they have enough people to visit the sites to make sure that conditions are met." (Ithaca Journal article by Tom Wilber, 12/11/09.)

Future enforcement would thus be dependent on a "condition subsequent"-namely the approval of large future budget increases for the DEC by a largely pro-drilling legislature. The fact that there are only two bills pending in the New York Legislature which attempt to restrict or limit hydro-fracking in any way-the Brennan bill in the Senate and the Ortiz bill in the Assembly--and they appear to lack any support whatsoever, to the point of having almost no sponsors or support in either house, verifies the lack of political will in the Legislature to restrain gas-well drilling in the Marcellus Shale. Further evidence of the pro-drilling stance of the Legislature comes from the fact that there is NO SEVERANCE TAX on gas removal in New York State. Louis W. Allstadt, referred to earlier, states on that subject, "New York is one of only 3 states that do not have a severance tax on gas as it is produced at the well. New York needs this revenue to support a serious regulatory body for overseeing the drilling and production of gas..." (Elmira Star-Gazette, Guest Columnist, Nov. 30, 2009) The severance tax is generally considered to be a fee charged for the removal of valuable minerals from the ground, thus permanently reducing the inherent value of the land.

Thus, the stage is set for a possible pocket veto by the legislature or governor of future funding for the DEC, EITHER OF which could negate the promises of future enforcement implied in the draft SGEIS. In that event the public will almost certainly hold the DEC responsible for any environmental damage caused later by hydro-fracking, even though the DEC doesn't have the personnel to do their job properly, thus dealing the whole environmental movement a big set-back. Oversimplified? Perhaps. But many stories in literature and history also follow the same old plots and story lines. Remember the old saw, "Don't worry, the check is in the mail-you will be funded properly."

It would furthermore be worthwhile for the DEC to consider during an extended moratorium period whether a cash- strapped legislature will be able to provide adequate future funding necessary for the greatly expanded enforcement effort needed to curtail fracking abuses.

3. NEW YORK STATE DOES NOT CURRENTLY HAVE WASTE DISPOSAL PLANTS CAPABLE OF DE-TOXIFYING THE FRACKING FLUIDS WHICH WILL BE REMOVED FROM THE WELLS IN MARCELLUS DRILLING AREAS.

Approval of the DSGEiS and new drilling permits should be conditioned upon satisfactory proof that the drilling company has established contracts with already existing waste disposal plants, which have also been approved by the State, capable of accepting and disposing of the waste fluids generated by their drilling rigs. Anything less would constitute irresponsible action on the part of the DEC. It could create problems for our neighbors in Pennsylvania who would likely receive the fracking fluids that cannot be processed in New York at this point. Or it could act as an inducement to the truck drivers to break the honor code that the DEC has imposed upon them and to find other places to dispose of their toxic loads

of liquids. Louis W. Allstadt states on this subject "..New York has no plants that can process any significant amounts of this material. Other States with similar shale oil are hard-pressed to handle their own flowback fluids..... No well should be allowed to be hydro-fracked until that driller has obtained a contractually binding time slot after the hydro-fracking at a licensed processing plant.....The DEC has proposed no such process." Thus a highly experienced executive of a giant oil company himself finds that the DEC planning is inadequate and faulty. Certainly, it would be perfectly reasonable to freeze the issuance of well drilling permits until there are plants in place in New York State capable of processing the waste-water that will be produced by the hydro-fracking of wells in the Marcellus Shale.

4. THERE ARE NO REGULATIONS IN PLACE TO PREVENT THE LOOTING AND DESTRUCTION OF NEW YORK'S UNUSUAL AND ENVIABLE WATER RESOURCES:

On this subject it is easy to move from the sublime to the ridiculous. No one contests the fact that there are drought conditions in many areas of the world, in such far-flung places as the Western plains (Outback)of Australia, Bolivia(in South America), and the central plains of Spain. Even in the United States, water is already the irreplaceable natural resource in the States of Nevada, California, Colorado, New Mexico, Oklahoma, Kansas and even Florida. The residents of those states know the value of water, because much time and attention is paid to the allocation of water resources there-because people fight over water there. Water can be costly in those states. In other words, it costs money to obtain and use water.

But under the DSGEIS, this State is proposing to allow mostly out-of-state drilling companies to obtain the one product that is absolutely necessary for horizontal, high volume, hydraulic hydro-fracking-water-- -from New York's natural sources, such as lakes and streams, in an unregulated environment. This means the water is obtained for industrial use at a cost of exactly nothing. And high-volume hydro-fracking uses up to 5,000,000 gallons of water for each well, with possibly thousands of wells to be drilled in the near future. Does this constitute good management of the State's resources, or good management of state government, which is in dire need of funds to operate with? If New York State decided to charge the drilling companies for the water they take here, or to include water under a Severance Tax, they could make up substantial portions of our deficits. Or, minimally, they could at least allow the towns and municipalities to set their own fees for waters taken from within their municipal boundary lines, so that they, at least, could balance their own local budgets

5. THE COURTS MAY FIND THAT BOTH THE FINAL SGEIS AND ARTICLE 23 OF THE ENVIRONMENTAL CONSERVATION LAW ARE UNCONSTITUTIONAL, EITHER UNDER ARTICLE 9 OF THE NEW YORK CONSTITUTION, WHICH GUARANTEES HOME RULE TO THE MUNICIPALITIES IN THE STATE, OR UNDER THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

On that point, the DSGEIS specifically states that New York will continue the prohibition against local participation in oil drilling decisions originally included in the 1981 Amendment to the Environmental Conservation Law in the form of new Article 23. Section 23-0303. Subdivision 2, passed in 1981, stated that, "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries....." The State thus pre-empted and superseded all local laws relating to gas-well drilling, except in the area of roads and real property assessments.

