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**U.S. House of Representatives**  
**Committee on Natural Resources**  
**Washington, DC 20515**

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March 20, 2012

The Honorable Nancy Sutley  
Chair  
Council on Environmental Quality  
722 Jackson Place, N.W.  
Washington, DC 20503

Dear Chair Sutley:

I write to request that the Council on Environmental Quality (CEQ) develop and implement guidance for the manner in which federal loan and mortgage-granting programs address the environmental risks associated with oil and gas drilling when issuing loans or mortgages for property on which oil or gas drilling leases exist. The New York Times yesterday reported<sup>1</sup> that the U.S. Department of Agriculture (USDA) recently concluded that before loans or loan guarantees are issued by the Rural Housing Service Program for land on which oil and gas drilling leases exist, they must undergo environmental analysis under the National Environmental Policy Act (NEPA). Prior to this determination, USDA had categorically excluded such loans or loan guarantees from having to perform such environmental analysis, but USDA officials recently concluded that allowing people with drilling leases on their properties to continue such exemptions “places the Agency at risk of NEPA related litigation.” Following the publication of The New York Times story, USDA Secretary Vilsack issued a statement that appears to rescind the conclusions made by his staff and states that he will reaffirm that “rural housing loans are categorically excluded under the National Environmental Policy Act.”

Since numerous other federal agencies – including Fannie Mae, Freddie Mac, the Federal Housing Administration and the Veterans Administration – also issue or underwrite mortgages or loans, it stands to reason that an equivalent concern and thus a need for a government-wide policy with regard to how to address the litigation and environmental and safety risks associated

<sup>1</sup> [http://www.nytimes.com/2012/03/19/us/drilling-property-mortgages-may-get-closer-look-from-agriculture-dept.html?\\_r=1&hp#commentsContainer](http://www.nytimes.com/2012/03/19/us/drilling-property-mortgages-may-get-closer-look-from-agriculture-dept.html?_r=1&hp#commentsContainer)

with oil and gas drilling exists. I request that you develop such a policy so as to minimize the potential financial and legal exposure of taxpayers who back these federally issued loans and mortgages to the risks associated with oil and gas drilling. I believe that a programmatic environmental impact statement under NEPA would be one policy approach worth pursuing because of the opportunity for public transparency and input, the comprehensive nature of such analysis, and because no other past or ongoing study into the potential environmental impacts associated with hydraulic fracturing address the question of how these loans or mortgages comply with NEPA.

As you know, hydraulic fracturing is a well stimulation technique used to maximize production of oil and gas in unconventional reservoirs. In order to create additional permeability in the producing oil or gas formation, hydraulic fracturing is used to create spaces (or fractures) in the rock pores enabling the oil or gas to flow more freely to producing wells. To create these fractures, the process of hydraulic fracturing involves pumping millions of gallons of water combined with sand and often-unidentified chemical agents (collectively known as fracturing fluids) down the well bore at extremely high pressures. More recently, this same drilling technique has been used to produce oil from low permeability shale deposits in the United States.

Natural gas production using hydraulic fracturing offers the prospect of an enormous expansion of domestic natural gas supplies, which could benefit consumers, industrial customers, and utilities that use natural gas. However, with increased use of this technology, there has been an increase in public concern about the impacts of hydraulic fracturing on water quality, water quantity, air quality, public health, and the environment. Many of the concerns have centered on the contamination of drinking water that could occur if fracturing fluids were to seep into groundwater or surface water during the process of hydraulic fracturing. Oil and gas companies use a variety of additives and chemicals in their fracturing fluid with the goal of widening and extending the length of the fractures and transporting large amounts of material to “prop open” the fractures. While some of these chemicals are generally harmless, such as sand and salt, an investigation by the House Energy and Commerce Committee Democratic staff released by Reps. Henry A. Waxman (D-Calif.), Diana DeGette (D-Colo.) and I found that between 2005 and 2009, 14 leading oil and gas companies used more than 780 million gallons of hydraulic fracturing products containing 750 different chemicals, including carcinogenic and other toxic components such as lead and benzene.<sup>2</sup> In fact, these companies used 29 distinct chemicals that are known or possible human carcinogens, regulated under the Safe Drinking Water Act (SDWA) for their risks to human health, or listed as hazardous air pollutants under the Clean Air Act. The investigation also found that 12 of the 14 companies used more than 32 million gallons of diesel fuel — which often contains benzene, toluene, ethylbenzene and xylenes (the BTEX compounds) — chemicals known for their toxicity and adverse health impacts in 20 states.<sup>3</sup>

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<sup>2</sup> <http://democrats.energycommerce.house.gov/index.php?q=news/committee-democrats-release-new-report-detailing-hydraulic-fracturing-products>

<sup>3</sup> <http://democrats.energycommerce.house.gov/index.php?q=news/rep-waxman-markey-and-degette-report-updated-hydraulic-fracturing-statistics-to-epa>

Disposal of hydraulic fracturing wastewater is another public health and environmental concern. As much as 80 percent of the fluids injected for hydraulic fracturing returns to the surface as “flowback,” which can be contaminated with tens of thousands of pounds of chemicals, naturally occurring radioactive material, salt and sand. A deep horizontal shale well can use anywhere from 2 to 10 million gallons of water to fracture a single well.<sup>4</sup> While the percentage of chemical additives in hydraulic fracturing fluid is typically small,<sup>5</sup> the quantity of fluid used in the fracturing process is so large that the United States Geological Survey estimates that three million gallons of fracturing fluid would yield about 15,000 gallons of chemicals in the waste.<sup>6</sup> Last year, The New York Times released results of an investigation<sup>7</sup> that indicated that the recovered fracturing fluid, which flows back up the well after drilling, is loaded with naturally occurring radioactive elements associated with the shale formations. The investigation suggested that millions of gallons of drilling wastewater contaminated with radioactive radium, at levels that far exceed the safe drinking water standards, were dumped into rivers and other U.S. waterways. In several cases, fracturing wastewater was sent to treatment facilities that could not adequately treat it. The New York Times investigation also found that natural gas from hydraulic fracturing operations had seeped into underground drinking water supplies in at least five states, including Colorado, Ohio, Pennsylvania, Texas and West Virginia. Wastewater pumped into disposal wells has also been implicated in small earthquakes in Texas, Arkansas and Ohio.<sup>8</sup>

