

JAMES BRYAN BACON, ESQ., P.C.

Attorney at Law

P.O. Box 575
New Paltz, New York 12561
(845) 419-2338

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Comments on Proposed HVHF Regulations
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-6510

***Re: NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S
PROPOSED REGULATIONS FOR
HIGH VOLUME HYDRAULIC FRACTURING
6 NYCRR PARTS 52, 190, 551 and 560***

Dear Sir or Madam,

Please accept the following comments on behalf of the Croton Watershed Clean Water Coalition and a number of residents living in the southern tier of New York State relating to the New York State Department of Environmental Conservation (DEC) proposed regulations for High Volume Hydraulic Fracturing (HVHF).

DEC must include additional definitions in proposed 6 NYCRR §550.3 to update the New York's Environmental Conservation Law (ECL) definitions dating from enactment of the state's 1963 oil and gas legislation.¹ Updated definitions are required due to advancements in oil and gas extraction technology and significant advances in the understanding of New York's geology and substrata where natural gas is trapped in impermeable rock formations.

Publications by the oil and gas industry² and professionals regularly refer to a wide array of natural gas derivatives, extraction processes and geologic formations, none of which are reflected by the definitions in the ECL or DEC's proposed regulations.

¹ Environmental Conservation Law (ECL) §23-0101.

² http://www.naturalgas.org/overview/unconvent_ng_resource.asp.

As explained by the industry:

Technology and geological knowledge advances now allow acquisition of unconventional natural gas deposits. Several techniques allow unconventional gas to be extracted, including fracturing, acidizing and pressurizing using water or steam. Tight gas sandstones act simply as a reservoir, whereas coal and shale act as a source rock as well as a reservoir for the gas.³

As a result, we request DEC to add the following definitions to 6 NYCRR §550.3 in order that the regulations reflect a current understanding of natural gas and its source formations in New York and to ultimately clarify DEC's position on the law of capture and the purposes of compulsory integration.

Conventional Gas: migratory natural gas deposits tapped by vertical drilling and no artificial stimuli or pressurization. Conventional gas deposits in migratory pools have been the most practical sources to mine. Once drilled, the gas is extracted quite readily and easily usually by natural pressurization.

Unconventional Gas: natural gas deposits obtained from impermeable source rock through hydrofracturing, acidization, flooding or other pressurizing means. The term also covers deep gas, tight gas and shale gas.

Tight gas: natural gas that is stuck in a very tight formation underground, trapped in unusually impermeable, hard rock, or in a sandstone or limestone formation that is unusually impermeable and non-porous, i.e. the Lower Silurian age Medina Group and Theresa Sandstone (Galway Formation).

Shale gas: Natural gas trapped in the source rock from the Devonian Age, i.e. Genesee, Marcellus; Silurian Age, i.e. Sodus and Ordovician Age, i.e. Utica.

Deep gas: gas produced from sources at significant physical depths of 7,500 to 10,000 feet. Such formations are Middle to Late Ordovician to Cambrian in age and include the Trenton, Black River, Theresa and Potsdam. In the Finger Lakes area and Southern Tier it would include the Middle and Lower Ordovician age.

³ <http://www.oilandgasevaluationreport.com/2010/10/articles/technology/tight-gas-sandstone-is-it-truly-unconventional/>.

Source rock: Rock formations containing tight gas and/or shale gas including the Deep Trenton-Black River “hydrothermal dolomite,” Marcellus Shale, Lower Silurian Clinton Group shales, Lower Silurian age Medina Group sandstones, Ordovician-age Utica Shale and Theresa Sandstone (Galway Formation).

Support for additional definitions is found in DEC’s publications as well. As DEC’s website⁴ explains “New York has untapped ‘deep’ exploration potential. Of more than 33,000 wells currently in the New York well database, fewer than 600 wells were drilled deeper than 5,000 feet. Only 655 wells in New York’s current database were drilled to the Trenton Formation or deeper. (This total may not include recent Trenton-Black River wells, which are confidential.) Fewer than 110 wells have penetrated the entire sedimentary section.”

Deep natural gas deposits will only become more sought after as time increases the value of the resource and technology advances to make extraction more and more economical. DEC’s definitions should be brought up to date to reflect current field conditions and the resources which will be extracted as a result of the promulgation of DEC’s new regulations and completion of DEC’s environmental review of HVHF.

I also include herewith my comments submitted to the New York State Assembly Committee on Environmental Conservation on January 10, 2013 which also calls for clarifying the oil and gas definitions. Specifically, we object to DEC’s use of undefined and loosely defined terms to expand the purposes of compulsory integration and the law of capture to allow a driller in a spacing unit to mine all non-migratory gas beneath a spacing unit. DEC’s response to comment 4232⁵ in its Assessment of Public Comment on the draft regulations, indicates DEC will interpret the law of capture to include non-migratory gas.

