

May 10, 2012

Ms. Ruth L. Earl
Records Access Officer
New York State Department of Environmental Conservation
Office of General Counsel, 14th Floor
625 Broadway
Albany, NY 12233

Re: **New York Freedom of Information Law Appeal**

Dear Ms. Earl:

This is an administrative appeal filed under the New York Freedom of Information Law (FOIL), N.Y. Pub. Off. §§ 84-90, in response to the New York Department of Environmental Conservation's (DEC) partial constructive denial of two FOIL requests filed by Environmental Working Group (EWG) (DEC FOIL Nos. 12-647 and 12-648).

EWG is a 501(c)(3) non-profit organization dedicated to using the power of information to protect public health and the environment. In keeping with that mission, EWG filed two separate FOIL requests with the DEC on Mar. 6, 2012, seeking all correspondence and communications since Jan. 1, 2011, among Gov. Cuomo, Marc Gerstman, Howard Glaser, Robert Hallman, Joseph Martens, Lawrence Schwartz, and/or Steve Russo and the following representatives of oil and natural gas companies:

- Anschutz Exploration Corporation, including predecessors;
- Cabot Oil & Gas Corporation;
- Cahill Gordon & Reindel;
- Chesapeake Energy Corporation;
- CONSOL Energy, Inc.;
- Corning Place Communications;
- Hinman Straub;
- Hisock & Barclay;
- Independent Oil & Gas Association of New York;
- Levene Gouldin & Thompson;
- Norse Energy Corp;
- Range Resources Corporation;
- Southwestern Energy Company;
- The West Firm;
- Mark Boling;
- Brad Gill;
- Yvonne Hennessey;
- Paul Hartman;
- John Holko;
- Scott Kurkoski;
- Sen. Tom Libous;
- Steve Palmatier;
- Gregory Sovas;
- Nancy Testani; and
- Tom West

We requested the records to evaluate whether Gov. Andrew Cuomo will “let the science and the facts” settle New York’s debate over shale gas drilling. Thomas Kaplan, Millions Spent in Albany Fight to Drill for Gas, N.Y. Times, Nov. 26, 2011. EWG believes that the DEC has failed to produce documents responsive to our requests, and therefore has constructively denied EWG access to these additional documents.

EWG's first request sought only electronic communications such as e-mails and online calendar entries. EWG limited the scope of the first request to make it as easy as possible for the DEC to search for, review, and deliver responsive records, or to deny the request with a statement of the reasons for doing so. Electronic communications can be readily obtained using the search function on the e-mail and calendar management software used by the DEC. To make the request more straightforward, EWG provided a list of names to search for, and even supplied individual domain names associated with specific oil and gas companies and their representatives. For a records access officer well accustomed to handling FOIL requests, the request for electronic communications should have taken no more than a day or two to process.

The second request was broader, seeking responsive information of any kind located within the DEC "including writings, memoranda, e-mails, text messages, letters, notes, meeting requests, calendar entries, 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."

On Mar. 14, 2012, the DEC sent EWG written confirmation that it had received the two requests and stated that we could expect responses to the FOIL requests within 20 business days (by Apr. 11, 2012). DEC did not ask for extra time to complete either request. Shortly after Apr. 11, 2012, EWG received a CD from the DEC containing approximately 280 pages of documents with a cover letter dated Apr. 11, 2012. In the letter, the DEC's records access officer wrote, "I have enclosed a CD that maintains copies of all documents identified as responsive." No claim was made that the DEC withheld documents based on a statutory exemption.

EWG's review of the documents found that the DEC produced e-mails, e-mail attachments, several letters sent by mail, and a fax. However, there were no records of telephone conversations, meeting minutes, cell-phone records, or notes despite the fact that several phone conversations and meetings are mentioned in the records sent by the DEC.

Specifically:

1. An e-mail sent by Thomas West of the West Firm to the DEC's Steven Russo (the West Firm's Yvonne Hennessey is carbon-copied) on July 7, 2011, at 11:40:45 a.m., states:

Steve, we look forward to the meeting on the 20th to discuss local law preemption issues. It looks like there may be some people coming in from out of town to attend that meeting. Also, there are some who may want to participate by telephone. We will set up the dial-in number if you can make sure that we are in a conference room with a speakerphone. I will let Cathy know well in advance of the meeting who will be attending in person so that appropriate arrangements can be made with security.

We did not receive any minutes of this meeting, telephone records, or other related documents.

2. An e-mail sent by Thomas West to the DEC's Jennifer Maglienti and Steven Russo (the West Firm's Yvonne Hennessey is carbon-copied) on July 20, 2011, at 10:26:59 a.m., referencing what is likely the same meeting, states:

Steve and Jennifer, in preparation for our meeting today, we have completed an analysis of the scope of the preemption of local laws under Section 23-0303(2) of the Environmental Conservation Law.

