

New York State Department of Environmental Conservation  
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In the Matter of the Applications of

Application Number  
8-4432-00085

FINGER LAKES LPG STORAGE, LLC

For permits to construct and operate a liquid petroleum gas storage facility in the Town of Reading, Schuyler County, pursuant to the Environmental Conservation Law  
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POST-ISSUES CONFERENCE BRIEF

by

Seneca County, Yates County, the Town of Fayette, the Town of Geneva, the Town of Ithaca, the Town of Romulus, the Town of Starkey, the Town of Ulysses, the Town of Waterloo, the City of Geneva, the Village of Watkins Glen, and the Village of Waterloo – collectively, the  
“Seneca Lake Communities”

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**I. Introduction**

Finger Lakes LPG Storage, LLC’s (the “Applicant”) proposal to create a regional storage and distribution hub for millions of barrels of liquefied petroleum gas (“LPG”) on the shores of one of the Finger Lakes Region’s most valuable and defining natural assets – Seneca Lake – threatens not only the health of that important resource, but also the safety, identity, and welfare of all municipalities in the region. Those threats were not adequately considered or mitigated in the Draft Supplemental Environmental Impact Statement (“DSEIS”), Document IV.A (2011-08, Accepted DSEIS), or the Draft Permit Conditions, Document V.1 (2014-11-10, DEC Staff Draft Permit Conditions), issued by the Department of Environmental Conservation (the “Department” or “DEC”) for this facility (the “Project”). Concerned for their communities, twelve of the region’s municipalities – Seneca County, Yates County, the Town of Fayette, the Town of Geneva, the Town of Ithaca, the Town of Romulus, the Town of Starkey, the Town of Ulysses, the Town of Waterloo, the City of Geneva, the Village of Watkins Glen, and the Village of Waterloo (the “Seneca Lake Communities” or the “Communities”) – filed a Petition for Full Party Status on January 16, 2015 (“Communities’ Petition”) challenging the DSEIS and the permit conditions for failing to comply with Article 23 of the New York Environmental

Conservation Law and the State Environmental Quality Review Act (“SEQRA”).<sup>1</sup> The offers of proof contained in that petition, as well as the arguments offered by the Seneca Lake Communities at the Issues Conference conducted on February 12 and 13 (“Issues Conference”), demonstrate several substantive and significant issues that demand adjudication.

On behalf of the tens of thousands of residents they represent, the Seneca Lake Communities now offer this Post-Issues Conference Brief in support of full adjudication of the concerns directly relevant to their daily lives – such as the integrity of Seneca Lake and the character of the environment that they call home. Importantly, the DSEIS fails to adequately consider how this high-risk industrial facility conflicts with the officially-adopted development goals of the region’s local governments – who seek to cement the region’s trend toward de-industrialization and the promotion its historic rural identity – and the risks it poses to their ability to provide safe, potable drinking water. Both the DSEIS and the Draft Permit Conditions also fail to consider any meaningful project alternatives and do not provide adequate mitigation or assurance against other potential significant impacts resulting from the genuine threat of catastrophic failure at the facility.

As outlined in the Communities’ Petition and below, the Seneca Lake region is simply the wrong place at the wrong time for the kind of major industrial development the Project represents.

## **II. Summary of Substantive and Significant Issues and Request for Relief**

Part 624 of the Department’s regulations empowers the Administrative Law Judge (“ALJ”) to hold an adjudicatory hearing on issues raised by petitioners for full party status, provided they are substantive and significant. 6 New York Code, Rules & Regulations

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<sup>1</sup> The identities, environmental interests, statutory interests, and precise grounds for opposition of the Seneca Lake Communities are contained in in the Communities’ Petition as required by 6 N.Y.C.R.R. § 624.5(b)(1). Communities’ Petition at Section III.

(“N.Y.C.R.R.”) §§ 624.4, 624.5. An issue is substantive if “there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.” *Id.* § 624.4(c)(2). It is significant if “it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.” *Id.* § 624.4(c)(3).

As identified in the Communities’ Petition, through oral argument at the Issues Conference, and below, the Seneca Lake Communities present the following substantive and significant issues for adjudication as detailed in Sections III-VII of this brief: (1) the DSEIS does not reasonably evaluate the potential significant adverse impacts of the Project on the character and officially adopted land use plans of the municipalities in the region; (2) the DSEIS’s consideration of alternatives is totally insufficient; (3) the DSEIS does not reasonably evaluate the potential significant adverse impacts of the Project to Seneca Lake water quality and those who depend on it as a source of drinking water; (4) the DSEIS does not reasonably evaluate the potential significant adverse impacts of a spill, accident, or catastrophic event on local emergency resources; and (5) the Draft Permit Conditions fail to provide indemnity or adequate assurance to protect the region’s municipalities.

These failures deprive the Department of factual information necessary to form the legally required record upon which to issue findings pursuant to SEQRA, N.Y. Environmental Conservation Law (“E.C.L.”) § 8-010 *et seq.*, as set forth in 6 N.Y.C.R.R. § 617.11, or to issue necessary permits for the Project under Article 23, E.C.L. §§ 23-1301 to 23-1307. Accordingly, the Seneca Lake Communities request the opportunity to present evidence, expert testimony, and supporting documentation at an adjudicatory hearing. The Communities offer to demonstrate that

the Project's unanalyzed environmental impacts warrant denial of the permit, or at the very minimum, substantial additional protective conditions.

