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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

December 29, 2011

Joe Martens, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233

Dear Commissioner Martens:

Thank you for the opportunity to provide comments on the revised Draft Supplemental Generic Environmental Impact Statement on Oil, Gas and Solution Mining (SGEIS) issued by the Department of Environmental Conservation (DEC).

While addressing a number of the issues cited by concerned citizens and organizations during the comment period on the DEC's draft SGEIS, the revised SGEIS and recently released draft regulations still fail to adequately address the issue of remediation of contamination resulting from natural gas production. This shortcoming in the draft and in current law and regulation led me to submit legislation to create a Natural Gas Production Contamination Damage Recovery and Remediation Fund (Natural Gas Damage Recovery Fund), now introduced in the Assembly as A.8572 by Assemblyman Sweeney.

Given the large number of oil and gas wells in New York State, as well as concerns regarding the safety of natural gas transmission infrastructure in the wake of the San Bruno, California, pipeline disaster, the need for such a program is clear. The Natural Gas Damage Recovery Fund would provide needed resources to respond quickly to dangerous contamination and ensure that New York residents do not have to face costly and prolonged delays in resolving damage claims for losses related to natural gas production.

The program proposed in my bill is modeled on the New York Environmental Protection and Spill Compensation Fund (Oil Spill Fund), which draws on the expertise and collaborative efforts of DEC, the Office of the State Comptroller (OSC) and the Office of the Attorney General (OAG). With the Oil Spill Fund, DEC is able to respond quickly to emergencies and OSC can ensure that the accounting for expenditures is scrupulous and the Fund is used for appropriate expenses, while the legal expertise of the OAG ensures that responsible parties are held accountable and money is recouped whenever possible. These agencies will have similar roles in the program I am recommending.

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The important measures to address contamination resulting from natural gas production set out in my legislation include:

- Regulations to establish a prompt course of action in the event of contamination resulting from natural gas production.
- Funds to allow DEC to respond quickly to an emergency related to natural gas production and provide damaged parties with recourse other than litigating against the oil and gas companies.
- Strict liability for parties who cause contamination.
- Authority for the Attorney General to recover costs expended by the Natural Gas Damage Recovery Fund from parties who cause contamination.
- A public registry of all gas-production-related incidents in New York State.

Damage Covered

The bill would provide funding to remediate any damage to the environment, natural resources, real or personal property, or any hazardous condition that prevents the use of property or requires relocation. The Natural Gas Damage Recovery Fund would address damages occurring in the following situations: transportation of materials associated with a natural gas well site or natural gas production; activities associated with drilling, stimulating, completing, or operating a natural gas well; the release of substances used in or associated with processes related to natural gas production; and construction or operation of natural gas processing or transmission facilities.

Liability

The bill would establish a standard of strict liability for all cleanup and decontamination costs, as well as direct and indirect damages for parties who have caused contamination through the natural gas production process. To ensure that damaged parties and DEC have access to resources to remediate losses and damage quickly, the Fund itself would be strictly liable for the following: damaged or destroyed real or personal property; lost income from the time that property is damaged until it is usable again; reduction in value of property in comparison with its prior value; and replacement or restoration of natural resources damaged.

The owner or operator of a drilling site that has caused contamination would be strictly liable for cleanup and decontamination costs and all direct and indirect damages paid by the Fund. The OAG would be empowered to seek reimbursement of all Fund expenditures from parties responsible for contamination. The State and parties acting to remediate contamination would be held harmless except for acts or omissions of gross negligence or willful misconduct. The bill does not limit the ability of damaged parties to sue oil and gas operators who damage their property. Also, the bill does not limit the liability of oil and gas operators who cause contamination.

Program Financing

The program has two primary mechanisms to fund remedial actions. The bill authorizes DEC to establish a surcharge on gas well drilling permits in an amount sufficient to capitalize the Natural Gas Damage Recovery Fund at a level to be determined by DEC. In addition, a supplemental surety bond requirement would ensure that the companies engaged in gas production activities in New York have sufficient resources to remediate any contamination and related damages.

