

MARCELLUS SHALE GAS DEVELOPMENT IN NEW YORK STATE

Alert 1

The early complaint by environmental groups that Marcellus Shale Gas development and high volume hydraulic fracturing was somehow exempt from environmental regulation has largely disappeared – and the resulting amount of regulation of these activities in New York state will be significant. In fact, such regulation by New York State Department of Environmental Conservation (NYSDEC) is likely the largest new regulatory program proposed by the Agency since it was required to ramp up its air permit program under the Clean Air Act amendments of 1990.

The Environmental attorneys at Jaeckle Fleischmann & Mugel, LLP are pleased to issue the first in a series of Alerts providing analysis and updates regarding New York's proposed regulation of Marcellus Shale gas development & high volume hydraulic fracturing.

Have you had the opportunity to read the New York State Department of Environmental Conservation's (NYSDEC's) "Revised Draft Supplemental Generic Environmental Impact Statement On the Oil, Gas & Solution Mining Regulatory Program" (GEIS)? Or NYSDCE's draft regulations? In recent months, the amount of paper issued by NYSDCE and other agencies in connection with *Marcellus Shale Gas development* has been staggering. The latest version of the GEIS, its Appendix, Economic Assessment Report and the draft regulations amount to over 1500 pages. Not included in this page total is a new New York state law that regulates all water withdrawals greater than 100,000 gallons per day, proposed regulations issued by the Delaware and Susquehanna River Basin Commissions regulating aspects of Marcellus Shale Gas development and high volume hydraulic fracturing within those watersheds, and USEPA proposed air and water regulations also aimed at such activities.

The most frequently asked question in recent weeks has been whether New York State will permit high volume hydraulic fracturing in horizontal wells used to extract Marcellus Shale gas. This question almost certainly must be answered in the affirmative – it is not reasonable to believe that NYSDCE would issue three very extensive versions of the GEIS, engage in two lengthy public comment periods and commence

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NYSDEC is now on its third version of the GEIS and public comments are due on January 11, 2012. Over the next few months, our publications will highlight specific components of the proposed and final regulations. These publications will be posted on www.jaekle.com as a reference library and will cover areas such as:

- Well location restrictions, drinking water well testing and water withdrawals
- Wastewater and liquid waste handling and treatment
- Drilling and well operations
- Air emissions regulations
- The Role of Local Government
- Other issues covered by the GEIS, including transportation, financial security, NORM and others

issuing extensive regulations, only to conclude that these activities may not proceed. A more difficult question is: when will such activities begin to be permitted? Unless (1) the State succumbs to further and significant delay, (2) the legislature passes a bill banning Marcellus Shale gas development or high volume hydraulic fracturing with veto-proof majorities, or (3) one or more opponent groups not only challenge the final GEIS and/or regulations, but also get an injunction preventing any permitting of such activities during the pendency of the lawsuit, none of which is likely, development will likely begin in 2012.

The most difficult question to answer is this: will New York State's regulations be so onerous that little or no Marcellus Shale gas development occurs in the State? We are starting to hear from industry sources that the latest draft of the GEIS and draft regulations may have crossed the line. Restrictions on well locations and set back requirements, the amount of safety redundancy and triggers for site-specific environmental studies are reaching a point where industry representatives may be questioning the economic feasibility of drilling in the State once the permitting program begins to operate. Industry representatives have recently stated that the proposed regulations and requirements could add from \$500,000 to \$1 million to the cost of drilling a horizontal well, putting NYS at a significant competitive disadvantage with neighboring states which are currently developing Marcellus and Utica shale resources.

Although comprehensive regulations are proposed, many environmental groups still oppose Marcellus Shale Gas development until "adequate" safeguards are in place. Through our series of Alerts, we will continue to monitor the progress of these regulations and update you on the important aspects of Marcellus Shale Gas development in New York State.

[For more information, contact Dennis P. Harkawik at 716.843.3848 or dharkawik@jaeckle.com or Charles D. Grieco at 716.843.3844 or cgrieco@jaeckle.com.](mailto:dharkawik@jaeckle.com)

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