We did not receive any minutes of this meeting, telephone records, or other related documents.

3. An e-mail sent by the DEC's Alison Crocker to Yvonne Hennessey of the West Firm (Steven Russo is carbon-copied, among others) on Aug. 15, 2011, at 12:58:09 p.m., states:

Dear Yvonne – Attached you will find summaries prepared by the Divisions of Mineral Resources, Water, Lands and Forests and Fish, Wildlife and Marine Resources, to guide our discussion this afternoon. Please forward these to all the attendees, particularly those participating by telephone. . . .

We did not receive any minutes of this meeting, telephone records, or other related documents.

4. An e-mail sent by the DEC's Marc Gerstman to Thomas West (the DEC's Steven Russo and Eugene Leff are carbon-copied) on Aug. 22, 2011, at 7:55:35 p.m., states:

Tom, Lets talk in the morning.

We did not receive any minutes of this discussion, telephone records, or other related documents.

5. An e-mail sent by Thomas West to the DEC's Marc Gerstman (the DEC's Steven Russo is carbon-copied) on Aug. 23, 2011, at 4:56:50 p.m., that may reference the "Lets talk" discussion in the previous e-mail, states:

Marc, thanks for the opportunity to talk today We would like to suggest a high level meeting with the Executive Staff at DEC and representatives from industry to go over the more significant issues that we have identified that will either make New York noncompetitive or make drilling infeasible. Our working group has been given the task to identify those issues and alternatives by the end of this week with a view towards meeting with you and other members of the Executive Staff next week. Our preference would be to meet Wednesday afternoon if that works for you and your colleagues.

We did not receive any minutes of the discussion mentioned at the beginning of the e-mail (“opportunity to talk today”), telephone records, or other related documents. In addition, we received no minutes, telephone records, or other related documents regarding the meeting subsequently mentioned.

6. An e-mail sent by the Independent Oil and Gas Association of New York’s Brad Gill to the DEC’s Joe Martens (the DEC’s Marc Gerstman and Steven Russo are carbon-copied, along with Thomas West and Yvonne Hennessey) on Sept. 2, 2011, at 3:41:51 p.m., states:

Attached for your review is a document prepared by the Independent Oil and Gas Association of New York (IOGANY) reflecting industry’s comments and concerns about the sGEIS, the rule-making process, and the resulting economic impacts to New York. This represents a collaborative effort from various industry sources and it may provide a good working basis for our meeting next Tuesday.

We did not receive any minutes of this meeting, telephone records, or other related documents.

7. A letter attached to the e-mail from Sept. 2, 2011, from the Independent Oil and Gas Association of New York to the DEC’s Joe Martens states:

We anticipate that this document will frame the issues for discussion at our meeting on Tuesday, September 6.

We did not receive any minutes of this meeting, telephone records, or other related documents.

8. An e-mail sent by Thomas West to the DEC’s Marc Gerstman and Steven Russo (Yvonne Hennessey is carbon-copied) on Sept. 14, 2011, at 4:15:04 p.m., states:

Marc and Steve, thanks again for the recent meetings. As a follow-up to our discussions yesterday, it would be good if we could get clarification concerning how the “contiguous . . . patches” of grassland and forest land language will be interpreted Also, we would like to take you up on the offer to have technical meetings concerning the draft stormwater general permit and the air issues. We envision small working groups relative to each of those issues. If possible, would like to have the working group meeting concerning the draft stormwater general permit prior to finalization of that document for publication. The air meeting can be scheduled later. Please let us know what works for the Department and call if you have any questions.

We did not receive any minutes of these meetings, telephone records or other related documents.

9. An e-mail sent by Thomas West to the DEC's Steven Russo, among others (the DEC's Marc Gerstman is carbon-copied, as are Brad Gill and Yvonne Hennessey), on Sept. 20, 2011, at 9:39:09 a.m., states:

In preparation for our meeting this afternoon, we are transmitting the results of our research concerning whether the hydraulic fracturing process constitutes a discharge to the waters of New York State The following persons will be attending the meeting in person today. We will also have several people participating by telephone.

1. Jim Carr
2. David Cornue
3. Mara Ginsberg
4. Dan Griffiths
5. Yvonne Hennessey
6. Tom West

Thanks for the ongoing dialogue concerning these issues.

We did not receive any minutes of this meeting, telephone records or other related documents.

10. An e-mail from the DEC's Julia Tighe to Brad Gill and Southwestern Energy Co.'s Mark Boling, among others (Steven Russo is carbon-copied, among others), on Sept. 28, 2011, at 12:39:55 p.m., states:

Thank you for agreeing to participate in the High-Volume Hydraulic Fracturing subcommittee to develop revenue recommendations. We would like to have a conference call on Monday October 3 at 430 PM to move the discussions forward.
Number: 866-394-2346
Code: 5394750548

We welcome folks in Albany to come to the DEC's office. Please let me know by COB Friday if you can participate.

