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Environmental LAW

Revised recommendations on Marcellus Shale development

The development of the natural gas resources in the Marcellus Shale formation across the southern tier of New York and Pennsylvania has taken off within the last few years. While leasing and exploration in New York has continued, well permitting and development has been on hold subject to an executive moratorium while New York state's Department of Environmental Conservation (DEC) conducted a Supplemental Generic Environmental Statement (SGEIS) under the State Environmental Quality Review Act. The DEC finally issued the draft SGEIS on July 1.

The Marcellus Shale formation is a black shale formation deep underground in the southern tier and extending down through Pennsylvania, Ohio and West Virginia. The Marcellus is estimated to hold between 168 and 516 trillion cubic feet of natural gas. By comparison, New York residents use about 1.1 trillion cubic feet per year.

However, due to the depth and nature of the formation, horizontal drilling and hydraulic-fracturing techniques are required to access the gas trapped in the shale. Basically, hydraulic fracturing or "fracking" involves the placement of a well within the gas-bearing zone, pumping a pressurized fluid of water and chemicals into the rock, causing a fracture and fission, withdrawing the fluid and allowing the proppant (sand or beads) to remain to prop open the shale fractures so that the natural gas can be extracted.

Some estimates suggest that the impact could be as many as 30,000 new jobs and \$1.4 billion in annual economic impact. A recent Penn State study of shale gas development in that state has identified the "Marcellus multiplier," in that for every \$1 that gas producers spend, there is \$1.90 in total economic impact.

Although fracking is far from a new technique, the explosive growth of Marcellus Shale gas development has caused federal and state agencies to take a cautious approach. Critics of gas development have cited potential environmental issues such as air pollution, land-use development, water pollution and traffic matters.

In Pennsylvania, residents have raised concern about the

potential presence of industrial chemicals in groundwater, along with migration of methane gas around well casings. Overall, there have been relatively few incidents in Pennsylvania, however the high profile nature of the issue has caused the DEC and other environmental agencies to closely scrutinize the practice. Aside from the DEC's review, the U.S. Environmental Protection Agency is currently conducting an extensive study on hydraulic fracturing.

The DEC's revised SGEIS report is the result of substantial re-analysis of a draft SGEIS issued in December 2009. The latest draft is in excess of 900 pages and represents the DEC's consideration of 13,000 public comments, industry and consultant input and the DEC's visits to Pennsylvania sites where incidents have occurred.

The new report is significant in a variety of ways. First, the SGEIS reverses key elements of the 2009 report that would have allowed hydraulic fracturing within: 1) the New York City and Syracuse watersheds; 2) primary aquifers; and 3) public forests, wildlife areas and parklands. The new report prohibits these activities.

The DEC's website now contains a map of prohibited drilling areas reflecting these locations. The DEC has indicated that if adopted, the recommendations would protect sensitive areas across the state, while still allowing access to 85 percent of the Marcellus Shale in New York.

Second, permits will be allowed on private land subject to stringent regulation and permitting by the DEC. The new restrictions now include the following key provisions: well-water protection — no permits will be issued for sites within 500 feet of a private water well or spring and no permits will be allowed within 2,000 feet of a public drinking water supply well or reservoir subject to review of historical data; well casings — the DEC will generally require a third cemented well casing around each well to prevent the migration of gas; spill control — flowback water will need to be maintained in tanks with secondary containment; stormwater control — new permit processes will regu-

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late storm control measures to prevent runoff; and water withdrawals — a special permit will now be required for large volume withdrawals to protect water bodies.

The DEC is also creating a High-Volume Hydraulic Fracturing Advisory Panel to provide further recommendations and oversight of the practice.

In addition, the DEC will require approved plans for disposing of flowback water and brine, including a tracking process to monitor disposal of the fluid. The agency will also require water treatment facilities to undergo review and approval prior to accepting waste fluid for treatment. Further, the DEC's SGEIS has identified 322 chemicals proposed for use in the state along with health hazard information for each. As part of each drilling permit, DEC will require drilling companies to fully disclose and publicly identify products and additives used in the hydraulic fracturing process.

The SGEIS also provides that the DEC will notify local governments of each permit application that it receives. The permit applicant must also certify that the proposed activity is consistent with local zoning and land use laws and, if not, the DEC will require an additional level of review prior to issuance of a permit.

In another departure from the 2009 SGEIS, the DEC has indicated that the prior report did not adequately consider the socioeconomic and community impacts from hydraulic fracturing. These include both positive and negative impacts from the

activity, impacts to local roads and traffic, and visual and noise impacts. As a result, the DEC has engaged independent consultants that are analyzing these potential impacts for consideration in the final report.

The SGEIS will be subject to a 60-day comment period starting this month. The DEC will not issue any drilling permits until the public comments are reviewed and the final SGEIS has been issued.

The DEC has assessed the Pennsylvania experience, problems and issues and attempted to create a comprehensive permitting process that allows hydraulic fracturing. However, it remains to be determined whether the proper balance has been struck to permit natural gas development while protecting the state's environment.

Initially, the oil and gas industry is concerned about the SGEIS report due to the extent of the areas where drilling is prohibited and the scope of the permitting requirements. Conversely, a variety of environmental groups have argued that there should be a blanket ban on drilling and that the proposed restrictions do not go far enough. Moreover, the DEC's delay in issuing well permits to prepare another SGEIS has likely tempered the positive economic impact to New York as drilling companies have shifted resources to other states.

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