Finally, the Seneca Lake Communities note that the failures in the SEQRA process have also deprived the public of a full and fair opportunity to comment on a major development potentially affecting their safety and welfare. Accordingly, in addition to a hearing on the above-identified issues, the Communities request that the public also be provided an opportunity to offer comment on a complete record containing analysis of the relevant significant environmental impacts, project alternatives, and mitigation measures.<sup>2</sup>

### **III. The Applicant's Failure to Consider the Project's Significant Adverse Impact on Community Character Raises an Important Issue for Adjudication**

The Applicant's proposal to convert long-abandoned salt caverns into a large industrial storage facility and regional transportation hub for the movement of massive quantities of a hazardous substance through the Seneca Lake region materially conflicts with the officially expressed development goals and self-described character of nearly every municipality in that region. Far from being speculative or purely psychological, this conflict is rooted in the unmistakable text of the area's numerous and readily-available comprehensive planning and land use documents, expressing the desire to preserve local rural character and cement the region's trajectory toward becoming a recognized center for agri-business, viticulture, and tourism. Because the DSEIS – without explanation and contrary to the clear dictates of SEQRA and the Department's own guidance – wholly ignores these potential detrimental consequences to local community character, that omission raises a substantive and significant issue that must be adjudicated.

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<sup>2</sup> As noted below, in the instances of the DSEIS's failure to provide analysis of impacts to community character or to consider a reasonable range of alternatives, it may also be appropriate to hold the DSEIS deficient as a matter of law pursuant to 6 N.Y.C.R.R. § 624.4(b)(5)(iii). *See supra* at notes 7, 10.

**A. SEQRA Requires Consideration of Impacts on Community Character – Beyond Immediate Nuisance-Like Harms – Wherever Those Impacts Are Significant**

In order to achieve its stated purpose of “enhanc[ing]” and “enrich[ing] the understanding” of the natural as well as “human and community resources important to the people of the state,” E.C.L. § 8-0101, SEQRA requires earnest examination of any potential significant impacts to the “environment,” defined to include “objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing *community or neighborhood character.*” E.C.L. §§ 8-0109(2), 8-0105(6) (emphasis added); 6 N.Y.C.R.R. § 617.7(c)(1)(v).

It is undisputed that impacts to community character can take the form of instantly perceptible injuries to neighborhood harmony such as excessive noise, dust, odor, light, or traffic. *See, e.g.*, 6 N.Y.C.R.R. § 617.7(c)(1)(i) (“substantial adverse change in . . . traffic or noise levels” is an indicator of significant adverse impact on the environment). But since the early landmark case *Chinese Staff & Workers Ass’n v. City of New York*, the Court of Appeals has held that SEQRA, by its very terms, demands consideration of many community harms not classified as physical nuisances:

It is clear from the express terms of the statute and the regulations that environment is broadly defined . . . . Thus, the impact that a project may have on . . . existing community character, *with or without a separate impact on the physical environment*, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition.

68 N.Y.2d 359, 365-6, 502 N.E.2d 176 (1986) (emphasis added). Accordingly, in *Chinese Staff*, the Court found that regulations adopted by the City of New York pursuant to SEQRA required an assessment of a proposed high-rise luxury condominium’s effect on “the potential long-term

secondary displacement of residents and businesses,” 68 N.Y.2d at 368, independent of the project’s nuisance-like effects, such as noise. *Id.* at 362, n.2 (noting the project’s noise mitigation measures were used to support the negative declaration issued).

The Department openly shares this expansive view of community character. In the SEQR Handbook, DEC explains that “[c]ommunity character relates not only to the built and natural environments of a community, but also to how people function within, *and perceive*, that community.” DEC, *The SEQR Handbook, 3<sup>rd</sup> Edition* (2010) (emphasis added), available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf) [hereinafter “SEQR Handbook”]. Likewise, in its recent and extensive Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (“RDSGEIS”) available at <http://www.dec.ny.gov/energy/75370.html>, the Department defined community character as comprised of elements such as: “land uses; local history and oral traditions; social practices and festivals; unique local restaurants and cuisine; and local arts.” RDSGEIS at 2-172 to 2-173. In other words, while physical inputs are essential components, community character is truly a composite of both the “tangible and intangible characteristics” of that community. *Id.* at 2-173. The relevant “sense of place” created is not wholly quantifiable, but nonetheless very real and very important to those who live there. *Id.*

SEQRA recognizes this importance by the equal weight it places on examination of both the “natural” and the “human and community resources” affected by a proposed action. *See* E.C.L. § 8-0101. For that reason, just as with natural resources, the potential adverse impacts to community character must be considered not only in the immediate project area, but wherever they are significant. *See* E.C.L. § 8-0105 (“environment” defined as those “conditions which will be affected by a proposed action,” including, *inter alia*, “land, air, water” and “neighborhood

character”); 6 N.Y.C.R.R. § 617.7(c)(3) (“[t]he significance of a likely consequence . . . should be assessed in connection with . . . its geographic scope”). Accordingly, the Commissioner has held that the examination of potential impacts on community character or other resources cannot be limited to the boundaries of the actual or adjacent municipalities where a project occurs, but rather that:

The geographic scope of the inquiry depends upon the nature of the impact. For example, any assessment of visual impacts must include the entire relevant viewshed of the project . . . . The evaluation of air pollution impacts must take into account the entire geographical extent of those impacts, including those beyond the boundaries of the municipalities identified.

