

6 NYCRR Parts 52, 190, 550-556, 560, and 750
HIGH-VOLUME HYDRAULIC FRACTURING

SUMMARY OF ASSESSMENT OF PUBLIC COMMENT

This assessment summarizes and responds to the consolidated comments received on the draft regulations for Parts 52, 190, 550-556, 560, 750-1, and 750-3. The revised draft Supplemental Generic Environmental Impact Statement (rdSGEIS) was released for public comment on September 7, 2011. On September 28, 2011, the New York State Department of Environmental Conservation (Department) released for public comment draft regulations concerning high-volume hydraulic fracturing and the SPDES General Permit for Stormwater Discharges from High-Volume Hydraulic Fracturing (HVHF General Permit). Public hearings were held concurrently on all of these documents and the combined public comment period was held open until January 11, 2012. In total, the Department received over 66,000 individual public comments on these documents, from postal mail, electronic submissions, and speakers at public hearings held in 2011.

The Department processed every comment and comments received equal consideration. The Department broke down comment submissions into smaller, more manageable segments. Similar segments were combined into one consolidated statement. Therefore, one consolidated statement could represent portions of identical or similar comments received from a number of commentors. Of the 66,000 comments, there are more than 650 consolidated statements on the draft regulations to which the Department provided responses.

The Department received comments from many diverse groups and individuals including mineral rights owners, federal, state and local agencies, environmental organizations, landowner coalitions, industry representatives, and legislators. During preparation of the proposed revised regulations, the Department incorporated suggestions made by the public (both with respect to the proposed regulations and the 2011 rdSGEIS).

The Assessment of Public Comment presents and responds to all of the consolidated comments. This is a summary of the most frequent comments and the Department's responses. In addition to comments on the proposed regulations, the Department received comments on the

substance of the regulatory supporting documents. The Department provided additional discussion with respect to estimated costs of the regulations on industry in the revised Regulatory Impact Statement and made changes to the other revised regulatory documents, where appropriate.

With respect to the proposed regulations at 6 NYCRR 750-3, the majority of comments were submitted on the following topics: setbacks; wastewater disposal; and chemical disclosure and the alternative analysis. The majority of comments received on the setbacks were that the setbacks are not restrictive enough to protect water resources; however, some comments stated that the setbacks are too conservative.

Setbacks were developed as an effective risk management tool to protect water resources in the event of a spill. In this regard, each setback reflects the magnitude of the potential risk or harm. In developing the setbacks, the Department considered the designated use of the resource, such as drinking water supply (and in such cases, population served).

In addition to setbacks, the revised regulations at 6 NYCRR 750-3 and the draft HVHF General Permit propose measures to prevent spills and releases and to contain those that occur. Specific Best Management Practices are required for all aspects of high-volume hydraulic fracturing operations (e.g., pit construction and liner specifications; closed-loop systems in certain instances; wastewater storage; secondary containment; peripheral berm; and emergency and spill response plans).

Specific changes from the proposed regulations can be found in the revised regulations at 6 NYCRR 750-3.3 (prohibitions) and 750-3.11 (ineligible for coverage under a stormwater general permit for HVHF operations, but where an individual SPDES permit and site-specific State Environmental Quality Review Act review are required).

The Department also received numerous comments regarding the disposal of HVHF wastewater. The proposed revised regulations at 6 NYCRR 750-3 require an approvable Fluid

Disposal Plan that identifies the ultimate disposition of HVHF wastewater and contains an acceptable contingency plan for disposition of such fluids.

Many comments related to a Publicly Owned Treatment Works (POTW), as a disposal option. POTWs may accept HVHF wastewater so long as the POTW is in compliance with applicable regulations, including any necessary approvals and permits. The revised regulations at 6 NYCRR 750-3 include requirements for acceptance of this wastewater for disposal at POTWs. The POTW must have an Environmental Protection Agency (EPA) or Department approved pretreatment program and must conduct a headworks analysis and receive approval prior to applying to accept HVHF wastewater. The headworks analysis evaluates the pollutants present in the wastewater against the capabilities of the treatment system and assesses any potential adverse impacts to a treatment system process and the receiving waterbody. All State Pollutant Discharge Elimination System (SPDES) permits require periodic monitoring to ensure compliance with applicable limits to ensure water quality standards are met. A similar demonstrable showing is required for other HVHF wastewater disposal options in New York State (e.g. privately owned industrial treatment facilities; deep well injection).

Comments were also received on the requirements for disclosure of chemical additives and the alternatives analysis. The analysis must include documentation to the Department's satisfaction that proposed alternatives exhibit reduced aquatic toxicity and pose at least a low potential risk to water resources and the environment as all known available alternatives. The Department intends to provide further guidance regarding the specifics of the alternatives analysis. Also, the revised regulations at 6 NYCRR 750-3 require that the owner or operator maintain a list, at the well site, of the chemical additives used. All documents submitted to the Department would be available to the public, subject to exceptions in the Freedom of Information Law.

With respect to the proposed regulations at 6 NYCRR 52 and 190, the majority of comments sought an expansion of the prohibition from Department administered State-owned lands to all public lands, a prohibition of pipelines on State-owned lands, a prohibition of subsurface access, or a prohibition of drilling on private lands adjacent to State-owned lands.