However, the HVHF of any owner’s property without their consent is trespass and an unlawful taking.

HVHF coupled with Compulsory Integration is a Trespass

The *Second Restatement of Torts*—a treatise issued by the American Law Institute (ALI) that summarizes the general principles of current tort law provides that an actor is subject to liability for trespass for any intentional entrance onto or

⁴ Capturing the Benefits from New York’s Natural Oil and Gas Resource Endowment: http://www.dec.ny.gov/docs/materials_minerals_pdf/nyserda5.pdf.

⁵ Assessment of Public Comments 6 NYCRR Parts 52, 190, 550-556, 560, and 750 (PDF) (1MB) - Comments received from September 28, 2011 through January 11, 2012; available at http://www.dec.ny.gov/docs/administration_pdf/asspubcom.pdf.

into land—regardless of whether actual harm results—and makes no exception for subsurface trespass.

New York recognizes subsurface trespass. “The essence of trespass to real property is injury to the right of possession, and such trespass may occur under the surface of the ground.” *Bloomingdales, Inc. v. New York City Transit Authority*, 13 NY3d 61, (2009). (See also *O’Connell v. Graves*, 70 AD3d 1451, (4th Dep’t 2010), where subterranean encroachment of septic system considered trespass; *Smith v. City of Brooklyn*, 18 AD 340, 345-46, (2nd Dep’t 1897), “An adjoining owner has no right to tunnel into another’s land for water or minerals, or take away soil lying under the surface;” *Hathorn v. Dr. Strong’s Saratoga Springs Sanitarium*, 55 Misc. 445 (Saratoga Cty, Sup. Ct. 1907), “The rights of an owner in property below the surface should be regarded as inviolable as those in property upon the surface” and *Forbell v. The City of New York*, 164 N.Y. 522 (1900), “No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated.”

There is no doubt that HVHF constitutes a trespass where the well-bore or fractures invade a neighboring subsurface property. Even in the Texas matter of *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 9 (Tex. 2008), where the majority side-stepped the issue, the dissenting judge stated “[the] party effectively enters another’s lease without consent, drains minerals by means of an artificially created channel or device, and then ‘captures’ the minerals on the trespasser’s lease.”

Current law (ECL §23) allows the subsurface migratory gas to be extracted from beneath other properties integrated into a spacing unit. However, the ECL does not explicitly extend that right to non-migratory gas from source rock. That extension should not be allowed for the following reasons.

First, in New York, the law of capture and the doctrine of correlative rights have historically only applied to migratory subsurface minerals. The gas trapped in the Marcellus shale is different:

[H]ydrocarbons exist in rock or more specifically the pore space within the rock.... Porosity is defined as the fraction of the void space... Many shales have high porosity values reaching 20% to 30%. The problem with shale (and coal) is the lack of interconnectivity... This interconnectivity is referred to as permeability. Take for example a Styrofoam cup. Styrofoam is very porous (which gives it excellent insulating properties) yet it has no permeability because your drink does not leak out of it. Permeability is a measure of a porous material (i.e. rock) to transmit fluid.

Without permeability you can't get oil or gas in or out of the rock... With the development of hydraulic fracturing, permeability can be produced in a rock that has very little naturally occurring permeability. It's this man-made increase in deliverability of hydrocarbons to the wellbore that makes an economic or an uneconomic well... you must have both porosity and permeability to have a producible reservoir. Porosity is static. Permeability can be enhanced.⁶

Therefore, by allowing HVHF to proceed to obtain the Marcellus shale beneath an unconsenting neighbor, the ECL would for the first time be used to force a trespass upon the neighbor's subsurface property.

Second, the 1963 oil and gas legislation (Title 9 of the ECL) was written prior to the development of HVHF and was based upon 1963 technology; i.e. vertical drilling into oil and/or gas *fields and pools*. Because oil or gas will flow toward the point of lowest pressure, the 1963 unitization law was authorized as necessary to efficiently drain oil pools and gas domes which underlay more than one property. The 2005 amendments to the ECL did not change the definitions of pool, fields or reservoir to include tight shale formations. Those definitions are:

“Field” means the general area overlaid by one or more pools.

“Pool” shall mean an underground reservoir containing a common accumulation of oil and gas or both. Thus each zone of a structure which is completely separated from any other zone in the same structure is a pool. 6 NYCRR 550.3

“Reservoir” means any underground reservoir, natural or artificial cavern or geologic dome, sand or stratigraphic trap, whether or not previously occupied by or containing oil or gas.