*St. Lawrence Cement Co, LLC*, Second Interim Decision of the Commissioner, 2004 WL 2026420, \*51 (DEC 2004).<sup>3</sup> This view is consistent with that of the courts. *See Vill. of Pomona v. Town of Ramapo*, 94 A.D.3d 1103, 1106-07 (2d Dep’t 2012) (holding village had standing under SEQRA to challenge adjacent town’s rezoning of property zoned for single-family residences along town-village border, where rezoning would almost quadruple current allowable residential density and it was alleged that multi-family district was not consistent with community character of surrounding rural density zones); *Vill. of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 94 (2d Dep’t 2007) (recognizing that development in one municipality “can have a significant detrimental impact on the character of [a neighboring] community”); *Wal-Mart Stores Inc. v. Planning Bd. of Town of N. Elba*, 238 A.D.2d 93, 99 (3d Dep’t 1998)

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<sup>3</sup> In this case, the Commissioner held that the ALJ had “defined too narrowly the geographic scope of air and visual impacts,” but that additional consideration of the projects consistency with trends in the Hudson Valley region was not necessary. *Id.* at \*51. As discussed below, however, there, unlike here, that project’s potential inconsistency was identified and analyzed in the record. *Id.* at \*34-35, \*50 (finding relevant DEIS considered both physical and cultural landscape of Hudson Valley – such as its role as “geographic center of the American Romantic Movement” – and stating “local trends may potentially change the mix of industrial, commercial, agricultural and residential sectors in this part of the Hudson Valley. To the extent that there may be differing perspectives on these trends, these viewpoints have been expressed in the legislative hearing and in the public comments on the DEIS.”).

(affirming agency contemplation of community character impacts on “the Lake Placid region, a premier resort and tourist community”).

**B. Material Conflict with Formal Community Land Use Planning Is Well Recognized as a Significant Environmental Impact Under SEQRA**

While community character is a key concern under SEQRA, its broad contours sometimes make it difficult to measure or express. Perhaps for this reason, the Department’s SEQRA regulations specifically identify that “the creation of a material conflict with a community’s current plans or goals as officially approved or adopted” is an indicator of significant adverse impact to the environment. 6 N.Y.C.R.R. § 617.7(c)(1)(iv).

Local land use planning documents have long been used as an important guidepost for understanding what impacts to a community’s character may be significant. *See, e.g., Lane Construction Company*, Interim Issues Ruling, 1996 WL 33140733, \*13 (DEC 1996) (“For a definition of [the relevant] community’s character, we are referred by case law and agency precedent to any existing local plans and ordinances.” (citing to *Chinese Staff*, 68 N.Y.2d 359, other internal citations omitted)). Zoning, formal comprehensive planning, and other land use measures are regarded both “as the expression of [a] community’s vision of itself,” *Lane Construction*, 1996 WL 33140733 at \*13, and “evidence of a community’s desires for the area.” *Palumbo Block Co.*, Interim Decision of the Commissioner, 2001 WL 651613, \*2 (DEC 2001) (quoting *William E. Dailey, Inc.*, Interim Decision of the Commissioner, 1995 WL 394546, \*7 (DEC 1995)); *see also* SEQR Handbook at 87 (“Courts have supported reliance upon a municipality’s comprehensive plan and zoning as expressions of the community’s desired future state or character.”). Accordingly, where available, such plans “should be consulted when evaluating the issue of community character as impacted by a project” to ascertain whether a material conflict exists. *Palumbo Block Co.*, 2001 WL 651613 at \*2.

The Applicant attempts to obfuscate this longstanding practice of consultation of local planning and land use documents by asserting that it is “well established that community character is not adjudicable as a separate issue.” Finger Lakes LPG Storage, LLC, Response to Party Status Petitions (“Applicant’s Response”) at 5-6 (community character is not adjudicable); *see also* Transcript at 50-51. Not only is this sweeping and unqualified contention contrary to established precedent, *see Village of Chestnut Ridge*, 45 A.D.3d at 94-95 (citing *Chinese Staff*, 68 N.Y.2d at 359, for proposition that a project may have impact on community character without a separate physical impact); *Palumbo Block Co.*, 2001 WL 651613 at \*2 (including community character in an adjudicatory hearing); *WHIBCO, Inc.*, Interim Decision of the Deputy Commissioner for Air and Waste Management, 1998 WL 389014, \*3 (DEC 1998) (ordering adjudication on issue of “[c]ommunity [c]haracter/[c]ultural [r]esources” as well as on separate issues of “[n]oise,” “[v]isual impacts,” and “[t]raffic”); Transcript at 52 (ALJ: “I don't think we've ever said that community character per se is unadjudicable”), each of the cases cited by Applicant actually emphasizes the central role that local land use documents play in SEQRA’s required community character analysis. *See Red Wing Properties, Inc.*, Interim Decision of the Commissioner, 2010 WL 3366172, \*6 (DEC 2010) (“The character of a community can be determined mainly by local land use plans and local zoning ordinances”); *Crossroads Ventures, LLC*, Interim Decision of the Deputy Commissioner, 2006 WL 3873403, \*27 (DEC 2006) (noting the “long-standing principle of deference to local plans” in SEQRA community character analyses); *St. Lawrence Cement Co, LLC*, 2004 WL 2026420 at \*49 (“The Department, to a large extent, relies on local land use plans as the standard for community character. Adopted local plans are afforded deference in ascertaining whether a project is consistent with community character”).

Thus, the sufficiency of the community character analyses in those cases directly depended on the consideration of local land use planning documents either already in the record or that otherwise would be developed through a full adjudicatory hearing. *Red Wing*, 2010 WL 3366172 at \*6; *Crossroads*, 2006 WL 3873403 at \*27; *St. Lawrence Cement*, 2004 WL 2026420 at \*50. Indeed, the *St. Lawrence Cement* decision also recognized the importance of considering “the proposed project’s consistency with trends in the community,” information often detailed in local or regional planning documents. 2004 WL 2026420 at \*50 (adjudication on community character not necessary because DEIS contained information on “the ‘historic character of the regional landscape’ . . . . the development of antique, craft and art gallery trades, as well as the growth of tourism, in th[e] area” (quoting the relevant DEIS)).