We did not receive any minutes of this conference call meeting, telephone records or other related documents.

11. An e-mail from Thomas West to the DEC's Steven Russo on Oct. 21, 2011, at 6:00:08 p.m., states:

Steve, as you recall, we talked about the need for a meeting to discuss some of the issues associated with the air mitigation proposals Our current thinking is that we should pick a date in early December to schedule our meeting on behalf of the IOGA New York working group. I know that you have public hearing

scheduled that first week after Thanksgiving. Potentially, we could schedule the meeting for Thursday or Friday (12/1 or 12/2) of that week or the Tuesday (12/6) of the following week. We do not want to push the meeting much further out given the close of the public comment period and the potential need to build a record support for whatever we propose. We have people traveling long distance, so I would like to avoid a Monday meeting. We also would suggest that this be a smaller meeting, like the meeting that we just had regarding water issues, which seems to be the most productive format.

We did not receive any minutes of these meetings, telephone records or other related documents.

12. An e-mail from Thomas West to the DEC's Alison Crocker (Steven Russo is carbon-copied) on Dec. 15, 2011, at 11:04:01 a.m., states:

Alison, our group is still reeling from the meeting last Friday and the notion that industry can be out of compliance when they are using engines that are fully compliant with EPA requirements.

We did not receive any minutes of this meeting, telephone records or other related documents.

References to these meetings and phone calls without corresponding documents produced by the DEC lead us to believe that the DEC has failed to deliver at least some records responsive to our requests and raises questions about whether the DEC has conducted a good faith, diligent search, as required by the FOIL, N.Y. Pub. Off. §§ 89(3).

In light of those concerns, I sent an e-mail to the DEC on May 7, 2012, "to confirm that the documents on the CD represent the full universe of records located in the DEC in response to my requests and that no other records, or portions of any records, were withheld." On that same day, DEC responded in an e-mail, stating that "you are in receipt of copies of all documents identified as responsive to your requests. No responsive documents were withheld from disclosure."

On May 8, 2012, after reviewing the documents again, I sent a follow-up e-mail to the DEC to raise concerns about the quality of the DEC's search and asked the DEC "to certify again that no records were withheld and a diligent search was in fact conducted." The DEC has yet to respond to what should be a simple request.

The Cuomo Administration's decision on shale gas drilling may be imminent — and the stakes could not be higher. Although the oil and gas industry maintains that the high-volume hydraulic fracturing and horizontal drilling used to extract shale gas are safe, EWG's research and companies' own statements provide evidence of the potential for drilling to threaten water supplies, property and health. The DEC itself recognizes that drilling pollution could impose astronomical costs on New York. The public has a right to know whether the DEC is making its decision on shale gas drilling based on science alone, or whether it intends to cave to drilling

industry pressure.

Therefore, EWG hereby asserts its right to appeal the DEC's partial constructive denial of our requests. See N.Y. Pub. Off. § 89(4)(a). We ask that you review this appeal and our original FOIL requests and conduct a good faith, diligent search for all responsive documents or certify that no records were withheld and that such a search was in fact conducted. Your search should not be limited to documents associated with the meetings and telephone conversations we have mentioned herein. Rather, it should encompass any and all documents responsive to our original FOIL requests.

EWG looks forward to a reply to this appeal within 10 business days, as is required under the FOIL, N.Y. Pub. Off. § 89(5)(c)(2). If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

If the DEC anticipates any problems with complying with this request, please contact Thomas Cluderay at (202) 667-6982 or tcluderay@ewg.org. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Cluderay', written in a cursive style.

Thomas Cluderay
Assistant General Counsel
Environmental Working Group

New York State Department of Environmental Conservation
Office of General Counsel, 14th Floor
625 Broadway, Albany, New York 12233-1500
Phone: (518) 402-9185 Fax: (518) 402-9018
Website: www.dec.ny.gov



Joc Martens
Commissioner

certified mail: return receipt requested

May 16, 2012

Thomas Cluderay
Environmental Working Group
1436 U St. NW, Suite 100
Washington, DC 20009

Re: Freedom of Information Law Requests # 12-647 and # 12-648

Dear Mr. Cluderay:

This is in response to your letter appealing the Department's response to your Freedom of Information Law (FOIL) requests seeking all correspondence and communications since Jan. 1, 2011 among seven State officials and twenty-five representatives of oil and natural gas companies. Of the seven State officials whose records were requested, three (Joseph Martens, Marc Gerstman and Steven Russo) are officers and employees of this Department and four (Governor Cuomo, Howard Glaser, Robert Hallman and Lawrence Schwartz) are officers and employees of the Executive Chamber.