The Department received some comments opposed to the prohibition on surface disturbances associated with high-volume hydraulic fracturing on State-owned lands.

With respect to Department administered state-owned lands, the proposed regulatory prohibition on surface disturbances associated with high-volume hydraulic fracturing on these lands is based, in part, upon the unique legislative protections and legal constraints applying to these lands. This prohibition was not extended to adjacent private lands because these lands are not subject to the same legal and legislative constraints. Similarly, the Department did not prohibit subsurface access from adjacent private lands because subsurface access to mineral resources underneath State lands would not be inconsistent with the purposes for which these State lands were acquired. The Department determined that government entities having jurisdiction over other publicly-owned lands should decide whether to prohibit high-volume hydraulic fracturing on the surface of those lands.

Finally, with respect to pipelines, the Department does not believe that a prohibition is necessary to ensure that State-owned lands are managed consistent with the purposes for which they were acquired. Pipelines would be permitted on State-owned lands only if certain provisions of the ECL are met, and in compliance with an approved Unit Management Plan.

With respect to the proposed rulemaking at 6 NYCRR 550-556 and 560, the comments received contained critiques from various stakeholders, some stating that the regulations went too far in regulating the proposed activity of high-volume hydraulic fracturing, while others stated the proposed rules are too permissive. Some of these comments necessitated revisions to the proposed rules, but the majority did not.

Several of the comments on Part 550 expressed concern over the Department's ability to enforce its regulations. The Department believes that there are ample existing legal mechanisms available to the Department to enforce the proposed regulatory requirements.

Some comments on Part 551 expressed concern over the financial security requirements related to plugging of wells and abandonment of well sites. Several commentors expressed

concern over the removal of the \$2 Million cap on financial security, and others expressed concern that financial security should cover more activities (clean up, contingency) than plugging and abandonment. The proposed revised regulations allow for the plugging of wells without predetermination of the associated costs, creating flexibility for the Department to capture the true potential costs.

A few comments suggested severance taxes or other fees, but these revisions are beyond the Department's authority and would require legislative action.

Several of the comments on Part 552 expressed varied opinions regarding extending the permit period to two years. The Department believes the proposed extension is warranted because the complexity of permitting a high-volume hydraulically fractured well makes the 180 day time period unmanageable. Comments on this Part also questioned the provision for verbal authorization of emergency operations, however, the Department believes this provision is necessary to allow rapid responses to unexpected or non-routine situations that could impact public health and safety and the environment. Comments also focused on the details of what should be included in a well permit application, and in some cases suggested that requirements specific to high-volume hydraulic fracturing should apply to all wells. The potential impacts of other wells are effectively addressed by existing regulations and permit conditions.

Many of the comments on Part 553 expressed concern that the spacing units referenced in the proposed regulations were too small and may result in concentrating more well pads over the landscape and increasing the potential for habitat fragmentation. Spacing unit size is constrained by statute. Other comments addressed proposed variance provisions or compulsory integration (the latter of which is prescribed by statute and beyond the scope of this proposed rulemaking).

Many comments on Part 554 expressed concern over the potential for improper disposal of waste fluids and solids. In addition to the requirements set forth in the proposed regulations, the revised rulemaking includes a requirement that the owner or operator state in its fluid disposal plan that it will maximize the reuse and/or recycling of used drilling mud, flowback

water and production brine to the maximum extent feasible. Furthermore, some record-keeping requirements set forth in Part 554 have been enhanced in the revised rulemaking.

The bulk of the comments on Part 555 were on construction specifics related to casing and well plugging requirements. Many of the comments on Part 556 expressed concern about the potential air impacts of venting and flaring. A revision was made to the proposed regulations to clarify the approval process for flaring that would reduce potential air impacts. Other comments focused on the proposed Sundry Well Notice and Report form, requesting either clarification on when it would be required or the time frames for submission. The revised rulemaking includes time frames, a verbal approval process for sundry notice operations similar to the verbal approval process in Part 553 and authority for the Department to suspend or terminate sundry notice approvals for good cause.

Most comments on the proposed rulemaking were on the new Part 560 that specifically covers high-volume hydraulic fracturing activities. The proposed rules for this Part mirror many of the environmental mitigation measures identified during the SEQRA process. The comments corresponded to similar comments the Department has received on the 2011 rdSGEIS, including areas such as emergency response, transportation impacts, local government and public input, fracturing fluid disclosure, setbacks and prohibitions, notification and reporting requirements, water well testing requirements, cementing and casing requirements, Naturally Occurring Radioactive Materials (NORM) and other areas.

The revised proposed regulations provide for enhanced environmental protections while providing for efficient utilization of mineral resources. Specifically, in response to these comments, the Department has proposed substantial revisions to the Part 560 regulations to include: several new definitions; an enhanced application process, including a 15-day public notice period; authority to collect SEQRA fees; enhanced chemical disclosure provisions with website posting; an increased setback from inhabited private dwellings or places of assembly, with a variance process; enhanced notification and records retention requirements; specified parameters for water well testing and a requirement to report deviations from baseline; public posting of Drilling and Production Waste Tracking Form, and post-completion fracturing fluid

disclosure; and specifics on NORM testing. Other non-substantial clarifying revisions were made to proposed Part 560 based on comments received regarding application requirements, fluid disposal plans, setbacks, casing and cementing requirements, site reclamation, and recordkeeping.