**C. Seneca Lake Communities’ Offer of Proof Demonstrates that the DSEIS’s Failure to Consider the Project’s Material Conflict with Local Character and Planning Efforts Raises a Substantive and Significant Issue for Adjudication**

The evidence proffered by the Seneca Lake Communities demonstrates that the DSEIS’s utter failure to include analysis of the local and regional land use documents that SEQRA and the Department consider essential to the understanding of community character raises a substantive and significant issue for adjudication. *See* Communities’ Petition at 8-12; Transcript at 33-34, 36. As described below, the issue is “substantive” because consideration of discrete impacts in absence of any reference readily available and officially adopted descriptions of the character or planning goals of the likely affected communities raises “sufficient doubt” that Applicant took the requisite “hard look” at the Project’s community character impacts. *See* 6 N.Y.C.R.R. § 624.4(c)(2); *Kahn v. Pasnik*, 90 N.Y.2d 569, 574 (1997) (relevant question in examination of SEQRA review conducted by an entity is whether agency took “hard look” at relevant areas of environmental concern and made a reasoned elaboration for its decision.” (quoting *Gernatt*

*Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996))). Given the clear and material conflict of the Project with those expressions of local character and development goals, this failure is also significant, because were the conflict appropriately considered, it would have “the potential to result in the denial of [the underground storage] permit, a major modification to the [P]roject, or the imposition of significant permit conditions.” 6 N.Y.C.R.R. § 624.4(c)(3).

**1. The Officially-Adopted Planning Documents and Actions of Municipalities in the Seneca Lake Region Show a Clear Desire to Protect Seneca Lake, Preserve Rural/Small Town Identity, and Promote Land Use Patterns that Foster Compatible Development**

Although each municipality in the Seneca Lake region has its individual identity and aspirations, even a cursory review of the relevant and readily available municipal land use documents yields clear cultural similarities and commonly-shared goals. Paramount among them are the recognition of the region’s emergence as a center for viticulture, agri-business, and tourism and the strong desire to promote that trend. *See, e.g.*, Town of Catharine Comprehensive Plan at 7-8 (Town’s “agricultural heritage . . . supports the region’s economy by directly enhancing our thriving tourism industry. Agritourism . . . should remain a priority in the town. Tourism in the Finger Lakes Region is largely centered on the cultivation of grapes for use by area wineries.”), available at <http://bit.ly/1EGJrP6>; A Comprehensive Plan for the Town of Montour & Village of Montour Falls at 1, 30 (2007) (acknowledging importance of region’s bucolic character and agri-tourism and expressing hope to “tap into the energy and income associated with increased tourism and a general long-term rise of the Finger Lakes region to create a new era of prosperity and promise for both the Town and Village.”), available at <http://bit.ly/1IejC88>.<sup>4</sup>

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<sup>4</sup> The Seneca Lake Communities respectfully request that judicial notice be taken of these local land use planning documents and others cited in this brief, pursuant to 6 N.Y.C.R.R. § 624.9(a)(6) (“ ALJ or the commissioner may take official notice of all facts of which judicial notice could be taken”), similarly to the ALJ’s treatment of

To this end, nearly all local land use documents in the Seneca Lake region express the desire to preserve rural and small town character and resources, *see, e.g.*, Towns of Fayette and Varick, Comprehensive Plan at 1 (2005/2006) [hereinafter “Fayette Plan”] (listing as a goal to “[r]etain the rural, agricultural character of the Towns”), *available at* <http://bit.ly/1IekUA6>; A Comprehensive Plan for the Town of Hector New York at 11-12 (2001) (recognizing “[o]ne of the most difficult challenges the Town faces is to retain the current rural lifestyle” and expressing desire to “[m]aintain [] natural beauty” and “[e]ncourage agricultural and small business growth compatible with the area.”), *available at* <http://bit.ly/1H8eFPo>, and to exclude potentially harmful uses, such as large-scale development or heavy industry. *See, e.g.*, Fayette Plan at 76 (residents surveyed found development compatible with rural character included “tourist and outdoor recreation businesses, agricultural support businesses and home office businesses rather than other types of commercial and industrial businesses”); Town of Starkey, 2014 Comprehensive Plan at 19 (2014) [hereinafter “Starkey Plan”] (“A strong majority of survey respondents stated that they prefer to maintain a high quality of life by rejecting heavy industry including hydrofracking for natural gas in the Town, and by promoting small, locally developed businesses, light industry, and the present agrarian economy in order to maintain a clean, safe, and healthy environment”), *available at* <http://bit.ly/1JbmrD>; Comprehensive Plan of the Town of Reading at 2 [hereinafter “Reading Plan”] (listing goal to “[d]iscourage large scale development that changes the Town’s character.”), *available at* <http://bit.ly/1IXqc5>.<sup>5</sup>

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additional information submitted by Applicant at the issues conference. *See* Transcript at 155-56 (submitting Schuyler County Hazard Mitigation Plan). Links to these documents are provided in lieu of paper copies, but such copies will be made available upon request.

<sup>5</sup> It is important to note that even where local plans encourage the development of industry, this is generally meant to refer to light industrial activities only, not heavy industry. *See, e.g.*, Starkey Plan at 19. Even in one of the very few local plans that do envision maintaining some heavy industrial areas, the Town of Geneva Comprehensive Plan, calls for the conversion of industrial-zoned land into a commercial zone as well as the buffering of heavy industrial

Another persistent theme is the appreciation of Seneca Lake as a central defining feature of the region and the need to protect its role as a key attraction and asset to residents, visitors, and businesses alike. *See, e.g.,* City of Geneva Master Plan & Local Waterfront Revitalization Program at I-3 (Seneca Lake “is a very important, natural, cultural, and economic resource for the City. The City has made significant strides in making the lake an important force in the area’s economic redevelopment as well as a key recreational and open space link to the downtown, residential neighborhoods, and outlying communities.”), *available at* <http://bit.ly/1Dj99qR>; Village of Watkins Glen Comprehensive Plan at 33 (2012) (“Because the Finger Lakes Region is of economic importance, Watkins Glen has been able to craft a regional identity due to its presence on the lake.”) [hereinafter “Watkins Glen Plan”], *available at* <http://bit.ly/1DJkpid>.