You submitted two separate FOIL requests dated March 6, 2012 to this Department. A compact disc containing copies of all responsive records for both requests (approximately 280 pages) was sent to you by letter dated April 11, 2012. The cover letter from the Department's Records Access Officer stated "I have enclosed a CD that maintains copies of all documents identified as responsive." On May 7, 2012, you sent an e-mail to the Records Access Officer asking for confirmation that "... the documents on the CD represent the full universe of records located in the DEC in response to my requests and that no other records, or portions of any records were withheld." An e-mail response later that day stated that "you are in receipt of copies of all documents identified as responsive to your requests. No responsive documents were withheld from disclosure."

FOIL requires agencies to disclose existing records unless there is a statutory basis for denying access to particular records. Your letter dated May 10, 2012 indicates that you are appealing the response because "EWG believes that the DEC has failed to produce documents responsive to our requests, and therefore has constructively denied EWG access to these additional documents." However, there is no indication that access to any existing records was

May 18, 2012

Justin C. Levin
FOIL Counsel
Records Access Officer
State of New York
Executive Chamber
Albany, NY 12224

Re: New York Freedom of Information Law Appeal

Dear Mr. Levin:

This is an administrative appeal filed under the New York Freedom of Information Law (FOIL), N.Y. Pub. Off. §§ 84-90, in response to the Executive Chamber's partial constructive denial of a FOIL request filed by Environmental Working Group (EWG).

EWG is a 501(c)(3) non-profit organization dedicated to using the power of information to protect public health and the environment. In keeping with that mission, EWG filed two separate FOIL requests with the Executive Chamber on Mar. 6, 2012, seeking all correspondence and communications since Jan. 1, 2011, among Gov. Cuomo, Marc Gerstman, Howard Glaser, Robert Hallman, Joseph Martens, Lawrence Schwartz, and/or Steve Russo and the following oil and natural gas companies, their representatives and supporters:

- Anschutz Exploration Corporation, including predecessors;
- Cabot Oil & Gas Corporation;
- Cahill Gordon & Reindel;
- Chesapeake Energy Corporation;
- CONSOL Energy, Inc.;
- Corning Place Communications;
- Hinman Straub;
- Hisock & Barclay;
- Independent Oil & Gas Association of New York;
- Levene Gouldin & Thompson;
- Norse Energy Corp;
- Range Resources Corporation;
- Southwestern Energy Company;
- The West Firm;
- Mark Boling;
- Brad Gill;
- Yvonne Hennessey;
- Paul Hartman;
- John Holko;
- Scott Kurkoski;
- Sen. Tom Libous;
- Steve Palmatier;
- Gregory Sovas;
- Nancy Testani; and
- Tom West

We requested the records to evaluate whether Gov. Andrew Cuomo will "let the science and the facts" settle New York's debate over shale gas drilling. Thomas Kaplan, Millions Spent in Albany Fight to Drill for Gas, N.Y. Times, Nov. 26, 2011. EWG believes that the Executive Chamber has failed to produce documents responsive to our requests, and therefore has constructively denied EWG access to these additional documents.

EWG's first request sought only electronic communications such as e-mails and online calendar entries. EWG limited the scope of the first request to make it as easy as possible for the Executive Chamber to search for, review, and deliver responsive records, or to deny the request with a statement of the reasons for doing so. Electronic communications can be readily obtained using the search function on the e-mail and calendar management software used by the Executive Chamber. To make the request more straightforward, EWG provided a list of names to search for, and even supplied individual domain names associated with specific oil and gas companies, their representatives and supporters. For a records access officer well accustomed to handling FOIL requests, the request for electronic communications should have taken no more than a day or two to process.

The second request was broader, seeking responsive information of any kind located within the Executive Chamber "including writings, memoranda, e-mails, text messages, letters, notes, meeting requests, calendar entries, 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." We also requested "copies of any records located on personal and/or political campaign computers and phones created by the public officials identified in this FOIL request, to the extent that such records were created for the purposes of conducting official state business."

On Mar. 13, 2012, the Executive Chamber sent EWG written confirmation that it had received the two requests and stated that we could expect responses to the FOIL requests within 20 business days (by Apr. 10, 2012). The Executive Chamber did not ask for extra time to complete either request. Shortly after Apr. 10, 2012, EWG received a cover letter from the Executive Chamber dated Apr. 10, 2012, explaining that the Executive Chamber had located only one page responsive to our first request for electronic records. The single page was enclosed. It appears to be an electronic calendar entry from Thomas Irvin regarding a meeting on Mar. 1, 2012, between Robert Hallman and Tom Congdon from the Executive Chamber and Tom West and his client "Paul Hart" from Chesapeake Energy. ("Paul Hart" may, in fact, have been a misspelling of Paul Hartman.) We were surprised to have received so little information in response to our first request that covered a period of more than 14 months during which the regulation of shale gas drilling was one of the most high-profile issues in New York state.

