

November 28, 2012

Records Access Officer
Executive Chamber
State Capitol
Albany, NY 12224

Records Access Officer
New York State Department of
Environmental Conservation
625 Broadway
Albany, NY 12233

Re: **Freedom of Information Law Request for Records**

Dear Sir or Madam:

Under the provisions of the New York Freedom of Information Law (“FOIL”),¹ the Environmental Working Group (“EWG”) hereby requests copies of the following records² located within the Office of New York Governor Andrew Cuomo and/or the New York Department of Environmental Conservation (“DEC”):

1. All documents since Jan. 1, 2008, regarding the decision to propose 300,000 gallons/well as the volume threshold for high-volume hydraulic fracturing in the DEC’s revised 2011 Draft Supplemental Generic Environmental Impact Statement (“2011 Revised Draft SGEIS”);
2. All documents since Jan. 1, 2008, regarding the public health and environmental impacts of increasing the volume threshold for high-volume hydraulic fracturing from $\leq 80,000$ gallons/well, which appears in New York’s 1992 generic environmental impact statement for drilling (“1992 GEIS”), to $\geq 300,000$ gallons/well in the 2011 Revised Draft SGEIS, and whether and/or how the 1992 GEIS is sufficient to mitigate potential harms caused by wells using between 80,000 and 299,999 gallons/well;
3. All data and/or permits for oil and gas wells drilled in New York since Jan. 1, 2008, containing information about the amount of fluid used for hydraulic fracturing operations for each well;

¹ N.Y. Pub. Off. §§ 84-90.

² For purposes of this request, “records” means information of any kind, including writings; memoranda; emails, including their subject lines, names of recipients and their e-mail addresses, and any attachments; text messages; letters; notes; meeting requests; calendar entries, including the names of invitees and their e-mail addresses, and any attachments; meeting minutes; documents; drawings; graphs; charts; photographs; electronic and magnetic meeting recordings; records of telephone conversations, including cell-phone records; and any other compilation of data from which information can be obtained. EWG also seeks copies of any records located on personal and/or political campaign computers and phones created by DEC and Executive Chamber staff to the extent that such records were created for the purposes of conducting official state business.

4. All data and/or permit applications for oil and gas wells under review by the DEC, containing information about the amount of fluid drillers anticipate would be used in their hydraulic fracturing operations; and
5. All documents since Jan. 1, 2008, regarding oil and gas wells that may have, or may currently be, using more than 80,000 gallons/well, including documents that reference or pertain to discussions by DEC and/or Executive Chamber staff to ensure that no well exceeds the volume threshold currently authorized in New York.

EWG is a non-partisan, non-profit organization dedicated to marshaling the power of information to protect public health and the environment.³ As part of that mission, EWG conducts original research and reports on U.S. oil and natural gas drilling. EWG has given particular attention to a method known as hydraulic fracturing in which drilling companies inject a mix of water, sand, and chemicals (some of them toxic) under high pressure into natural gas and oil wells. The fluid breaks open underground rock formations and allows natural gas and/or oil to flow to the surface. In view of current science, EWG believes lawmakers and regulatory agencies need to learn more about the risks of high-volume hydraulic fracturing and how to manage them in a way that does not compromise water resources and public health. That is why EWG continues to take part in New York's debate about whether to allow high-volume hydraulic fracturing — the outcome of which will not only have consequences in New York, but also nationally as other states look for direction on the issue.

EWG submitted comments on the 2011 Revised Draft SGEIS and corresponding regulations earlier this year,⁴ joining tens of thousands who have raised concerns about the potential consequences of allowing high-volume hydraulic fracturing in New York.⁵ EWG's analysis shows that the record before the DEC cannot support claims that drilling can be done safely.⁶ For one, the 2011 Revised Draft SGEIS underestimates the risks of hydraulic fracturing, which are inherent even by drillers' own admission.⁷ It also proposes grossly inadequate safeguards for protecting public health and the environment.⁸ For example, corresponding rules would allow drilling as close as 500 feet from private water wells, even though studies show that natural gas

³ See Env'tl. Working Group, <http://www.ewg.org> (last visited Nov. 26, 2012).

⁴ Env'tl. Working Group, *New York State Not Prepared to Cope with Fracking Risks*, <http://www.ewg.org/report/new-york-state-not-prepared-cope-fracking-risks> (last visited Nov. 26, 2012) (comments as filed available for download).

⁵ See Fred LeBrun, *A Lull, But a Need for Vigilance*, Albany Times Union, Feb. 12, 2012, <http://www.timesunion.com/local/article/A-lull-but-a-need-for-vigilance-3305535.php>.