These goals are not only expressed in the written aspirations of the region’s municipalities, but also in their concrete efforts and legislative actions to prevent industrialization of their communities, particularly along the lakefront. For example, after investing substantial time, effort, and money into refurbishing its own waterfront, *see* City of Geneva Waterfront Infrastructure Feasibility Study (2012), *available at* <http://bit.ly/1y1SMxf>, the City of Geneva, along with a number of other municipalities, opposed the construction of a rail spur in Seneca Falls designed to service a landfill there because “trash trains” running to and from the landfill would have cut directly through the revitalized waterfront area. Resolution Against “Big Garbage” City of Geneva (Sept. 4, 2013), *available at* <http://bit.ly/1Ik2vIm>. In another relevant example, nearly every municipality on the western side of the lake at some point passed a ban or moratorium on oil and gas extraction using high-volume hydraulic fracturing, many of which also included bans on gas storage. *See* Resolutions of the City of Geneva, Town

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zones from other community areas. *See* Town of Geneva Comprehensive Plan Update at IV-8 to IV-9 (2006) [hereinafter “Town of Geneva Plan”] *available at* <http://bit.ly/1HAfOzO>.

of Geneva, Town of Milo, Town of Starkey, and Town of Torrey, copies of which are annexed hereto as Attachment A.

On the whole, both the official plans and conforming actions of the region’s municipalities demonstrate a shared desire to break decisively from the region’s late 20<sup>th</sup> century industrial stigma, toward a future that is more bucolic, clean, and environmentally and economically sustainable. Through their purposeful efforts this trend is already apparent in the predominant character of the Seneca Lake region – now defined by wineries, breweries, and protected natural areas – but it is not irreversible. *See* Economic Development Report of Susan M. Christopherson, Ph.D., at 7, attached as Exhibit 6 to Gas Free Seneca’s Petition for Full Party Status [hereinafter “GFS Petition”] (viability and growth of region’s wine industry are “deeply dependent” on perception of the region as unpolluted and suitable for viticultural activities); Letters from JP Vineyards, LLC and Forge Cellars, attached as Attachment A to the Seneca Lake Communities Petition for Full Party Status. Accordingly, any actions which threaten this carefully promoted local and regional trajectory must be carefully considered.

**2. Because the DSEIS Lacks Any Mention of the Available and Critically Relevant Municipal Planning Documents, It Is Devoid of a Factual Record Upon Which to Adequately Assess the Project’s Community Character Impacts under SEQRA**

Nearly every municipality adjacent to or around Seneca Lake has some type of land use planning document – either in the form of a formal comprehensive plan, a land use law, or both, *see supra* Section III(C)(1). Yet, the DSEIS provides absolutely no mention of these documents and almost no description of the character of the localities or the region that they describe. Indeed, the terms “community character,” “land use,” “zoning,” and “comprehensive plan,” appear nowhere in the document. While the DSEIS does provide a token description of the environmental setting in the Town of Reading, *see* DSEIS at 144-45, it references neither the

town's comprehensive plan or land use law,<sup>6</sup> *see*, Land Use Law for the Town of Reading, available at <http://bit.ly/1JQFRSJ> [hereinafter "Reading Law"]; Reading Plan nor any relevant land use documents from other municipalities whose character and goals are likely to be affected by a new heavy industrial use on the shores of Seneca Lake. *See infra* Section III(C)(1).

In servicing the "Northeast propane market," the DSEIS concedes that the Applicant's vision of a "a robust loading facility" providing "large scale truck, rail, and pipeline access" to 2.1 million barrels of LPG will no doubt entail greatly increased transportation of hazardous material through the Seneca Lakes Communities and the region at large. DSEIS at 14. Even worse, many of the rail lines likely to carry these shipments run through sensitive community areas, such as the western shore of Seneca Lake and Watkins Glen State Park. *See* DSEIS at 121-22, 125-26 (describing train movements through Watkins Glen State Park and of northbound trains along Seneca Lake); *cf.* Town of Geneva Plan at III-10 ("The rail line around Seneca Lake is often looked at as an unfortunate infrastructure decision that blocks access to the lake and limits the development potential along the lakeshore.").

The failure to consider the communities' relevant planning documents without which "a lead agency has little formal basis for determining whether a significant impact upon community character may occur," SEQR Handbook at 88 – or perform a similarly detailed community character assessment such as those performed by Drs. Flad and Christopherson – constitutes a clear failure, as a matter of law, to take the requisite hard look at the Project's potentially significant injuries to community character. *See Chinese Staff*, 68 N.Y.2d at 368; *Ginsburg Dev. Corp. v. Town Bd. of Town of Cortlandt*, 150 Misc.2d 24, 33 (Westchester Cnty. Sup. Ct. 1990)

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<sup>6</sup>Applicant asserts that relevant land use planning documents were not available at the time that the DEIS was prepared in 2011, referring to the 2014 Schuyler County Countywide Comprehensive Plan. Transcript 56-57. This argument, however, wholly ignores the comprehensive plan and the land use law officially adopted by the Town of Reading itself, both of which were in existence in 2011. *See* Reading Plan, Reading Law.

(annulling negative declaration by failure to consider potential impact of amendment to town steep slope ordinance on “new development in the area, most particularly, ‘affordable housing’”).