Shortly after Apr. 10, 2012, EWG also received a second cover letter from the Executive Chamber dated Apr. 10, 2012 informing us that the Executive Chamber had located 86 pages of documents and a DVD responsive to our second, broader request and that we should send a check for \$21.50 for the materials. The Executive Chamber noted that "certain portions of the responsive records are redacted because they are exempt from disclosure pursuant to the Public Officers Law." The Executive Chamber explained that some of the redactions were made to protect confidential communications between an attorney and client or because they were attorney work products. Other portions were redacted because they were inter-agency or intra-agency materials, the Executive Chamber explained.

On Apr. 18, 2012, I mailed a letter to the Executive Chamber requesting the 86 pages of documents and DVD. I enclosed a check from EWG for \$21.50.

On May 1, 2012, I had not received the documents and e-mailed the Executive Chamber to ask for an update. The same day, I received an e-mail in response that the documents had been mailed on Apr. 20, 2012.

On May 4, 2012, I still had not received the documents and e-mailed again. The Executive Chamber responded the same day by e-mail that a representative would send the documents and DVD by overnight delivery on May 7, 2012. On May 7, 2012, two envelopes arrived, each containing the 86 pages of partially-redacted documents, the DVD and a cover letter dated Apr. 20, 2012. One of the envelopes had been mailed the day before according to its UPS label. The other, based on the U.S. Mail postage, had been mailed on April 20. However, the zip code on this envelope had been typed as "20005" while EWG's correct zip code is 20009. Someone, perhaps at the Post Office, had written a "9" over the "5" in black magic marker to correct the zip code. Perhaps the incorrect zip code accounted for the delay in receiving the mailed materials.

On May 8, 2012, I sent an e-mail to the Executive Chamber asking a representative to "certify that the 86 pages and the DVD that were sent account for every record that was located in the Executive Chamber in response to my requests and that no other records, or portions of any records, were withheld." I also asked the Executive Chamber to "certify that a good faith, diligent search for records was conducted in response to my requests." In addition, I requested that the Executive Chamber push back the 30-day time period for filing an appeal because we had received the materials 17 days after they had been mailed. The Executive Chamber has not responded to this e-mail.

The materials sent by the Executive Chamber in response to our second, broader request contained the same one-page record produced in response to our first request that appears to be an electronic calendar entry. Also included were testimony before the New York State Senate from Chesapeake's Paul Hartman regarding drilling wastes, a letter from Chesapeake's Mike Brownell to Commissioner Martens regarding the state's plan for regulating high-volume hydraulic fracturing, a memo with a partially redacted title about local governments' ability to regulate oil and gas drilling, a memo from Chesapeake opposing proposed legislation to regulate drilling waste, an article from *Oil & Gas Journal* about the economic benefits of developing the Utica Shale, Chesapeake's comments to the DEC regarding the state's plan for regulating high-volume hydraulic fracturing, similar comments from the Independent Oil & Gas Association of New York, several fact sheets about drilling from Chesapeake that appear similar to those available on the company's web site and a DVD about natural gas drilling in the Marcellus Shale produced by Chesapeake.

It is simply inconceivable that the Executive Chamber could have so few documents responsive to our request covering a period of more than 14 months during which the debate over shale gas drilling was one of the most important and prominent in New York state. It is especially difficult to believe that the Executive Chamber located not a single e-mail or phone record among

Governor Cuomo, six top administration officials and 25 different individuals and drilling companies that were involved in the debate over drilling for shale gas in New York. When we sent an identical FOIL request to the Department of Environmental Conservation, the DEC provided approximately three-dozen e-mails, many of them from Thomas West. (We believe that the DEC also engaged in a partial constructive denial of our request and have submitted an administrative appeal to the DEC.) It seems doubtful that West sent not a single e-mail to members of the Executive Chamber and conducted no phone calls with them during this period of more than 14 months, especially when the Executive Chamber has provided an electronic meeting record indicating that West met with Robert Hallman and another member of the Executive Chamber on Mar. 1, 2012. It is also strange that the Executive Chamber would disclose a variety of materials from Chesapeake, yet not a single document or phone record from the other drilling companies named in our FOIL request including Anschutz, Cabot, CONSOL, Norse, Range and Southwestern.

This evidence leads us to believe that the Executive Chamber has failed to deliver at least some records responsive to our requests and raises questions about whether the Executive Chamber conducted a good faith, diligent search, as required by the FOIL, N.Y. Pub. Off. §§ 89(3). As noted above, Executive Chamber officials have failed to respond to an e-mail I sent more than a week ago asking them to certify that they have performed such a search and have not withheld any additional records or portions of records. My e-mail also asked the Executive Chamber to push back the 30-day period for filing an appeal. Previously, Executive Chamber officials responded to my e-mails on the same day I sent them, raising further concerns that the Executive chamber has not fully responded to my FOIL request.

