



What New York's Counties Can Do To Prepare for Shale Gas Development

By James Northrup

New York counties, townships, and cities have been given valuable time to prepare for the development of shale gas prospects in the state. Counties and municipalities should ask their state legislatures to bring state oil and gas regulations into the 21st century.

The scope of the activity dwarfs the State's preparedness. The size of the shale gas formations in New York and the well spacings contemplated will simply overwhelm both the Department of Environmental Conservation (DEC) and local governments' abilities to respond effectively. The DEC is chronically understaffed and underfunded. The counties where the shale gas is found have no infrastructure to deal with this level of industrialization. Since the activity is not taxed by the state, and since the drilling companies will not pay much tax in the state, there will be no government revenue to address the upfront costs that drilling represents. While the revenue to the government from the wells may be down the road, the costs to county roads and bridges will be front-loaded. Counties should adopt a road repair ordinance that establishes adequate bonding requirements and liability for repairs. This ordinance should apply to all county roads. Further, counties should encourage towns to adopt similar local ordinances. Rather than have each town administer its own ordinance, the county highway department should take responsibility for all road agreements. Here are some examples of what needs to be done at both the state and local levels:

- 1) ***Counties and municipalities should be given local safeguards over drilling activity.*** If a well site falls within an approved land use plan or zoning map, it should be subject to the review and approval of the local government agency. State law should not exempt drilling from local zoning regulations.¹ The county should petition the state to change the law. But in the meantime, lack of local review and approval will put tourism, recreation, and agriculture and other vital industries at risk.
- 2) ***Counties and municipalities should be notified when a well permit application is submitted in their area.*** The proposed regulations only require notification after the permit has been issued by the state. The local government agencies should be aware of any permits that have been filed in their area. This enables them to plan ahead, and, if necessary, comment on the application. The County Planning Department should be charged with this responsibility and should be staffed and funded to carry out the work involved.

¹ http://www.fortworthgov.org/uploadedFiles/Gas_Wells/090220_gas_regulations.pdf

- 3) ***Local government agencies should be able to enter into road use agreements with drilling and fracturing contractors.*** Absent such safeguards, county roads and bridges would be ruined by fracking operations without recourse. The county should adopt a state-of-the-art agreement and provide enforcement staffing.
- 4) ***Local governments should adopt best practices developed in more mature oil and gas states.***² There are model ordinances for addressing the impacts of gas drilling, and some counties are well ahead of others in preparedness. The first order of business is for local government to ensure that they are empowered to protect their citizens and their capital assets. Once so empowered, counties must work to adopt best practices that are in sync with the environmental and economic impacts associated with shale gas development. Some major issues to address:
 - a) ***Emergency preparedness:*** coordinating emergency response, including fire departments, police forces, hospital staff, etc. Drilling and fracking are subject to catastrophic accidents. The county should have a detailed plan in place prior to any drilling.
 - b) ***Noise, light, and odor ordinances:*** Drilling and fracking are an intense, 24/7 industrial process. Although noise, light, and odors are subject to local controls, the county should prepare model ordinances for its towns to adopt. And the county should assist in monitoring and/enforcement.
 - c) ***County Parks and other public lands:*** Under New York state law, these properties should not be leased to drillers.
 - d) ***Public Safety:*** Drilling is usually done by itinerant workers. Conflicts will arise. The county should be prepared to be responsive.
 - e) ***Disposal of Fracking Fluids:*** Counties must insure that byproducts and waste products are disposed of correctly.
- 5) ***Well permits should not be issued by the DEC. New York tasks the DEC with the issuance of drilling permits.*** This compromises the DEC's mission as environmental agency, since the state gains fees from issuing permits and thus is motivated to issue as many permits as possible. Most other oil and gas producing states keep their environmental agencies out of promoting drilling. ***Without such independence, the DEC has already been compromised in its environmental duties, as evidenced by the grossly inadequate draft guidelines for horizontal hydrofracking of shale gas.*** Permits should be issued by another state agency.
- 6) ***As long as the DEC remains conflicted in its mission, the County must be alerted to the very real potential for inadequate regulatory oversight.*** The County should consider setting up a reporting hotline for neighbors to call. The County might assign a staff person to double check that the DEC is monitoring the activity.
- 7) ***The DEC is further compromised by being tasked with forcing the compulsory integration of mineral rights owners into unitized well spacings.*** In layman's language, this means that the DEC is the state agency that can force unwilling landowners to participate in a well with their neighboring mineral rights owners, even if they did not want to sell their mineral rights.