The unexcused omission also reveals a vital flaw in Applicant’s argument that the DSEIS adequately considers community character through analysis of visual, noise, and traffic impacts. *See* Applicant’s Response at 5-11; Transcript at 50-52. Although SEQRA case law is clear that community character can be analyzed or adjudicated as a standalone issue, *see infra* Section III(B), even where it can be addressed in the context of “other issues for adjudication [such as] noise, visual and traffic impacts,” those impacts must be weighed against “a community’s current plans or goals as officially approved or adopted.” 6 N.Y.C.R.R. § 617.7(c)(1)(iv). Consideration of potential impacts to community character without reference to official land use documents is consideration of those impacts in a vacuum. Because this type of analysis, on its face, fails to satisfy SEQRA’s “hard look” requirement, it raises an issue for adjudication, 6 N.Y.C.R.R. § 624.4(c).<sup>7</sup>

**3. The Seneca Lake Communities Would Prove at an Adjudicatory Hearing that the Project Clearly and Materially Conflicts with the Local and Regional Community Character of the Seneca Lake Region**

The failure to consider community character impacts in accordance with SEQRA and Departmental guidance constitutes more than a mere technical violation of the statute. On the contrary, because the Project is in clear and material conflict with the self-described character and explicit land use goals of municipalities in the Seneca Lake region that the facility is likely to affect, this failure also raises a significant issue for adjudication.

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<sup>7</sup> This glaring failure of the DSEIS to consider a key environmental impact – and one that, in the present case, is central to the understanding the Project’s impacts on the human and community resources of the region – violates SEQRA as a matter of law. *See Chinese Staff*, 68 N.Y.2d 359. Accordingly, the ALJ may also use his authority under 6 N.Y.C.R.R. § 624.4(b)(5)(iii) to find the DSEIS legally deficient and direct DEC to prepare a revised DSEIS for public comment.

As identified in the Communities' Petition, the nature of the material conflict is threefold: (1) the Project is a visible, heavy industrial use that is out of step with the trajectory and emerging identity of the region; (2) siting the Project directly on the shores of Seneca Lake conflicts with local and regional planning efforts specifically to protect environmental quality and perception of the lakefront area; and (3) the Project poses significant risks distinct from other industries – both with respect to potential accidents associated with the transportation of LPG throughout the region well as the threat of a catastrophic and spectacular failure of the facility itself – that could damage the integrity and reputation of the region as a whole. *See supra* Section III(C)(1).

At an adjudicatory hearing, the Seneca Lake Communities would offer proof of this material conflict in the form of officially adopted land use documents identified in this Post-Issues Conference Brief and the testimony of municipal officials and land use planning experts. *See* Communities' Petition at 9-10. These officials will provide insight into the relevant character and planning goals (many of which they are charged with drafting or implementing) of the likely affected communities that is key to the requisite inquiry into community character. Additionally, to demonstrate the appreciable risk and severity of industrial accidents or a catastrophic incident – either of which could greatly injure local identity and land use objectives by stigmatizing the Seneca Lake region as an unattractive industrial corridor – the Communities will rely on the expert reports of H.C. Clark, a Quantitative Risk Assessment by Dr. Rob Mackenzie, GFS Petition at Exhibits 1 and 2, as well as the testimony of Mr. Richard Kuprewicz, an engineer with over forty years of experience, including extensive experience in the siting, design, operation, maintenance, risk analysis, and management of natural gas and gas liquid infrastructure. *See* Communities' Petition at Attachment F.

In advance of such a hearing, however, the Seneca Lake Communities highlight that one need look no further than the plain language of officially adopted plans and land use laws of the Town of Reading and the adjacent Village of Watkins Glen to discover how the Project conflicts with local character and development goals. For example, the Town of Reading’s land use law – designed “to maintain not only the rural appearance and physical character of the Town, but also its rural way of life and social environment,” Reading Law § 1.2 – embodies the desires and recommendations of the town’s comprehensive plan to “[d]iscourage large-scale development that changes the Town’s character” and “[p]rotect Seneca Lake water quality.” *Id.* §§ 1.1-1.10.

Relevantly, that law designates all of the land east of New York State Route 14, which includes the proposed site of the Project, as the “Seneca Lake Protection Area,” where the “[s]torage of hazardous materials, except in sealed or unopened containers” if occurring “on a scale larger than that of an ordinary household” is flatly prohibited. *Id.* § 4.10-2. Despite the fact that the prohibition clearly applies to the Project, the DSEIS fails to explain how it will nonetheless miraculously avoid material conflict with this provision or otherwise comply with other applicable portions of the Reading law.<sup>8</sup> *See id.* § 4.1-2 (“general land use performance standards” stating that “no activity shall create a safety or health hazard, by reason of fire, explosion, radiation, or similar causes, to persons or property”); § 2.3-3, 6.1-6.3 (special use permit standards for uses of land greater than 15,000 sq. ft.). Conflict with the Village of Watkins Glen Comprehensive Plan is no less glaring; that plan explicitly identifies the “LPG facility” as a “threat” to the village’s planning goals. Watkins Glen Plan at Appendix C.

The extent and severity of these conflicts – which the Seneca Lake Communities will prove and further expand upon through additional written evidence and testimony at an

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<sup>8</sup> Although this demonstrates another instance where Applicant will likely not be able to meet applicable statutory and regulatory criteria, the Seneca Lake Communities identify it here to highlight the Project’s clear conflict with the relevant, officially-adopted community planning documents.

adjudicatory hearing – not only supplies a strong foundation for major modifications to the project or the imposition of new permit conditions (e.g., the elimination of butane storage, requiring rail transport, or the proposed truck depot),<sup>9</sup> they also provide grounds to support denial of the permit. As such, Applicant’s failure to adequately consider how the Project will affect community character in the region also raises a significant issue for adjudication. 6 N.Y.C.R.R. § 624(c)(3).

**D. The Unexplained Exclusion of Community Character Issues in the Scoping Process Does Not Excuse This Failure**

Applicant argues that its attempt to bury its head in the sand by ignoring key land use planning documents demonstrating the Project’s clear and material conflict with the character of the region’s municipalities is justified because the Final Scope, Document IV.D.20 (2011-02-15, DEC to BSK - Final Scope), did not include reference to community character. *See* Applicant’s Response at 15; Transcript at 47,49, 57-59. This argument is incorrect.