⁶ *E.g.*, Env'tl. Working Group, *Serious Flaws Plague NY Drilling Plan*, <http://www.ewg.org/release/serious-flaws-plague-ny-drilling-plan> (last visited Nov. 26, 2012) [hereinafter Env'tl. Working Group, *Serious Flaws*] (full report available for download).

⁷ *Id.* For example, Houston-based Cabot Oil & Gas Corporation tells investors in a recent annual report filed with the U.S. Securities and Exchange Commission that its business “involves a variety of operating risks,” which include “well site blowouts, cratering and explosions; . . . uncontrolled flows of natural gas, oil or well fluids; . . . pollution and other environmental risks.” Cabot Oil & Gas Corp., *Annual Report (Form 10-K)*, at 22 (Feb. 26, 2010). According to Cabot, these risks “could result in injury or loss of human life, . . . significant damage to or destruction of property, [and] environmental pollution” *Id.*

⁸ Env'tl. Working Group, *Serious Flaws*, *supra* note 6.

and associated contaminants can migrate several thousand feet from improperly cemented wells.⁹ The 2011 Revised Draft SGEIS does not even attempt to study how allowing high-volume hydraulic fracturing might affect the health of New York residents.¹⁰

In addition to these failings is the fact that the 2011 Revised Draft SGEIS would create a potentially sweeping regulatory loophole for drillers based on how the DEC defines the volume threshold for high-volume hydraulic fracturing. Without explanation or justification, the DEC proposes a volume threshold of 300,000 gallons/well for its definition of high-volume hydraulic fracturing.¹¹ According to the DEC, wells that exceed that threshold would have to comply with stronger permitting requirements designed to protect public health and the environment.¹² In contrast, wells that use less than 300,000 gallons/well would not be considered high-volume and would only have to follow environmental protection measures described in the 1992 GEIS.¹³ Missing from this proposal is the fact that the 1992 GEIS assumes that hydraulic fracturing operations would be using a maximum of 80,000 gallons of fluid/well.¹⁴ The DEC offers no basis for why measures designed to manage hydraulic fracturing operations that use up to 80,000 gallons/well are appropriate for wells that use an additional 219,999 gallons/well (the difference in volume between the thresholds that appear in the 1992 GEIS and 2011 Revised Draft SGEIS).¹⁵

In view of this gap, and the other issues identified herein, EWG seeks the requested records to evaluate whether the Cuomo Administration fully grasps the potential consequences of finalizing the 2011 Revised Draft SGEIS with its many scientific flaws and gaps. The public has a right to know,¹⁶ especially when Gov. Cuomo has pledged to “let the science and the facts” settle New York’s debate over shale gas drilling — “not emotion and not politics.”¹⁷

⁹ Id.

¹⁰ Id.

¹¹ N.Y. State Dep’t Env’tl. Conservation, Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program, Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs 3-6 (2011) [hereinafter 2011 Revised Draft SGEIS].

¹² Id.

¹³ Id.

¹⁴ See N.Y. State Dep’t Env’tl. Conservation, Draft Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program 9-26 (1988) (incorporated into 1992 GEIS).

¹⁵ See 2011 Revised Draft SGEIS, *supra* note 10, at 3-6.

¹⁶ See N.Y. Pub. Off. § 84.

¹⁷ Thomas Kaplan, Millions Spent in Albany Fight to Drill for Gas, N.Y. Times, Nov. 26, 2011, <http://www.nytimes.com/2011/11/26/nyregion/hydrofracking-debate-spurs-huge-spending-by-industry.html?pagewanted=all>.

Therefore, EWG requests that the Executive Chamber and the DEC make every reasonable effort to provide the requested records within the 5-day window prescribed by the FOIL.¹⁸ Copies of responsive records should be mailed within 5 days of receipt of this request to:

Thomas Cluderay
Assistant General Counsel
Environmental Working Group
1436 U Street NW, Suite 100
Washington, DC 20005

EWG understands that New York charges a \$0.25/page fee to duplicate the records requested.¹⁹ However, please contact me before making copies if you estimate the fee to exceed \$100.00.

Should you determine that portions of the requested records are exempt from disclosure under the FOIL, please segregate those portions and mail the remaining records within the statutory time limit. For any records or portions of records that you determine to be exempt, please provide a specific description of the record or portion of the record exempted along with a particularized description of the exemption. Also, please provide the name and address of the person or body to whom an appeal should be directed.

Thank you for consideration. If you require further clarification about this FOIL request or anticipate any problems with releasing the requested documents, please contact me at (202) 667-6982.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas Cluderay', written in a cursive style.

Thomas Cluderay
Assistant General Counsel
Environmental Working Group

¹⁸ N.Y. Pub. Off. § 89(3)(a).

¹⁹ Id. § 88(1)(c).