

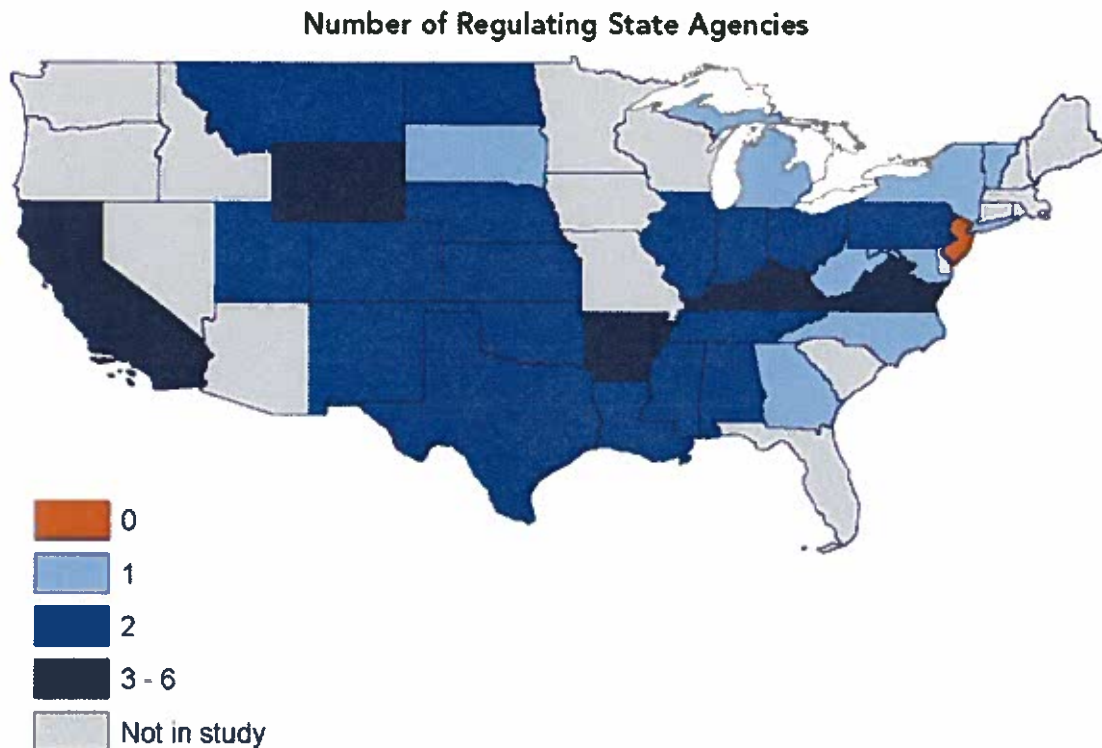
## New York's Nonexistent Environmental Agency

### **New York State lacks an autonomous environmental oversight of shale gas.**

New York is one of the few states that task its environmental agency, the DEC, with promoting drilling. This compromises the DEC's effectiveness as an environmental agency. New York is the only shale gas state that does not tax gas production, leaving its regulatory agency chronically under-staffed. The regulations are written by the industry. The DEC deviates from the industry line only to appease a political constituency such as New York City. Enforcement of gas well regulations is historically lax in New York.<sup>1</sup>

### **Tasking an environmental protection agency with issuing drilling permits compromises the agency's effectiveness.**

New York is one of only 8 states that combine drilling oversight with environmental regulation, and New York is one of 4 that have any shale gas potential. In 23 states in a recent study of 31 states<sup>2</sup>, the environmental oversight of gas production is separated from drilling supervision, which affords some measure of autonomy to the state environmental agency.



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<sup>1</sup> <http://www.scribd.com/doc/76085928/Worst-Practices-at-the-DEC>

<sup>2</sup> [http://www.rff.org/centers/energy\\_economics\\_and\\_policy/Pages/Shale\\_Maps.aspx](http://www.rff.org/centers/energy_economics_and_policy/Pages/Shale_Maps.aspx)

The DEC's environmental mission is compromised, as evidenced by the rules and regulations written by the industry. <sup>3</sup> The setback of a gas well from the spacing unit boundary is emblematic of how readily the DEC's environmental role is compromised. Before Chesapeake Energy's lobbyist rewrote the spacing unit setback, a gas well could be no closer than 660 feet from the property line. Chesapeake changed that to 330 feet, about the length of a football field, and the DEC lawyers effectively copied Chesapeake's wording verbatim. *There is no evidence that the DEC conducted any environmental impact assessment of the change.*