The Cuomo Administration's decision on shale gas drilling may be imminent — and the stakes could not be higher. Although the oil and gas industry maintains that the high-volume hydraulic fracturing and horizontal drilling used to extract shale gas are safe, EWG's research and companies' own statements provide evidence of the potential for drilling to threaten water supplies, property and health. The Cuomo Administration itself recognizes that drilling pollution could impose astronomical costs on New York. The public has a right to know whether the administration is making its decision on shale gas drilling based on science alone, or whether it intends to cave to drilling industry pressure.

Therefore, EWG hereby asserts its right to appeal the Executive Chamber's partial constructive denial of our second request for a broad range of communications among Gov. Cuomo, six administration officials, oil and natural gas companies, their representatives and supporters. See N.Y. Pub. Off. § 89(4)(a). We ask that you review this appeal and our original FOIL request and conduct a good faith, diligent search for all responsive documents or certify that no records were withheld and that such a search was in fact conducted. Your search should not be limited to documents associated with the information contained in this appeal. Rather, it should encompass any and all documents responsive to our original FOIL request.

EWG looks forward to a reply to this appeal within 10 business days, as is required under the FOIL, N.Y. Pub. Off. § 89(5)(c)(2). If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

If the Executive Chamber anticipates any problems with complying with this request, please contact Thomas Cluderay at (202) 667-6982 or tcluderay@ewg.org. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Cluderay', is positioned above the typed name.

Thomas Cluderay
Assistant General Counsel
Environmental Working Group



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

June 1, 2012

Thomas Cluderay
Assistant General Counsel
Environmental Working Group
1436 U Street NW
Suite 100
Washington, D.C. 20009

Dear Mr. Cluderay,

I write in response to your May 18, 2012, letter appealing the Executive Chamber's ("Chamber") determination of Freedom of Information Law ("FOIL") requests you submitted on March 6, 2012. Set forth below is the Chamber's determination of the merits of your appeal.

1. Background

By e-mail on March 6, 2012, you submitted two letters seeking, pursuant to FOIL, records of correspondence and communications to and from the Executive Chamber. One letter limited the request to electronic records ("Letter 1"), whereas the other requested all records, electronic, paper, or otherwise ("Letter 2"). These letters are attached as Exhibits A and B, respectively.

The Chamber responded to each of these requests separately by letters dated April 10, 2012. Both letters asserted that the Chamber had conducted a diligent search for the requested records. With respect to Letter 1, the Chamber explained that it had located one responsive record, which was enclosed with the response. With respect to Letter 2, the Chamber explained that it had located responsive records comprising eighty-six (86) pages and a DVD, and to receive these records, you should submit payment of \$21.50 to cover copying costs. The response to Letter 2 further advised that certain portions of the records to be produced would be redacted per New York Public Officers Law ("POL") § 87(2)(g), the exemption from disclosure under FOIL for inter- and intra-agency materials. Upon receipt of payment on April 20, 2012, the Chamber provided the records by mail. Because the records were apparently delayed in the mail, the Chamber sent a second set of copies by overnight service on May 7, 2012.

On May 18, the Chamber received your letter of appeal.

2. Discussion

Your appeal requests that the Chamber “conduct a good faith, diligent search for all responsive documents or certify that no records were withheld and that such a search was in fact conducted,” and “explain the reasons for denial [of records] in writing as required by law.” These two requests are addressed in turn below.

A. Certification and Search Requirements Under FOIL

The Chamber has already certified to having done a diligent search for the records you requested. The initial determination of your FOIL request by the Chamber explained, “We have performed a diligent search for the records you request and have found eighty-six (86) pages and a DVD that respond to your FOIL request.” There are no special requirements for a certification of having done a diligent search. See POL § 89(3). “The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required,” and an agency can meet the requirements of POL § 89(3)(a), “by averring that all responsive documents ha[ve] been disclosed and that it ha[s] conducted a diligent search for the documents it could not locate.” Rattley v. New York City Police Dep’t, 96 N.Y.2d 873, 875 (2001).

Moreover, when an agency has certified that it has conducted a diligent search, speculation about the presence of responsive materials in the agency’s possession is not sufficient to require any action on the agency’s part. See Daum v. Tessler, 804 N.Y.S.2d 920 (1st Dep’t 2005) (declining to find violation of FOIL where “[p]etitioner has offered no persuasive reason to reject respondents’ statement of diligent efforts to locate the subject documents”), New York Environmental Law & Justice Project v. City of New York, 730 N.Y.S.2d 285, 286 (1st Dep’t 2001) (there was “no demonstrable basis to support a finding that further documents responsive to petitioner’s request were in [the agency’s] possession”), Sorce v. Noll, 672 N.Y.S.2d 778, 778 (2d Dep’t 1998) (“petitioner’s mere conjecture and speculation as to what was held in the respondents’ files” found “insufficient to even raise a factual question as to whether respondents failed to turn over any documents in light of respondents’ certification . . . and . . . prior turnover of numerous documents”). The eighty-six pages and DVD produced to you constitute all of the records in the Chamber’s possession responsive to your requests, and they were produced with minimal redactions. No responsive records were withheld in their entirety. Thus, the Chamber need not conduct another search.