Therefore, the fact that the gas is trapped in the source rock removes it from the definition of field, pool or reservoir. As above, DEC's definitions need to be expanded to distinguish between conventional migratory gas and unconventional non-migratory gas.

HVHF coupled with Compulsory Integration is a Taking

Both the federal and state constitutions prohibit the taking of private property without just compensation. As recognized in *United States v. Causby*,

⁶ “*The 2 P's of Economic Reservoirs: Porosity and Permeability*” Greg McFarland <http://www.oilandgasevaluationreport.com/articles/oil-field-basics-1/>

328 U.S. 256, 265 (1946) ‘[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath.’ The physical occupation of property is the clearest example of a taking. “[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1872). Further:

“A physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and that is true without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982)

According to Gregory May, vice president of residential mortgage lending at Tompkins Trust Company, HVHF’s subterranean injection of hazardous materials will devalue and encumber the title of property.

There are “key areas that responsible and informed lenders have concluded create an inability for mortgage lenders to provide the required ‘representations and warrants’ to secondary market investors like Fannie Mae, Freddie Mac and FHA when a standard gas lease exists.”⁷

HVHF leasing would conflict with the terms of a residential mortgage document, conflict with set back provisions, title insurance and the lenders’ ability to confirm compliance with secondary market guidelines. Consequently, HVHF would render title by most accounts, unmarketable.

If one cannot sell their property or mortgage it, it is worthless. While the correlative rights doctrine may compensate an owner for the gas beneath his property it does not compensate him for the total loss of his property.

In conclusion, the ECL’s oil and gas policy calls for the full protection of “the rights of all persons including landowners and the general public.” HVHF does just the opposite. HVHF and CI strip away the individual’s private property rights and by forced trespass taints the property with hazardous chemicals and negates the marketability and lender financing of the property.

⁷ Greg May rebuttal to pro-drilling editorial appearing in the New York State Bar Association Journal January 2012 (which countered E.Radow’s NYS Bar Assoc. article from Nov. 2011). See <http://nysbar.com/blogs/barjournal/>.

In sum, in order to avoid the unconstitutional taking of private property without just compensation, DEC must promulgate a definition for conventional gas as migratory, define unconventional gas as non-migratory and limit the establishment of spacing units to be used for the drilling and extraction of migratory gas only. Again, the purposes of compulsory integration should not be used to upend NY's law of trespass and allow HVHF to take from a homeowner his most significant investment.

Finally, we reiterate our objection to subsurface drilling beneath any state lands and urge DEC to draft 6 NYCRR §52.3 to include prohibitions on subsurface disturbances of state lands.

As made clear by our prior comments:

HVHF is inconsistent with the state's policies of forest and wildlife stewardship as set forth in Article XIV §3 of the State Constitution. DEC's proposed ban on surface drilling on State lands must be extended to ban subsurface drilling activities which are inconsistent with Article XIV §3, the Environmental Conservation Law and public policy.⁸

DEC has prevented industrialization by prohibiting commercial mining, wind turbines, cellular phone towers, power lines and All-Terrain Vehicles (ATVs) from most areas, *i.e.*:

The placement of new communications towers (for purposes other than DEC administrative use), wind turbines or other utilities should be avoided and for ecological purposes would be more appropriately placed on private lands which have already been fragmented... [and]

State Forests are not an appropriate setting for industrial - scale wind farms that would require permanent clearing of land⁹... [and]

Current Department policy is to decline any commercial mining application(s) pertaining to State Forest lands, as the impacts from these activities are not compatible with the purposes for which Reforestation Areas were purchased.¹⁰

⁸ CWCWC comments submitted by James Bacon, Esq., dated December 29, 2011.

⁹ Pg 167-168 SPSFM.

¹⁰ SPSFM at 240.

In closing, we again state that drilling horizontally beneath State lands is inconsistent with DEC policy and the purposes for which State lands were acquired as HVHF would deposit hazardous frac fluids on State lands. The potential for HVHF fluids and wastes to migrate and contaminate surface resources may be caused by human or mechanical error, seismic activity, the passage of time, i.e. deteriorating concrete casings, methane migration or abandoned wells and opened fissures acting as conduits to the surface. Because the risk exists, subsurface drilling should be banned for all State-owned lands and waters, including all waterways. Similarly, any HVHF infrastructure, such as piping, utility connections or roads that cross or invade State lands, would be ¹¹ contrary to the NYS Constitution and ECL.

Respectfully submitted,

James Bacon
Attorney for CWCWC

¹¹ See Attachment A; Sustained Casing Pressure and Gas Migration; Brufatto, et al. Schlumberger, OilField Review, Autumn, 2003:
http://www.sourcewatch.org/index.php?title=File:Ingraffea_Slides_7-25-11-2_Page_16.png.