The Department’s regulations provide permit applicants the option to engage in scoping “to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant.” 6 N.Y.C.R.R. § 617.8(a). While scoping endeavors to streamline the EIS process, Applicant’s attempt to use scoping to exclude consideration of later-raised significant environmental impacts subverts the purpose of the scoping regulations, which “do not prohibit the public from submitting additional issues after the preparation of the final written scope provided it establishes that such issues are relevant and significant.” *See W. Vill. Comm., Inc. v. Zagata*, 242 A.D.2d 91, 97 (3d Dep’t 1998) (paraphrasing DEC description of 6 N.Y.C.R.R. § 617.8(g) in Article 78 challenge to newly

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<sup>9</sup>Despite Applicant’s promise that no truck transportation will be used to transport LPG to and from the Proposed Project in its revised transportation allocation, Document I.B.36 (2014-12-02, Product Transportation Allocation – Revised December 2014), DEC has not proposed draft permit conditions that would in fact prevent truck transport.

adopted SEQRA regulations); 6 N.Y.C.R.R. § 617.8(g) (issues raised after the scoping process where the nature of the issue, its importance to a potential significant impact, and the reasons why it was not identified during scoping and should be included are provided in writing).

The SEQR Handbook, which Applicant cites for its argument that “a final scope acts essentially as a ‘contract’ between the lead agency and the sponsor,” Applicant’s Response at 20 (quoting SEQR Handbook at 111), also supports the argument that all potential significant impacts should be considered, even if later-raised. It states on the same page that the “lead agency must still in all cases determine whether a draft EIS is adequate” before public comment and notify the sponsor if it “believes that a late issue is so important enough [sic] that the draft EIS must address it to be deemed adequate.” SEQR Handbook at 111. Accordingly, Applicant’s argument that a project sponsor may contract around SEQRA’s statutory mandates by foreclosing discussion of truly significant potential impacts through scoping is simply wrong as a matter of law.

Even if scoping could normally suppress consideration of earlier-missed significant adverse environmental impacts (which it cannot), it cannot do so here. As *St. Lawrence Cement* establishes, SEQRA’s requirements for raising issues after the scoping process do not apply in the context of an issues conference. *See* 2001 WL 1587361, \*47. Similarly to the present case, there, the applicant objected to petitioners raising issues “such as noise” and other impacts that petitioners “failed to raise in the scoping process.” *Id.* at \*47. Rejecting that argument, the ALJ concluded:

We disagree with this conclusion based upon our reading of the precedent cited by the applicant and our review of the applicable regulations . . . A review of the Final Generic Environmental Impact Statement for Proposed Amendments to Part 617 reveals that the Department's intent regarding changes to 617.8 was to limit the scoping process by requiring information “raised after the preparation of the final written scope and prior to the completion of the DEIS to meet a strict test for inclusion.” *This period does not*

*include the Part 624 issues conference and hearing. . . .* Given SEQRA's mandate to consider all potentially significant environmental impacts, SLC's interpretation of this regulation does not comport with statutory requirements.

*Id.* (emphasis added, and omitting internal citations to 6 N.Y.C.R.R. §§ 617.8(g), 624.4(c); *Al Turi Landfill, Inc.*, Ruling on Party Status and Issues, 1998 WL 1670484, \*17 (DEC 1998); and *Palumbo Block Co.*, Ruling on Party Status and Issues, 2001 WL 176029, \*18 (DEC 2001)).

Applicant attempts no explanation as to why it considers this case “instructive” in other respects, *see* Applicant’s Response at 16, but not so here.

Moreover, as conceded by Applicant at the Issues Conference, the issue of community character was “absolutely” brought up during the scoping process, Transcript at 57-58, a fact evidenced by the numerous comments the Department received during the scoping public comment period expressing concerns regarding the Project’s impacts on the rural identity, beauty, and economic vitality of the Seneca Lake region. *See* Document IV.D.18 (2011-02-08, Draft Scoping Comments, Approximately 91 Letters/E-mails) at 11, 21, 25, 29, 35, 46, 48, 51, 53-55, 57-60, 63, 65, 69, 71, 72, 74, 80, 84-86, 88, 89-91, 106, 109, 116, 121, 129-31, 133, 135, 146, 151-54. Despite this outpouring of concern for potential injury to local and regional community character, neither Applicant nor the Department have provided a satisfactory answer as to why the issue of community character was wholly, and without any publicly-available explanation, excluded from the Scope. Transcript at 57-59 (Applicant explaining that DEC staff were responsible for determining why impacts to burgeoning wine industry were not included in environmental setting of project), 75-76 (in response to question as to why impacts to the wine industry were “specifically not included in the scope” although raised in public comment, Mr. Weintraub for DEC answered, “I can’t recall that.”).

As the Department’s scoping regulations provide that “[s]coping must include an opportunity for public participation.” 6 N.Y.C.R.R. § 617.8(e). If that participation is to be in any way meaningful, at a minimum, attempts to subvert review of significant environmental impacts raised in comment by omitting those impacts from the final scoping document cannot be tolerated. 6 N.Y.C.R.R. § 617.8(e). Although, DEC noted at the issues conference that scoping is generally designed to “give the [a]pplicant fair notice of what it has to study,” Transcript at 75, even it admitted that under the circumstances of the present case the Scope does not act as a bar to adjudicating the issue of community character. Transcript at 76. (ALJ: “So you wouldn’t prohibit the Commissioner from looking at the Finger Lakes wine country because it wasn’t included in the scope?” Mr. Weintraub: “No.”).