B. The Chamber’s Redactions Were Justified and Proper Under FOIL

POL § 87(2)(g) permits agencies to deny access to records that constitute “inter-agency or intra-agency materials.” This exemption protects “the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers.” Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132

(1985). Although FOIL itself does not define the term “inter-agency or intra-agency materials,” New York courts “have construed this term to mean ‘deliberative material,’ i.e., communications exchanged for discussion purposes not constituting final policy decisions.” Matter of Russo v. Nassau Cmty. Coll., 81 N.Y.2d 690, 699 (1993) (quoting Matter of Xerox Corp., *supra*). See also Matter of Gould v. New York City Police Dep’t, 89 N.Y.2d 267, 277 (1996) (“impressions, recommendations, or opinions . . . would be exempt from disclosure”), Matter of Tuck-It-Away Assoc. v. Empire State Dev. Corp., 861 N.Y.S.2d 51, 57–58 (1st Dep’t 2008). Thus, portions of records held by the Chamber reflecting opinions, advice, evaluations, and the like fall squarely within the POL § 87(2)(g) exemption and may properly be redacted. I have carefully reviewed the redacted portions of the records produced to you in response to your FOIL request, and it is just this type of material that has been withheld.

3. Conclusion

The Chamber has fulfilled the statutory requirement to certify that it conducted a diligent search for the records you requested pursuant to FOIL, and the redacted portions of the records produced may be withheld as intra-agency material. Therefore, the Chamber’s determinations of April 10, 2012, were proper and are hereby affirmed.

Very truly yours,

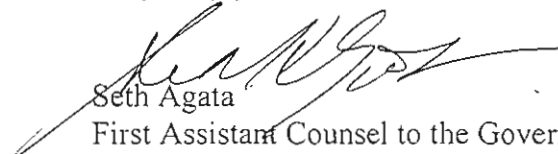

Seth Agata
First Assistant Counsel to the Governor
FOIL Appeals Officer

Exhibit A

March 6, 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 Electronic Communication Records

Dear Sir or Madam:

Under the provisions of the New York Freedom of Information Law ("FOIL"), N.Y. Pub. Off. §§ 84-90, the Environmental Working Group ("EWG") hereby requests copies of the following records¹ located within the Office of New York Governor Andrew Cuomo and the New York Department of Environmental Conservation ("DEC"):

All correspondence and communications since Jan. 1, 2011, among **Gov. Andrew Cuomo**; **Marc Gerstman**, DEC executive deputy commissioner; **Howard Glaser**, director of state operations for Gov. Cuomo; **Robert Hallman**, N.Y. deputy secretary of energy and the environment and former attorney at Cahill Gordon & Reindel; **Joseph Martens**, DEC commissioner; **Lawrence Schwartz**, secretary to Gov. Cuomo; and/or **Steven Russo**, DEC general counsel, and the following oil and natural gas companies, and/or representatives of oil and natural gas companies:

- **Anschutz Exploration Corporation** (including its predecessor Ansbro Petroleum Company and The Anschutz Corporation) (e.g., domain names: tac-denver.com, anschutz-exploration.com, and ansbropetroleum.com);
- **Cabot Oil & Gas Corporation** (e.g., domain name: cabotog.com);
- **Cahill Gordon & Reindel** (e.g., domain name: cahill.com);
- **Chesapeake Energy Corporation** (e.g., domain name: chk.com);
- **CONSOL Energy Inc.** (e.g., domain name: consolenergy.com);
- **Corning Place Communications** (e.g., domain name: comingplace.com);
- **Hinman Straub** (e.g., domain name: hinmanstraub.com);
- **Hiscock & Barclay** (e.g., domain name: hblaw.com);

¹ For purposes of this FOIL request, "records" *only* means electronic communications such as e-mails, subject lines, the names of recipients and e-mail addresses, and any attachments, and online calendar entries, including the names of invitees and e-mail addresses, and any attachments.