On March 26, 2008, Tom West, his law partner and as many as seven Chesapeake Energy employees met with Jack Dahl of the DEC to present Chesapeake's proposal to increase the state well spacing for shale gas wells, and to reduce the set back of gas wells within that unit from the property lines. Simply put, it is better for the driller for the spacing unit to be as large as possible, since that enables them to hold more acreage with one well in what amounts to an acreage speculation. It is also better for the driller for the gas well setback to be as close as possible to the property line. Conversely, the landowner is generally worse off with a large spacing unit, since that enables the driller to hold more acreage with the least number of wells, which can equate to lower royalties for the landowner. And the neighbors are worse off if the gas well is closer to their property line. Shown below is what the law was before Chesapeake re-wrote it, what Chesapeake proposed to Jack Dahl and Allison Crocker of the DEC, and what the final proposed law was. See page 5 of this list of communiqués between West and DEC staff.<sup>4</sup> In a nutshell, Chesapeake wrote New York's shale gas spacing and gas well setback law, reducing the setback of the well from the property line from up to 1,500 feet to no more than 330 feet.

#### **New York regulations prior to 2008**

<b>Well Depth</b>	<b>Spacing</b>	<b>Setback</b>
Less than 4,000 feet deep	80 acres	660' to property line
4,000 – 6,000 feet	160 acres	660'
6,000 – 8,000 feet	320 acres	1,000'
> 8,000 feet deep	640 acres	1,500'
<b>Chesapeake's Proposal</b>	640 acres	330'
<b>DEC proposed regulations <sup>5</sup></b>	640 acres	330'

<sup>3</sup> <http://www.scribd.com/doc/98812091/Who-Writes-New-York-s-Fracking-Regulations>

<sup>4</sup> <http://www.scribd.com/doc/98756217/Chesapeake-Writes-New-York-s-Fracking-Regulations>

<sup>5</sup> [http://www.sourcewatch.org/index.php?title=Fracking\\_Regulations](http://www.sourcewatch.org/index.php?title=Fracking_Regulations)

After 2008, as gas prices fell, drillers scrambled to hold leased acreage, arguing *force majeure* to extend their leases in New York<sup>6</sup> and attempting to get the well spacing doubled, to 1,280 acres, or two square miles. IOGA pushed for such a doubling in a September 11, 2011 letter to the DEC:

“Because New York law limits the size of spacing units for shale wells up to 640 acres, it will be the practice of industry to layout back-to-back units with a common well pad for both units thereby draining areas up to 1280 acres (two square miles).”<sup>7</sup>

The drillers subsequently persuaded State Senator Mark Grisanti to attempt to increase the spacing unit for one well up to *2 square miles*.<sup>8</sup> Perversely, such large well spacings on horizontal wells exacerbate the abuse of compulsory integration to coerce non-consenting landowners into participating in wells. New York’s compulsory integration law was for all intents and purposes written by Chesapeake’s lobbyist, Tom West, as evidenced by his FOIL’d correspondence with DEC staff attorney Allison Crocker in 2005, pages 58 – 103.<sup>9</sup>

**The DEC is mandated by Article 23 of the NYS Environmental Conservation Law to maximize the efficiency with which oil and gas are extracted.** The DEC interprets this as justification to maximize the quantity of gas extracted, regardless of the environmental costs, negative impacts to roads,<sup>10</sup> damage to the built environment or to the health of the citizenry.

**Industry has written New York’s gas regulations since at least 2005.** In that regard, the DEC has abrogated its role as environmental enforcement agency by allowing its environmental protection regulations to be written by the gas industry. The gas industry is the sole author of New York’s 2005 compulsory integration law.<sup>11</sup> Many states, such as Pennsylvania, impose no such burden on non-consenting landowners. Other states, such as Texas, resort to compulsory integration only under extreme circumstances. In contrast, New York’s law was literally dictated by the gas industry. In 2009, a driller hired the gas lobbyist that wrote the 2005 law to force a homeowner in a well.<sup>12</sup> In addition to being a breach of property rights, tantamount to “private eminent domain”, as described by the Governor of Pennsylvania, compulsory integration poses unique environmental risks in New York – since New York’s shallow rural water wells are particularly vulnerable to

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<sup>6</sup> <http://www.bloomberg.com/article/2012-06-14/a02B6uleXj2k.html>

<sup>7</sup> [http://static.ewg.org/reports/2012/insidettrack/2012SEP02\\_Gill.pdf](http://static.ewg.org/reports/2012/insidettrack/2012SEP02_Gill.pdf)