But the question arises whether, in doing so, the Legislature failed to consider the previously enacted imperatives contained in the Home Rule Amendment of 1963 to the New York State Constitution. That Amendment was designed to emphasize and protect the right of local municipalities to operate their own governments in this state, at least in areas relating to its "property, affairs, or government," and certain other areas denominated in Article 9, Section 2, c of the New York State Constitution.

To protect the rights of the New York State Legislature, nevertheless, the 1963 Amendment to the Constitution also made it clear that that the State Legislature could still pre-empt the local laws of municipalities if it passed

a General Law intended to regulate an entire area of government, which law applied to all the municipalities generally. But did the N.Y. Legislature in 1981 in the Mineral Resources Amendment to the ECL evince, for instance, any intent to regulate the entire question of whether an industry, such as gas drilling, had the right to take water as they pleased from the natural streams, lakes, and waterways in the Marcellus Shale area of New York ?

Hardly! High volume horizontal hydro-fracking, requiring millions of gallons of water to frack each new well, had not been developed at that time, and there was no way to drill for gas in the Marcellus Shale either. Neither was there any discussion of water rights in the 1981 Amendment. The need of the municipalities in New York State to sell their perhaps most valuable property-water-for industrial use, had not been forseen or envisioned in enacting Article 23 of the ECL, and there was certainly no mention of regulating the use of water as needed for gas well drilling in the new Article 23 Amendment to the ECL in 1981.

And a State agency, such as the DEC, by enacting new regulations in the form of a GEIS, as opposed to a new law enacted by the legislature, certainly cannot qualify under Article 9, section 2-B-2 of the New York State Constitution, as a "legislature" entitled to pass a "general law" which can over-ride a local law. State agencies cannot pass laws, period; only the State legislature can do that. It is also a truism that the subject of regulating the use of public and private water sales to private industry for industrial use has yet to see the light of dawn in the New York State Legislature to this very day.

The legislative history to Article 23 of the Environmental Conservation Law does not indicate that there was any awareness in 1980 or 1981 of a possible violation of the Home Rule Amendment to the State Constitution. Nor does the Report of the Attorney General at that time, Robert Abrams, which stated that he had no legal objection to the enactment of the new law, indicate that he had given any consideration to, or had any awareness of, the question of constitutionality under the New York Constitution.

Arguably, however, some consideration should have been given, for instance, to whether the municipalities had the right under the Home Rule Amendment, to pass local laws relating to the sale and use of water to gas drilling companies. And Article 23 of the ECL should have included comprehensive, general rules regulating this area involving the possible sale of water in the future for industrial use. The lack of such consideration and rules evidences a lack of intent to establish a general law regulating the sale of water industrially in this state, whether to drilling companies or other industrial users.

Thus, under the provisions in Article 23, Section 23-0303 of the Environmental Conservation Law, the State, arguably, has never established a right to pre-empt any local law regulating the sale of water by municipalities to companies for industrial use. Because of the right of municipalities to pass local laws relating to their "property and affairs", they should now be entitled to pass local laws regulating the use and sale of water to industrial users within their municipal property lines. The failure of Article 23 to include any provisions regulating the sale of water by municipalities for industrial use, or, in fact, regulating water in any way, means that conditions for pre-emption have not been met. The State cannot pre-empt by failing to regulate at all. C.F. Frew Run Gravel, Inc. v. Carroll, 71 N.Y.2nd 126(1987) Stated differently, non-regulation by the State should not pre-empt actual local regulation, in the form of actual ordinances passed by a municipality.

Federally, a constitutional issue is also likely to be raised relating to whether the GEIS violates the requirements of the 14th Amendment to the Federal Constitution insofar as it unfairly distinguishes between the rights of New York City residents and those of upstate residents with respect to the safety standards created by the DEC for safe-guarding their water supplies

Wouldn't it be remarkable if the net result of approving the SGEIS would be to have a Court of Appeals or Federal District Court finding that the municipalities had the right to regulate the sale of water within their boundaries, and that the attempt to pre-empt it in the SDGEIS was unconstitutional? Or that DEC unfairly discriminated between the protections given to upstate and New York City water supplies?

To summarize, the moratorium should be extended indefinitely in order to allow the DEC time to : 1. Obtain scientific studies validating the safety of this relatively new technology 2. Allow time for the construction of wastewater facilities in NYS which would be capable of processing the fracking fluid emanating from newly permitted gas wells 3. Study the question of whether a future unwillingness of banks and lenders to approve mortgages on leased properties could cause a precipitous drop in real estate values and assessments, and, if so, the effect of such an impact on municipal tax collections 4. Obtain binding legislative commitments for adequate future funding to monitor and regulate under the requirements of the SGEIS 5. Await the results of the new Federal impact study by the EPA 6. Consider the impact of possible extensive litigation against the State and DEC if the high volume hydro-fracking of new gas wells in the Marcellus Shale causes contamination of major water supplies or major aquifers in New York State. Obviously, such litigation could have serious future RIPPLE EFFECTS on the State's finances.

END

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