

**New York State Department of Environmental Conservation**

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Peter M. Iwanowicz  
Acting Commissioner

November 3, 2010

Acting Commissioner Peter M. Iwanowicz  
Attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services  
New York State Department of Environmental Conservation  
625 Broadway (14th Floor)  
Albany, New York 12233-1010

**BY E-MAIL AND FIRST CLASS MAIL**

Dear Acting Commissioner Iwanowicz:

**Re: DEC STAFF RESPONSE TO THE RFPLC SEPTEMBER 22, 2010  
APPEAL OF ALJ RULINGS  
Chemung County Landfill Permit Modification  
DEC Project No. 8-0728-00004/00013**

This is to respond to the Residents for the Preservation of Lowman and Chemung ("RFPLC") September 22, 2010 appeal of the Administrative Law Judge ("ALJ") June 3, 2010 memorandum striking certain RFPLC submissions ("the Ruling to Strike") and the ALJ September 3, 2010 Issues Ruling concerning Marcellus Shale Waste Streams ("the Marcellus Shale Issues Ruling").

**I. The Ruling to Strike**

The Commissioner should deny the RFPLC appeal of the Ruling to Strike because the only material struck was repetitive, irrelevant or clearly should have been provided earlier in the proceeding. No significant information was prevented from entering the record. This is borne out by the fact that RFPLC fails to point to even a single struck statement whose absence from the record results in material misunderstanding in the September 3, 2010 ALJ Ruling on Issues and Party Status.

**II. The Marcellus Shale Issues Ruling**

**Background**

Drill cuttings are rock fragments which result from a drill bit drilling through rock. Drilling fluids bring the cuttings from the bottom of the well to the land surface where the solids are then separated from the liquids and the solids are the drill cuttings. (Tr. 150. Ruling 27)

Like all rock, drill cuttings contain naturally occurring radioactive material, or NORM. The NORM in the drill cuttings has not been processed or concentrated. The Landfill may dispose of any waste stream that is not prohibited by Part 360 or the DEC issued permit issued pursuant to Part 360. The Landfill may dispose of Marcellus Shale drill cuttings because they are not prohibited by the regulation or the permit. Part 360 prohibits the disposal of radioactive materials which are regulated under 6 NYCRR Part 380, Part 382 or Part 383 at the Landfill. See, 6 NYCRR 360-1.5(b) and 360-2.17(m). However, these 380 series regulations specify that they do not apply to NORM unless that NORM has been processed and concentrated. See, 6 NYCRR 380-1.2(e), 382.1(c)(5) and 383-1.1(b)(5). Since the NORM in drill cuttings have not been processed and concentrated, the drill cuttings are not subject to the 380 series regulations. Thus, the drill cuttings are not prohibited from disposal at the Landfill. (Tr. 220- 222)

### The Commissioner Should Deny the RFPLC Appeal of the Marcellus Shale Issues Ruling

The Commissioner should deny the RFPLC appeal of the Marcellus Shale Issues Ruling because RFPLC has not raised a substantive and significant issue regarding the disposal of Marcellus Shale waste streams. RFPLC has offered little more than mischaracterization<sup>1</sup> and irrelevancy<sup>2</sup> to support its theory that Marcellus Shale drill cuttings contain processed and concentrated NORM. In significant contrast, the permit applicant provided a report supporting that these cuttings contain NORM at background – not at higher, concentrated – levels (CoPhysics Report, Ex. 10) and will use radiation detectors to help prevent any inadvertent disposal of regulated radioactive materials. (Department letter dated May 18, 2010) The final draft permit (DEC letter dated June 30, 2010) also clarifies that Marcellus Shale waste streams such as “flowback water related filter sludge, production brine related filter sludge, and free-phase liquids of any origin” will not be disposed at the Landfill, and that any other Marcellus Shale waste streams must be approved by the Department in writing prior to Landfill disposal (DEC letter dated June 30, 2010). Thus, there is no substantive and significant Marcellus Shale waste stream issue to be adjudicated at hearing.