- **Independent Oil & Gas Association of New York** (e.g., domain name: iogany.com);
- **Levene Gouldin & Thompson** (e.g., domain name: binghamtonlaw.com);
- **Norse Energy Corp** (including its subsidiary Norse Energy Corp USA, formerly Normew Inc.) (e.g., domain names: norseenergycorp.no and norseenergy.com);
- **Range Resources Corporation** (e.g., domain name: rangeresources.com);
- **Southwestern Energy Company** (e.g., domain name: swn.com);
- **The West Firm** (e.g., domain name: westfirmllaw.com);
- **Mark Boling**, executive vice president, general counsel, and secretary of Southwestern Energy Company;
- **Brad Gill**, president of Earth Energy Consultants and executive director of Independent Oil and Gas Association of New York;
- **Yvonne Hennessey**, attorney and partner at The West Firm;
- **Paul Hartman**, director of N.Y. government relations for Chesapeake Energy Corporation;
- **John Holko**, president of Lenape Resources Inc., and secretary of Independent Oil and Gas Association of New York;
- **Scott Kurkoski**, attorney and partner at Levene Gouldin & Thompson;
- **Sen. Tom Libous**, N.Y. State Senate deputy majority leader and member of Gov. Cuomo's High-Volume Hydraulic Fracturing Advisory Panel;
- **Steve Palmatier**, natural gas consultant to Chenango County, N.Y.;
- **Gregory Sovas**, former director of the DEC Division of Mineral Resources;
- **Nancy Testani**, senior business advisor at Hiscock & Barclay; and
- **Tom West**, managing partner at The West Firm.

EWG is a non-partisan, non-profit organization dedicated to using the power of information to protect public health and the environment.² 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

² See Env'tl. Working Group, <http://www.ewg.org> (last visited Mar. 6, 2012).

submitted comments in January 2012 on the DEC's draft environmental impact statement ("EIS") and corresponding regulations on high-volume hydraulic fracturing in New York.³

EWG's analysis of the draft EIS and regulations demonstrates that the record before the DEC does not support claims that drilling can be conducted safely.⁴ Moreover, the jobs generated by high-volume hydraulic fracturing are likely to be modest,⁵ especially when compared to the practice's potential impact on public health and the environment. That is why EWG asked the DEC to conduct its own rigorous scientific research before opening the door to high-volume hydraulic fracturing in New York. EWG also asked the DEC to wait for the U.S. Environmental Protection Agency ("EPA") to complete its review of the practice, especially in light of recent findings in Pavillion, Wyo., where EPA officials found groundwater contamination that is likely caused by nearby drilling and fracturing operations.⁶

The DEC received more than 60,000 public comments on its draft EIS and regulations and now is reading through them before making a final decision on whether to allow high-volume hydraulic fracturing in New York.⁷ EWG believes that a careful review of the public comments will reinforce our conclusion that the practice is simply too risky to allow at this point in time. For example, the U.S. Geological Survey, widely regarded as impartial and authoritative on drilling issues, warned the DEC that its plan to allow drilling and hydraulic fracturing for natural gas in the Marcellus Shale could endanger private water wells, municipal aquifers, and New York City's drinking water supply.⁸

In November 2011, Gov. Cuomo pledged to "let the science and the facts" settle New York's debate over shale gas drilling — "not emotion and not politics."⁹ EWG seeks the requested records to evaluate whether Gov. Cuomo will make good on his promise, or whether the oil and gas industry will convince him to overlook concerns identified by institutions such as the U.S. Geological Survey. The public has a right to know. After all, "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of government actions." N.Y. Pub. Off. § 84.

³ Env'tl. Working Group, *New York State Not Prepared to Cope with Fracking Risks*, <http://ewg.org/report/new-york-state-not-prepared-cope-fracking-risks> (last visited Mar. 6, 2012).

⁴ *E.g.*, Dusty Horwitt, Env'tl. Working Group, *Drilling Around the Law* (2010), <http://static.ewg.org/files/EWG-2009drillingaroundthelaw.pdf>; Dusty Horwitt, Env'tl. Working Group, *Cracks in the Façade: 25 Years Ago, EPA Linked 'Fracking' to Water Contamination* (2011), http://static.ewg.org/reports/2011/fracking/cracks_in_the_facade.pdf.

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⁷ 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>.

⁸ See Dusty Horwitt, Env'tl. Working Group, *Federal Scientists Warn NY of Fracking Risks* (2012), <http://www.ewg.org/report/federal-scientists-warn-ny-fracking-risks>.

⁹ 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 Office of the Governor and the DEC make every reasonable effort to provide the requested records within the 5-day window prescribed by the FOIL. N.Y. Pub. Off. § 89(3)(a). 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. N.Y. Pub. Off. § 88(1)(c). 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 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,



Thomas Cluderay
Assistant General Counsel
Environmental Working Group

Exhibit B

March 6, 2012

Records Access Officer
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State Capitol
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¹ For purposes of this FOIL request, "records" means information of any kind, including writings, memoranda, e-mails, text messages, letters, notes, meeting requests, calendar entries, 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.

² EWG also requests copies of any records located on personal and/or political campaign computers and phones created by the public officials identified in this FOIL request, to the extent that such records were created for the purposes of conducting official state business.

- **Corning Place Communications** (e.g., domain name: corningplace.com);
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⁷ U.S. Env'tl. Prot. Agency Office of Research & Dev., *Investigation of Ground Water Contamination Near Pavillion, Wyoming* xi (Draft 2011),

http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf.

⁸ 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>.

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