<sup>8</sup> [http://artvoice.com/issues/v11n25/week in review/grisanti and fracking](http://artvoice.com/issues/v11n25/week%20in%20review/grisanti%20and%20fracking)

<sup>9</sup> <http://www.scribd.com/doc/98756217/Chesapeake-Writes-New-York-s-Fracking-Regulations>

<sup>10</sup> <http://www.scribd.com/doc/74102302/New-York-Shale-Gas-Road-Impact>

<sup>11</sup> <http://www.scribd.com/doc/74790533/Compulsory-Integration-in-New-York>

<sup>12</sup> <http://www.propublica.org/article/forced-pooling-when-landowners-cant-say-no-to-drilling>

contamination from drilling,<sup>13</sup> and the wells and houses on non-consenting properties are not protected by the DEC's gas well setback regulations.<sup>14</sup> Under the DEC's gas well setbacks, a non-consenting home owner could be compelled into participating in a well that was 100 feet from their house, effectively voiding their mortgage and homeowner's insurance. Or be located within 500 feet from their water well, which almost guarantees that water will be rendered un-potable.

**New York has the worst gas well regulations in North America.** The setback of a gas well from a land use is a benchmark of regulatory protections. The greater the setback, the more protection for the built environment and water sources. The *DEC's shale gas well setbacks are worse than any other state or municipal ordinance in North America*, as indicated in the following table:

DEC		State and Local Ordinances	
House	100 feet	Texas	1,000 <sup>15</sup>
		MD.	1,000
		ND.	1,640
		Alberta	350 - 5,280
		Wyoming	350
		W. Va.	625
		N.M.	1,000 <sup>16</sup>
		Pa.	500 <sup>17</sup>
		Texas	1,000
School	150	N.M.	750 <sup>18</sup>
		Texas	1,500 <sup>19</sup>
Well	500	N.M.	1,000
Stream	150	N.M.	750
		N.M.	750
Pond	0	N.M.	750
Historical site	0	Utah	5,280
Park	0		

A shale gas well 100 feet from a house would effectively asphyxiate the occupants with diesel exhaust and gas emissions. How this is environmentally sound is beyond comprehension.

<sup>13</sup> <http://www.scribd.com/doc/65577477/How-Gas-Wells-Leak>

<sup>14</sup> <http://www.scribd.com/doc/72545747/Worst-Fracking-Regs>

<sup>15</sup> State setback of 200 feet overridden by town ordinances which vary from 600 feet in Fort Worth, 800 feet in Lewisville, to 1,320 feet in Midland. Flower Mound and Southlake are typical at 1000 feet.

<sup>16</sup> Santa Fe County and Valencia County. Arriba County is 650 feet.

<sup>17</sup> State setback

<sup>18</sup> Santa Fe County

<sup>19</sup> Town of Flower Mound

New York has no setbacks for seismic testing, except on state land. Meaning a seismic crew can shoot a shot hole with dynamite anywhere in the state, including 50 feet from a daycare center. Needless to say, this is not the case in other states:

Montana – 1,320 feet from any building, water well or spring

North Dakota – 600 feet from buildings, water wells, springs

Wyoming - 1,320 from building or water well

Maryland – 500 feet from a building

Oklahoma – 200 feet from a water well

Arkansas – 200 feet from a residence

Louisiana – 1,000 feet from a *boat*

*Boats* in Louisiana have more protection from seismic testing than do residents of New York. The notion that New York's regulations are "excellent" is a fallacy. They would be illegal in most states. They are an environmental disgrace.

**The DEC follows the industry line in regards to scientific evidence.** If the industry opposes scientific evidence that is unfavorable to fracking, the DEC parrots that opinion, even if the results are peer-reviewed<sup>20</sup> or is from a government agency.<sup>21</sup> Some inconvenient truths regarding how gas wells leak are simply ignored by the DEC, since they could hamper that agency's primary task of promoting drilling.<sup>22</sup>

**When it comes to reviewing public comments on the proposed SGEIS, the DEC just went through the motions – the only review that mattered was from the gas industry lobbyists that wrote most of the SGEIS regulations.** Most of the review work was either subcontracted out to consulting firms, who generally repeated gas industry propaganda.<sup>23</sup> Or was simply dictated by DEC staffers from industry lobbyists.<sup>24</sup> In some cases, the DEC went out of their way to either ignore information, such as the prevalence of poorly mapped localized faulting in Upstate which can result in gas geysers, as pointed out by the

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<sup>20</sup> <http://www.scribd.com/doc/73405864/Anomaly-in-the-Duke-Methane-Study>