² <http://www.earthworksaction.org/pubs/NMmodelregs.pdf>

<http://www.earthworksaction.org/pubs/COmodelregs.pdf>

Such “compulsory integration” as practiced in New York, *is illegal in other states*.³ New York’s mandatory participation in a shale gas well, and compelled by the state’s environmental protection agency, is a travesty of property rights and environmental safeguards. New York should not compel the compulsory pooling of mineral rights. New York’s compulsory pooling law as applied to HHF has an element of trespass, is enforced by an agency charged with the conflicting tasks of protecting the environment and exploiting gas reserves, and has yet to be tested in court. New York’s policy clearly violates the property rights of environmentally conscious owners who do not wish to participate in wells. The fact that the DEC’s policies on HHF of shale are flawed should enable non-consenting owners to successfully challenge compulsory pooling. As long as this situation exists, there will be unwilling landowners in the county that may be forced to participate due to environmental concerns that the DEC is not adequately addressing.

- 8) ***The State should tax gas production directly. New York does not have a direct tax on gas production. Only two other mineral producing states lack such a tax.***⁴ Such a tax, known as a severance tax, enables states not only to benefit directly from the oil and gas produced, but to fund the regulatory oversight necessary to monitor the activity – with the amount of oversight and environmental remediation activities tied directly to the volumes of gas produced – without tapping general revenues. All of the fully evolved oil and gas states – Alaska, Texas, Colorado, Louisiana, New Mexico, etc. – have such a tax to fund their regulatory oversight and add to state coffers. Since all major oil and gas operators in New York are domiciled out of state, they are unlikely to book much revenue in New York since it would then be subject to state income tax. The net effect is that New York State will grossly under-tax the activity – to the detriment of its regulatory efforts. ***New York should adopt a severance tax without further delay. The County should go on record as supporting a severance tax. Without a severance tax, no one from the state will be adequately monitoring the wells.***
- 9) ***The DEC’s proposed regulations are based largely on antiquated regulations for small existing vertical New York oil and gas wells.*** While the regulations may have been adequate for these relatively small wells, and while the DEC may have been sufficiently staffed and funded to regulate these minor oil and gas fields, the regulations and DEC’s staffing and funding are totally inadequate to regulate the exponentially larger horizontal hydrofracking of the Marcellus shale. For instance, as originally proposed, the DEC suggested a well setback of fifty (50) feet from municipal drinking water sources. This means that a horizontally hydrofractured shale well, which uses over 1 million gallons of fracking fluid, could be the same distance from the shoreline as a small vertical oil well that is a fraction of the size of the shale gas well. New York’s regulations should conform to the technology and the unique challenges of shale gas production in this state.⁵ And until the regulations are brought up-to-date with technology, the risk of water contamination is very high.
- 10) ***New York offers far less protection of municipal surface drinking water than other states.*** For instance, most major lakes in Texas are used for municipal drinking water. This means that drilling a well under those lakes would require the consent of the owner, i.e., the municipality; this is not the case in New York. Municipalities, which *use but do not own* the

³ Other states such as Texas, Oklahoma, Kansas, and Tennessee have no such mandatory pooling statutes or have weak, seldom enforced statutes to force non-consenters to participate in a well. Some states are “free ride states” - meaning the non-consenting owner gets a share of the revenue if the well hits, but do not have to pay for the well costs if it does not.

⁴ <http://www.mineralweb.com/owners-guide/leased-and-producing/royalty-taxes/oil-severance-tax/>

⁵ http://63.134.196.109/documents/10aug03_Northrup_EPA_final.pdf

lake water, have no oversight in drilling under the lake or next to the lake. The only municipal water sources with any meaningful protection in New York are New York City's reservoirs and Syracuse's lake – which have a higher standard of review for wells in their watershed. The rationale for this higher standard, than for, say, Lake Otsego, is that those water bodies do not have filtration systems. Yet, critically, the sediment filtration used by other municipalities will not filter out the toxic chemicals or the release of natural gas associated with a horizontal hydrofracking of shale gas deposits. ***The proposed special treatment for New York City and Syracuse residents amount to disparate treatment under the law. In short, it is illegal. All surface municipal drinking water should be given equal protection under the law.*** The county should petition the state and the DEC to amend its regulations so that public drinking water is treated equally statewide.

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