

# New York State Department of Environmental Conservation

Assistant Commissioner

Office of Water Resources, 14<sup>th</sup> Floor

625 Broadway, Albany, New York 12233-1010

Phone: (518) 402-2794 • Fax: (518) 402-8541

Website: [www.dec.ny.gov](http://www.dec.ny.gov)



Joe Martens  
Commissioner

April 15, 2011

Ms. Carol Collier  
Executive Director  
Delaware River Basin Commission  
P.O. Box 7360  
West Trenton, New Jersey 08628

Re: Delaware River Basin Commission (DRBC)  
Draft Natural Gas Development Regulations  
Made Available for Public Review and Comment in December, 2010

Dear Ms. Collier:

Included herein please find New York's comments on the above noted draft regulations. By this letter New York repeats its desire, as transmitted to you from the Governor of New York by letter dated December 1, 2010, that the Delaware River Basin Commission (DRBC) halt its efforts to enact the draft regulations. Given that the DRBC did not respond to the Governor's request, New York now strongly requests that the DRBC halt its efforts to apply the draft regulations in New York.

New York supports a strong program to regulate natural gas development activities, but the one proposed by the draft regulations, making DRBC the lead in New York is not appropriate. Nor can New York's concerns be satisfied by DRBC regulations administered by New York under an administrative agreement. Such a paradigm does not resolve the issues New York has with implementing conflicting or duplicative DRBC regulations in New York and would not provide New York with full enforcement authority under its own laws, as described herein.

By its own admission, DRBC intends for certain provisions of the regulations to rely on the state oil and gas regulatory programs of Pennsylvania and New York where separate administration by the DRBC would result in unnecessary duplication. As explained in the Governor's letter, New York has not yet completed efforts to review and develop program elements to regulate wells that employ high volume hydraulic fracturing (HVHF). It is, therefore, not possible to determine at this time precisely where separate administration by DRBC would be duplicative of New York's program for HVHF.

Ultimate regulation of HVHF wells in New York State will be a challenging and critically important activity that will suffer if DRBC regulations conflict with the technical and regulatory protocols eventually adopted in the state. Such conflicts will cause confusion, duplication, redundant regulatory fee assessments, differing regulations in different locations within the state and possible mismanagement.

Duplication and inconsistency will be particularly troublesome given that New York is better suited to regulate natural gas well siting and drilling, including HVHF, as described below.

#### Enforcement

New York is better suited to enforce requirements for HVHF. For example, under New York's Environmental Conservation Law, New York is authorized to assess civil penalties of up to \$37,500 per day per violation and criminal penalties of up to \$75,000 per day per violation. By contrast, DRBC authority is limited to \$1,000 per day per offense.

New York also has a long history of significant environmental enforcement actions, many of which result in multi-million dollar fines against very large and powerful entities. No such history exists for DRBC.

The New York State Department of Environmental Conservation (DEC) has a mature enforcement program with experienced inspectors, attorneys, hearing officers, and law officers. In addition, all executive level agencies in New York enjoy the support of the New York Attorney General's office. No such support exists for DRBC.

In short, New York's legal authority and support structure for undertaking enforcement activities make it more equal to the task of regulating large energy producers than DRBC.

#### Gas Development Regulatory Experience

New York is better prepared to regulate HVHF based on its long history of regulating oil and gas well development. Tens of thousands of wells have been successfully drilled in New York for oil, gas and solution salt extraction, geothermal, brine disposal and underground gas storage. Computerized records exist on more than 34,000 wells, of which about 14,000 are active. DRBC does not possess such experience.

#### Field Presence

New York is better suited to oversee oil and gas development activities because it has field offices and staff capable of overseeing various natural gas development activities. New York has a 24-hour spill reporting hotline and 24-hour inspection capability. DRBC has none of these capabilities. Even if DRBC were to open a field office in New York, it would just be duplicating New York's existing presence.

### Federal Program Delegation

New York is approved or delegated by the EPA to implement the Clean Water Act (CWA), Clean Air Act (CAA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). All of these federal programs allow NYSDEC to better employ federal authorities and leverage EPA resources in executing program activities under those federal authorities. DRBC has no such authority.

### Multiple Agencies Supporting NYSDEC's Regulatory Program

The lead agency in New York for regulating natural gas development is DEC. However, DEC receives support from numerous other agencies of New York State government. Such support does not exist for DRBC.

Supporting New York's insistence that DRBC not go forward with regulations that apply in New York is the lack of HVHF ongoing in New York at this time. Further, the New York City Watershed cannot be developed under the current SGEIS process and that watershed is a large portion of the area of the Delaware River Basin that is in New York.

Given New York's existing process and capabilities to regulate gas development activities, New York strongly requests that DRBC focus on areas for which DRBC is best suited.

General comments on the regulations that New York can make prior to completing its own comprehensive process are:

1. Section 7.5(c) Natural Gas Development Plans (NGDP) is intended to facilitate analysis of potential water resource impacts. Presumably those impacts would be impacts that are above and beyond the local impacts that are being assessed by the host state. In particular, DRBC would be expected to assure that waters in the Delaware River Basin are not degraded significantly and that those waters' status as Special Protection Waters is not harmed. To perform such an assessment, the exact siting of well pad and associated infrastructure is not necessary for analyzing potential impact to the waters in the basin and should not be addressed by DRBC.

Yet the structure of the NGDP requirements is unnecessarily more akin to large scale siting plan requirements. New York requests this paragraph be revised to focus on impacts rather than siting.

2. Section 7.3(k) is included to provide financial assurance for the plugging and abandonment and restoration of the natural gas well, well pad site and associated equipment. The enhancements to financial assurance provided by the draft regulations would be welcomed by New York. However, in the event that a state develops more robust financial assurance, New York strongly requests that this Section include a sunset clause or a clause deferring to an equivalent state program.

3. The proposed project review fees in Section 7.3 (l) are excessive. Fees for reviews already performed by New York should be deleted.

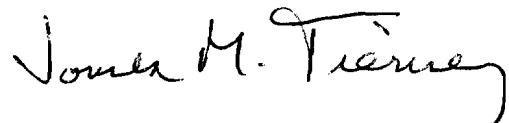
4. Section 7.3(i) sets forth provisions under which DRBC will defer to host state requirements, but limits those to natural gas and exploratory well construction and operation, and refers to New York's Environmental Conservation Law Article 23. However, Article 23 is only a portion of DEC's authority over activities associated with natural gas drilling. Authority under the Environmental Conservation Law goes substantially beyond Article 23 including, among other authorities, water quality protection authority under Articles 15 and 17.

5. Section 7.3(i)(2) allows for implementation of aspects of the DRBC program by states in accordance with administrative agreements between states and DRBC. But, New York's enforcement authority would be severely limited under an administrative agreement. For the reasons noted above, when comparing New York's enforcement capabilities to DRBC's enforcement capabilities, such a paradigm for regulating natural gas development would be considerably less effective than one implemented under New York authority.

In conclusion, New York is strongly opposed to DRBC's regulations as proposed for the above reasons. Either the development of the regulations must be deferred in its entirety, or regulations applicable to New York must be deferred. New York, invites DRBC to participate in the ongoing public process for New York's HVHF regulatory program. New York also strongly urges DRBC to defer to the State's existing permitting process for non-HVHF drilling and allow such projects to proceed under state-issued permits and approvals.

If you have any questions or comments, please do not hesitate to call Angus Eaton at (518) 402-8132. Thank you.

Sincerely yours,



James M. Tierney  
Assistant Commissioner  
for Water Resources

cc: Commissioners of DRBC