<sup>21</sup> <http://www.scribd.com/doc/83492110/USGS-Letter-to-DEC>

<sup>22</sup> <http://www.scribd.com/doc/65704543/Casing-Leaks>

<sup>23</sup> <http://www.scribd.com/doc/97715415/Who-Wrote-the-SGEIS>

<sup>24</sup> <http://www.scribd.com/doc/98812091/Who-Writes-New-York-s-Fracking-Regulations>

USGS,<sup>25</sup> or made tepid attempts to discredit studies regarding gas migration from wellbores,<sup>26</sup> since leaking gas wells are a particular problem in regions with shallow water wells like rural New York, and there is no fix.<sup>27</sup>

The dSGEIS drew over 80,000 comments, but the final draft went to the industry to see if the DEC staff got the wording right.<sup>28</sup> John Martin at NYSERDA handled review of the first round of dSGEIS comments. Much of the comment review work was contracted to Alpha Engineering, who had participated in drafting the dSGEIS. So the co-authors of the dSGEIS, Alpha Engineering, were given the opportunity to vet the critiques of their work. Martin subsequently left the NYSERDA and co-founded a “shale institute” at the University of Buffalo, putting out papers under the university’s imprimatur that were little more than thinly veiled industry propaganda.<sup>29</sup> The first report from Martin’s “institute” was in fact simply warmed-over spin from a previous industry sponsored paper.<sup>30</sup> Martin spoke at last year’s UB Shale lectures, where Robert Jacobi introduced him, the co-director of the new shale institute. <http://www.youtube.com/watch?v=yQkuafB12Q> He discusses NYSERDA at the 3:04 mark of this video: <http://www.youtube.com/watch?v=Dfwkf-CVBNs> The UB shale institute held private planning meetings in April and May 2012, which Martin participated in,<sup>31</sup> to strategize how to market the institute to the gas industry as an investment in public relations.<sup>32</sup> In other words, the state official that farmed out the review of dSGEIS comments retired to be come a full time fracking apologist.<sup>33</sup>

**The DEC allows the industry it regulates to review the proposed regulations that the industry drafted – but does not allow environmental groups to vet those same drafts.** The DEC, blithely ignoring its role as state environmental watchdog, gives the gas industry advance copies of its proposed gas well

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<sup>25</sup> <http://www.scribd.com/doc/83492110/USGS-Letter-to-DEC>

<sup>26</sup> <http://www.scribd.com/doc/73405864/Anomaly-in-the-Duke-Methane-Study>

<sup>27</sup> <http://www.scribd.com/doc/65577477/How-Gas-Wells-Leak>

<sup>28</sup> <http://www.ewg.org/report/inside-track-cuomo-team-gave-drillers-edge-influence-fracking-rules>

<sup>29</sup> <http://blogs.artvoice.com/avdaily/2012/05/15/ub-shale-institute-taps-industry-shills-for-first-report/>

<sup>30</sup> <http://public-accountability.org/2012/05/ub-shale-play/>

<sup>31</sup> <http://blogs.artvoice.com/avdaily/2012/07/02/ub-shale-institute-held-secret-meetings/>

<sup>32</sup> <http://blogs.artvoice.com/avdaily/2012/05/22/ behold-the-ub-shale-resources-and-society-institute/>

<sup>33</sup> <http://blogs.artvoice.com/avdaily/2012/06/29/new-york-times-looks-at-ub-shale-institute-again/>

regulations.<sup>34</sup> There is no indication that the DEC has allowed any environmental groups to vet such drafts. This swapping of drafts between gas lobbyists and DEC staff reads like an intra-office exchange between attorneys in the same law firm.<sup>35</sup> That is because the DEC functions like a minerals management agency – not an autonomous environmental agency. The “stakeholders” are the gas drillers – *not the citizens of the state* – because the DEC is not an independent environmental agency.

**New York is the only state with shale gas potential that does not tax gas production at the wellhead.** This is because New York’s oil and gas drilling regulations are written by the oil and gas industry.<sup>36</sup> This effectively offloads all of the public costs of road repair and pollution remediation to the taxpayers. It also starves the regulatory agency of a funding source. None of this is coincidental; it is simply emblematic how corrupted the system is in New York.