Proper well construction and operation are necessary for the safe production of oil and natural gas. There have been several notable cases in which hydraulically fractured wells have blown out, due to faulty construction, cementing or defective equipment, spilling large quantities of fracturing fluids and natural gas and causing the evacuation of multiple households.<sup>9</sup> One such event occurred in April 2011 when equipment failure at a well in Pennsylvania that was in the process of being hydraulically fractured, caused tens of thousands of gallons of chemical-laced water to spew out of the well and into a nearby creek, causing evacuation of homes and temporary suspension of drilling activities at nearby sites.<sup>10</sup>

It is presumably these type of environmental and safety concerns that led USDA officials to recommend an end to its practice of exempting properties on which oil and gas drilling leases exist from the NEPA requirements to analyze the potential environmental impacts of the drilling

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<sup>4</sup> Kargbo, D. et al. Natural Gas Plays in the Marcellus Shale: Challenges and Potential Opportunities. *Environ. Sci. Technol.*, 2010, 44 (15), pp 5679–5684

<sup>5</sup> Estimates range between 0.5 and 2% of the total volume of fracturing fluid.

See for example: <http://www.gwpc.org/e-library/documents/general/State%20Oil%20and%20Gas%20Regulations%20Designed%20to%20Protect%20Water%20Resources.pdf>

<sup>6</sup> <http://pubs.usgs.gov/fs/2009/3032/pdf/FS2009-3032.pdf>

<sup>7</sup> “Regulation Lax as Gas Wells’ Tainted Water Hits River” *The New York Times*, February 26, 2011

<sup>8</sup> See: <http://mobile.bloomberg.com/news/2012-01-03/ohio-halts-wells-after-quake-won-t-stop-natural-gas-drilling?category=%2Fnews%2Fenvironment%2F>

<sup>9</sup> See for example: [http://news.yahoo.com/s/ap/20110305/ap\\_on\\_re\\_us/us\\_onshore\\_well\\_blowouts](http://news.yahoo.com/s/ap/20110305/ap_on_re_us/us_onshore_well_blowouts)

<sup>10</sup> <http://www.reuters.com/article/2011/04/21/us-chesapeake-blowout-idUSTRE73K5OH20110421>

activities prior to issuing a loan or mortgage. The federal government directly loans or underwrites billions of dollars worth of mortgages each year. It seems apparent that a clarification of Federal policy in this area, which could include the development of a programmatic environmental impact statement that can be used government-wide, is needed in order to avoid potential taxpayer liability either for failing to comply with NEPA or for environmental damages that may one day occur on properties with mortgages backed by (or, in the case of default, owned by) the federal government. As you know, the House Natural Resources Committee is the authorizing committee in the House for NEPA, and is therefore responsible for conducting ongoing oversight over the Act and its implementation. In order to inform the Committee Democrats' oversight activities in this area, I request your prompt response to the following questions:

- 1) For each of the entities that underwrite, guarantee or directly issue loans, loan guarantees or mortgages, please indicate a) whether it is the current policy of that entity to exempt such loans, loan guarantees or mortgages from being subject to environmental analysis using categorical exclusions (or other regulatory mechanisms) under NEPA, and b) how that entity addresses the litigation and environmental and safety risks associated with oil and gas drilling that could be conferred on the mortgage-holder or lender in the event of litigation or actual damages.
- 2) Does CEQ believe that addressing the litigation and environmental and safety risks associated with oil and gas drilling that could be conferred on a taxpayer-backed mortgage-holder or lender in the event of litigation or actual damages should occur a) through the undertaking of an environmental assessment under NEPA prior to the issuance of each loan, loan guarantee or mortgage involving taxpayer funds, underwriting or guarantees by each entity issuing such loans, loan guarantees or mortgages, b) through the undertaking of a programmatic environmental impact statement under NEPA prior to the issuance of future loans, loan guarantees or mortgages involving taxpayer funds, underwriting or guarantees by any entity issuing such loans, loan guarantees or mortgages, or c) through some other regulatory mechanism (and if so, what)?
- 3) Please provide a specific and detailed timeline for how CEQ plans to assess and recommend changes to the manner in which entities interpret a) the applicability of NEPA to federal activities related to underwriting, guaranteeing or directly issuing loans, loan guarantees or mortgages and b) alternate means by which the litigation and environmental and safety risks associated with federal activities related to underwriting, guaranteeing or directly issuing loans, loan guarantees or mortgages will be addressed.
- 4) Has any federal entity that has underwritten, guaranteed or directly issued loans, loan guarantees or mortgages for a property that also had an oil or gas drilling lease on it been sued under NEPA for failure to comply with that Act's requirements? If so, please provide all details of each such instance.

- 5) Has any federal entity that has underwritten, guaranteed or directly issued loans, loan guarantees or mortgages for a property that also had an oil or gas drilling lease on it been sued because of alleged drilling-related environmental or safety damage that occurred on the property? If so, please provide all details of each such instance.

Thank you very much for your assistance with this important matter. Please provide your response no later than Friday April 20, 2012. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff of the House Natural Resources Committee Democratic Staff at 202-225-2836.

Sincerely,



Edward J. Markey  
Ranking Member  
Committee on Natural Resources