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## **New York Has a Gas Problem: How Do You Spell Relief?**

Governor Patterson is betting heavily on proceeds from natural gas extracted from New York's Marcellus Shale, a geologic formation abutting Sullivan County and much of the State's Catskill Mountain region. This is understandable, given New York's deep fiscal difficulty. But this rural region of the State is a popular destination for vacationers and others interested in outdoor pursuits; it's loved by those fortunate to live there, supports a rich agricultural community, and is the source for much of New York City's drinking water. Natural gas development is a heavily industrialized activity, and whether or not it's an appropriate land use for this region is a topic being fiercely debated.

And it's not just the Governor wagering a hefty bet. Some area property owners contend gas development is the only means of reviving a dismal local economy, that it provides a means for some farmers to keep their farms, and that economic benefits will flow to all, not just those leasing. Others believe the risks are just too high.

The urge to oversimplify complicated matters is irresistible. Policy makers and regulators often marginalize many, writing them off as collateral damage, casualties of the pragmatic compromise they deem necessary. That's not good public policy, and in the case of Marcellus Shale gas development, it's avoidable.

Real concerns do exist about what industrializing this area would mean, not just for the City's drinking water but also for local communities. Much of the discussion to date has focused on safety issues surrounding the relatively new technology of horizontal directional drilling and associated hydraulic fracturing, techniques to be used for extracting gas from this shale formation. And seismic "thumper" trucks are used to propagate intense pressure waves into the earth for locating drilling areas. So people worry about what might happen to the foundations of their homes. "Fracking" fluids containing toxic compounds are injected into rock at great depths below the surface, so fears exist over the potential for water contamination and related adverse effects on human and non-human health. Statements like, "it's safe" don't tell you much when it's your family's health that could be compromised by nearby gas development, and it's difficult selling property without a reliable source of drinking water.

Some correctly point out that risk is an unavoidable aspect of living; they also remind us that

although traffic accidents continue to occur there's no movement afoot to ban automobiles. But comparing such risks with those from gas drilling in the Catskill region doesn't offer clarity; it blurs important distinctions between unavoidable and avoidable risks; it confuses avoidable ones generally accepted by society through a process of informed consent, with those arising from narrower interests imposed upon others without their consent -- Yes, you may choose to smoke cigarettes, but you're no longer permitted doing so in hospitals and schools, and with good reason.

Add to this the fervor of private property rights and things get complicated quickly, so quickly that potential solutions -- or at least valuable considerations -- get drowned out.

At least two areas exist where major progress could be made towards establishing a higher level of confidence, perhaps even trust, between people who believe public protections from potential adverse effects related to gas drilling are inadequate and those who believe they are. It requires addressing the glaring conflict of interest inherent in the State's present regulatory structure, and it requires dealing more effectively with cost-shifting concerns on behalf of people not leasing, people who believe they'll bear significant costs from development, costs that amount to subsidizing profits for gas companies and those deciding to lease.

Dealing with the conflict of interest concern is reasonably straightforward; whether there's sufficient political will to do so isn't. The New York State Department of Environmental Conservation's Division of Mineral Resources needs to be restructured. DMR's revenue generating function (through gas leasing and related activities) needs to be separated from its regulatory and enforcement role -- you wouldn't retain the same attorney representing the other side of a transaction you had any serious interest in. And a necessary condition for this restructuring is that funding for revenue collection operations be contingent upon an independent funding stream for oversight, not the other way around.

In other words, simply separating both roles would not adequately address the problem at DMR, not if oversight activities remain dependent upon funding from collections. Additionally, securing independent funding for oversight, alone, would also be inadequate because political wrangling is a potential hot bed for a variety of perverse incentives. No. An independent funding stream for oversight must not be held hostage to political interests, or if that should occur, then budgetary and appropriation mechanisms need to exist that will ensure such hostage taking also triggers commensurate funding abductions for revenue collections. Allowing the current situation at DMR to stand is one reason why so many lack confidence in the current regulatory framework. It's the same lack of confidence playing out now with the BP oil spill in the Gulf of Mexico, and it was central to U.S. Interior Secretary Ken Salazar's decision to restructure Mineral Management Services so that both roles no longer reside within that federal agency.

Addressing the cost-shifting concern also appears straightforward, particularly for those subscribing to industry claims that drilling is safe. Dealing squarely with these concerns requires effective regulation informed by three guiding principles:

First, affected persons need to be made financially whole for any costs incurred or required and submitted on behalf of a legitimate claim. Initial payment, in full, should be made promptly and not contingent upon the uncertain outcomes of legal challenge.

Second, claims should be deemed legitimate if evidence supporting them rises to the level of "reasonable suspicion." Initial and complete payment of legitimate claims should not be required to meet any test beyond this, such as "preponderance of evidence," or "beyond reasonable doubt."

Third, responsible parties such as gas companies, who have paid legitimate claims in full, would be permitted to challenge payments retroactively within a narrow window of

time. They would bear a burden of proof, "beyond any reasonable doubt," that their activities have not caused damages submitted on behalf of legitimate claims.

A person believed to have incurred impacts from gas drilling would contact the agency responsible for oversight, presumably one previously cleaved from DMR; an investigation would ensue, and if a determination of reasonable suspicion is made, a legitimate claim would be filed and payment in full promptly made. Payments for issues anticipated to be chronic in nature, such as sickness, would be scheduled to the extent possible, with contingency plans otherwise made for providing support services needed in the future.

A gas company would be free to limit its liability through carrying appropriate insurance, or by spreading it across lease holders through contractual obligations.

It's difficult to envision any objection to such an arrangement because legitimate claims should never occur, if gas extraction from the Marcellus Shale is "safe."