**The DEC’s environmental actions consist largely of politically motivated carve-outs to key voting blocks.** The proposed regulations for shale gas drilling consist almost entirely of politically driven carve-outs, notably for the New York City reservoir watersheds, and other large metropolitan areas. It is indeed a document based on science, *political science*, and the science of counting votes.<sup>37</sup> Beyond that, there is precious little science to be found in the proposed regulations, only some second-hand industry propaganda. Rural areas are treated like fracking guinea pigs. Given the fact that the DEC’s primary mission is to sell well permits, an appreciation of hard science is apparently not a prerequisite for employment, and indeed may be a hindrance to career advancement within the department’s bureaucracy.<sup>38</sup>

There was no health impact assessment in the agency’s review of shale gas, *because minerals management agencies do not do such health impact assessments* – autonomous state environmental agencies do. It also explains why the socio-economic impact analysis of shale gas was an exercise in hyperbole, since that is what minerals management agencies do – promote drilling – they do not take a hard look at the economic and environmental downsides of such activities.<sup>39</sup>

In order to give the DEC the appearance of environmental legitimacy, the department has a bureaucrat with an environmental background as its figurehead. His predecessor, Pete Grannis,<sup>40</sup> left when he was unable to secure adequate staffing

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<sup>34</sup> <http://www.texassharon.com/2012/06/27/frackers-get-sneak-peak-at-rules-they-wrote/>

<sup>35</sup> <http://www.ewg.org/report/inside-track-cuomo-team-gave-drillers-edge-influence-fracking-rules>

<sup>36</sup> <http://www.scribd.com/doc/63145742/New-York-State-Gas-Production-Tax>

<sup>37</sup> <http://www.scribd.com/doc/66390117/The-Political-Science-of-the-SGEIS>

<sup>38</sup> <http://metroland.net/2012/06/29/field-of-distortions/>

<sup>39</sup> <http://www.scribd.com/doc/65070417/SGEIS-Socioeconomic-Hype-Voodoo-Frackonomics-2-0>

<sup>40</sup> [http://en.wikipedia.org/wiki/Pete\\_Grannis](http://en.wikipedia.org/wiki/Pete_Grannis)

to address the agency's environmental duties, a fact that does not seem to trouble Mr. Martens, who perpetuates the fraud that "New York has the best fracking regulations in the country" when the reverse is manifestly the case.<sup>41</sup>

**The revolving door at the DEC goes exclusively to the gas industry.** Some of the most prominent advocates for shale gas drilling are ex DEC employees. Not only do they become advocates for the industry they regulated, they change their tune on key aspects of regulatory practice, notably the role of home rule.<sup>42</sup> Conversely, there are no former DEC employees actively addressing the environmental hazards of fracking. This is not coincidental.

**The Department of Environmental Conservation is an environmental agency in name only.** The DEC's overarching role in gas drilling is as a gas industry advocate, apologist and facilitator. The DEC fulfills the same role as minerals management agencies in other states: to promote gas drilling and regulate drilling activity. It pays political lip service to its putative job of protecting the environment. The Department has handled shale gas regulations in stark contrast to the wording of its mission statement:

**"The New York State Department of Environmental Conservation (DEC) was created on July 1, 1970 to combine in a single agency all state programs designed to protect and enhance the environment.**

**Mission: "To conserve, improve and protect New York's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being."**

**DEC's goal is to achieve this mission through the simultaneous pursuit of environmental quality, public health, economic prosperity and social well-being, including environmental justice and the empowerment of individuals to participate in environmental decisions that affect their lives."**

The initial mistake was made when the state's environmental protection agency was tasked with issuing gas well permits. Until New York removes the minerals management function from the DEC, New York will have no effective regulatory control over the environmental risks posed by high volume horizontally hydrofracking. Until that regulatory restructuring is in place, high volume horizontal hydrofracking should be prohibited in New York.

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<sup>41</sup> <http://www.scribd.com/doc/72545747/Worst-Fracking-Regs>

<sup>42</sup> <http://www.scribd.com/doc/63141534/New-York-Gas-Well-Zoning>



## **Suggestions**

### **1. Separate natural resources agency**

Permitting and supervision of drilling should be handled by a separate agency, a bureau of natural resources. Drilling and fracking companies should be licensed by that state agency. They should post bonds sufficient to cover damages from drilling and fracking activities.

### **2. Autonomous environmental agency and environmental review**

The DEC should refocus on protecting the environment. All well permits should be subject to an environmental review, not the one-size-fits-none SGEIS approach.

### **3. Severance tax**

The state should tax oil and gas at the wellhead.

### **4. Home rule respected**

The state should not interfere with municipal land and road use ordinances.

### **5. Repeal compulsory integration**

New York's compulsory integration law marks a low-point in its regulatory history. It is the misbegotten result of collusion between the DEC staff and gas industry lobbyist. It should be repealed.

Similar regulatory structures are in place in 75% of the shale gas states. So the industry is not unfamiliar with its obligations to pay a severance tax, respect local land use laws, or be subject to independent environmental oversight.

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