DEC is authorized to set the bond amount so as to provide sufficient funding to cover costs of cleanup and decontamination. Penalties for violation of the statute and funds recovered from responsible parties would be returned to the Natural Gas Damage Recovery Fund.

Operation of the Program

Parties responsible for causing contamination would be required to immediately notify DEC and commence activities to contain the contamination. DEC may act to remediate the contamination, or direct the contaminator to promptly remove and clean up contamination. DEC is authorized to retain contractors for this purpose. DEC would first use funds from the surety bonds to pay for cleanup in cases where the polluters do not readily agree to pick up the costs. Money from the Fund would be used if the cleanup costs are so extensive that they exhaust the bonded funds. Contamination not immediately attributable to a responsible party but due to natural gas production would be addressed by DEC using resources in the Fund.

The bill also directs DEC to create a public registry of sites affected by contamination resulting from natural gas production. In other states, such as Pennsylvania, state regulators are unable to definitively describe the extent of contamination of private wells due to natural gas production. This is due to the common industry practice of requiring nondisclosure agreements as a condition of settlements with damaged parties. This lack of knowledge has the potential to hamper the ability of regulators to evaluate the effectiveness of industry regulation. Establishing a registry as part of a New York State permitting program will ensure that State regulators are informed in all instances of contamination and will ensure full transparency in the investigation and remediation of contamination.

Other Economic Issues

Based on the experience of shale gas development in other states, it is reasonable to infer that the development of gas reserves in shale deposits in New York State has the potential to impose negative economic impacts in addition to potential benefits. Some of these potential impacts have not been fully explored in the revised SGEIS. In Fort Worth, Texas, the development of gas from the Barnett Shale was found to significantly limit future land uses due to the placement of pipelines to gather and transmit produced gas, as well as to the placement of drilling infrastructure. In some instances, the placement of drill rigs within setbacks required by federal mortgage insurance regulations made it difficult, if not impossible, to sell impacted homes.¹

More recently, information from Wyoming has shown that impacts to ground water may be associated with natural gas development. As has been widely reported, the EPA is attributing aquifer contamination in Pavillion, Wyoming, to natural gas development. Since a large portion of New York State residents and businesses rely on groundwater, the economic consequences would be severe if contamination problems were to become widespread. It is particularly noteworthy that the problems in Wyoming were attributed to vertical wells. Given this information, it is critical that DEC evaluate whether smaller hydraulic fracturing jobs, below the 300,000 gallon threshold proposed in the SGEIS and that are not subject to the more stringent regulations, could pose a threat to sensitive resources such as the New York City and Syracuse watersheds and primary aquifers. In addition, DEC should evaluate whether groundwater moving through aquifers contaminated by either high volume hydraulic fracturing or conventional natural gas production could pose a threat to water quality in the sensitive regions where high volume hydraulic fracturing is banned. DEC should also reevaluate the adequacy of setbacks from private and public water supplies proposed in the revised SGEIS.

DEC has proceeded with due deliberation in reviewing the potential impacts associated with unconventional techniques for developing shale gas reservoirs in New York State. However, there are additional issues that should be addressed to ensure that the development of the Shale gas reserves in New York State does not impose unexpected negative impacts on New York residents, the State economy or municipal budgets. As noted above, a crucial issue that must be addressed is how contamination caused by natural gas production in New York State will be cleaned up. Preventing accidents and contamination from oil and gas development must always be our first priority but, however careful the industry and regulators may be, accidents are inevitable.

¹ Fullenwider, Susan, "If We Knew What We Know Now...A Decade of Lessons Learned From Urban Drilling in Fort Work." Penn State Cooperative Extension Marcellus Shale Webinar Series: <https://meeting.psu.edu/p67821187/?launcher=false&fcsContent=true&pbMode=normal>.

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I urge you to support passage of the Natural Gas Damage Recovery Fund legislation. This bill would ensure that the necessary resources are available to achieve timely, permanent solutions.

Thank you for the opportunity to provide this information, I look forward to discussing these matters with you.

Sincerely,

Thomas P. DiNapoli
State Comptroller