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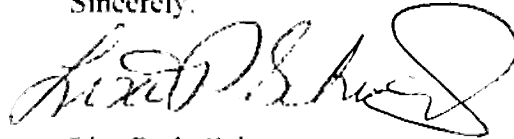
<sup>1</sup> RFPLC’s appeal (p.5) states that, “According to the Draft SGEIS, solids in the Marcellus Shale drill cutting waste (rock cuttings alone) are approximately 25-30 times more radioactive than background.” However, the Department’s September 2009 draft supplemental Generic Environmental Impact Statement concerning issuance of permits for horizontal drilling and high volume hydraulic fracturing in the Marcellus Shale (“dSGEIS”) actually states that the data collected to determine NORM concentrations in Marcellus Shale rock cuttings “indicate levels of radioactivity that are **essentially background values**,” and that the same data “do not indicate an exposure concern for workers or the general public.” (dSGEIS page 5-30) (bolding added) While the dSGEIS includes comprehensive data on the radioactive parameters in Marcellus Shale rock cuttings, only the data concerning parameters Radium 226 and Radium 228 is relevant to assessing exposure concern.

<sup>2</sup> RFPLC’s appeal (pp. 8–9) asserts that “CoPhysics is not an environmental laboratory certified to analyze solid waste samples for radiochemical or chemical parameters”, and that “The ELAP website lists all New York laboratories certified to perform radiochemical analysis in New York, and CoPhysics is not on that list.” However, RFPLC neglects to mention that there is no DOH ELAP certified laboratory in existence which performs radiological analysis on solids such as drill cuttings because the ELAP program does not include certification for radiological analysis on solids. The DOH website which RFPLC cites specifies that ELAP certification is given in the category of drinking and non-potable water – and not a single laboratory listed at that link is ELAP certified to measure radioactivity in any other material. (<http://www.wadsworth.org/labcert/elap/radochem.html>, on November 3, 2010)

Additionally, the Commissioner should deny the RFPLC appeal because it is now clear - with the June 30, 2010 close of Department staff's investigation of certain spill wastes (learned the week prior to the issues conference) - that there is no efficiency associated with hearing RFPLC's concerns about Marcellus Shale waste stream disposal at the Landfill in this permit modification proceeding. Again, RFPLC has not raised a substantive and significant issue regarding the disposal of Marcellus Shale waste streams. Furthermore, the Marcellus Shale Issues Ruling is correct to state, among other things, that the drill cuttings have been disposed and are expected to continue to be disposed at the Landfill, whether or not the permit is modified, under the authority of the existing permit and related Department staff approval; that RFPLC's concerns about the disposal of particular Marcellus Shale waste streams may be raised before DEC in a request for modification of the Landfill permit under 6 NYCRR 621.13(b); and that RFPLC alternatively may petition DEC under 6 NYCRR Part 619 for a declaratory ruling on its claim that particular Marcellus Shale waste streams may not be legally disposed in a landfill regulated under 6 NYCRR Part 360.<sup>3</sup>

Thus, for all the reasons stated above, the Department staff respectfully requests you to deny the RFPLC appeals of the Ruling to Strike and the Marcellus Shale Issues Ruling.

Sincerely,



Lisa Perla Schwartz  
Assistant Regional Attorney

cc: G. Abraham, Esq.  
R. Hull, Esq.  
T. West, Esq.

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<sup>3</sup> Correctly, the Marcellus Shale Issues Ruling does not rely on the dSGEIS to resolve the Landfill Marcellus Shale disposal issue in this permit proceeding, making no suggestion that RFPLC seek solution to its concerns about Landfill disposal through the dSGEIS. In fact, the dSGEIS discusses but does not determine or decide what wastes may be disposed in a landfill. Rather, that dSGEIS discussion reflects existing law and regulation (e.g., 6 NYCRR Part 360).