**IV. The DSEIS’s Consideration of Alternatives is Totally Insufficient and Raises a Substantive and Significant Issue for Adjudication**

The DSEIS’s failure to consider both the no action alternative and a range of reasonable alternatives is a fatal defect in the DSEIS. This failure raises a substantive and significant issue for adjudication under 6 N.Y.C.R.R. Section 624.4.

**A. The Applicant Cannot Rely on the Final Scope to Justify an Otherwise Inadequate Consideration of Alternatives**

As with the DSEIS’s failure to consider community character, the Final Scope does not shield the Applicant, or for that matter the Department, from being challenged in the permit hearing process for failure to consider reasonable alternatives. Applicant’s reliance on the Final Scope is misplaced. *See supra* Section III(D). It is still required to comply with the law, and failure to do so is still a potentially fatal defect in the DSEIS – Final Scope or no Final Scope.

The Applicant argues that its truncated discussion of alternatives cannot violate SEQRA because it complies with the Final Scope. It claims that “the alternatives to the Project to be

evaluated in the DSEIS were defined in the Final Scoping Outline, and the DSEIS properly addresses each of those alternatives.” Applicant’s Response at 20. The Final Scope “acts essentially as a ‘contract’ between the lead agency and the sponsor.” *Id.* (quoting SEQR Handbook at 111). Petitioners’ arguments are misplaced, the Applicant claims, because “the DSEIS is not required to evaluate any alternatives not included in the Final Scoping Outline.” *Id.*

As discussed, the Applicant’s reliance on the Final Scope as a “contract” is misplaced. *See supra* Section III(D). No agreement between the Department and a project sponsor can contract away SEQRA, which is clear that a reasonable range of alternatives to a proposed project must be considered, including the no action alternative. 6 N.Y.C.R.R. § 617.9(b)(5)(v).

This makes sense. Both the Applicant and the Department are bound by SEQRA, and neither has the authority to permit the other to submit a legally deficient EIS. Contracting parties cannot agree to give each other something they never owned in the first place.

There is no requirement to ‘speak now or forever hold your peace’ where a project sponsor followed a Final Scope. Section 617.8(g) does not apply to proceedings under Part 624. *St. Lawrence Cement Co.*, 2001 WL 1587361. Scoping exists to narrow issues and to “ensure that the draft EIS will be a concise, accurate and complete document that is adequate for public review.” SEQR Handbook at 104. It is not intended prevent consideration of whether the final product meets SEQRA’s requirements. To do so would hardly serve to produce an “accurate and complete” document.

**B. The DSEIS Failed to Consider the No Action Alternative**

The DSEIS is inadequate because it failed to consider the no action alternative. The Department’s regulations are clear: “[t]he range of alternatives must include the no action alternative.” 6 N.Y.C.R.R. § 617.9(b)(5)(v). That discussion “should evaluate the adverse or

beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action.” *Id.* The goal is to “provide a baseline for evaluation of impacts and comparisons of other impacts.” SEQR Handbook at 126. The DSEIS here does not do that, and none of the explanations offered by the Applicant justify its exclusion.

The Applicant claims that the DSEIS satisfies the “substance” of the no action discussion. Applicant’s Response at 17. The DSEIS, the Applicant claims, describes the “likely circumstances at the project site if the project does not proceed” by describing the existing environmental setting. *Id.* at 17-18 (citing *Wilmorite, Inc.*, Decision of the Commissioner, 1982 WL 177242, \*22 (DEC 1982)). It also describes the “direct financial effects of not undertaking the action,” which the Applicant notes is adequate “for many private actions.” *Id.* at 17-19 (citing *Gernatt Asphalt Prods., Inc.*, Rulings of the ALJ on Party Status and Issues, 1994 WL 1735233, \*17 (DEC 1994)).

Describing the existing environmental setting here is not a satisfactory discussion of the no action alternative. Both the *Wilmorite* and the *Gernatt* decisions predate relevant amendments to SEQRA. The 1995 amendments added language that “compels the EIS writer to consider specifically the capability of a site to environmentally improve, recover or be amenable to restoration and remediation in the absence of the proposed project.” DEC, *Final Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) Regulations*, 79 (1995), available at <http://on.ny.gov/1CUvyIC>. This change was made, the Department explains, because “[t]o only look at a site today or in the near term is an unfair characterization that may inappropriately preclude opportunities for natural or engineered site enhancement and increased value.” *Id.* This is exactly what the Applicant’s

argument here would do – it would ignore SEQRA’s post-1995 mandate and limit the no action discussion to describing the site as-is. That is not consistent with modern-day SEQRA.

Discussing the direct financial effects of not undertaking the action here is also not an adequate discussion of the no action alternative. The SEQR Handbook does say that identifying those financial effects is enough “[f]or many private actions.” SEQR Handbook at 126. Here, however, that is just not enough to provide the “baseline for evaluation of impacts and comparisons of other impacts” that the no action alternative exists to create. *Id.* A purely fiscal discussion does not establish a baseline for community character, water quality, cavern integrity, noise, traffic, or any of the major concerns raised about the proposed project.

Nor is the financial discussion in the DSEIS even really an attempt to provide that for this site. The Applicant asks us to look at its explanation of all the great things the project will do, imagine a world where that does not occur, and call that a no action discussion. Even if a purely financial discussion were appropriate, that hardly qualifies as the “evaluat[ion]” SEQRA requires. 6 N.Y.C.R.R. § 617.9(b)(5)(v).

Finally, the Department’s argument that it considered the no action alternative in a letter does not cure this failure. In oral argument, Mr. Weintraub stated that “in 2012 the Applicant submitted to the Department staff a document that’s in the hearing record and that was provided to Gas Free Seneca . . . that sets out the no action alternative.” Transcript at 480. That letter, the Department claims, “informs us and the public has had it and it’s been the subject of a lot of comments.” *Id.* at 481. This letter does not appear to be publicly available – it is not listed on the Department’s website for this project. *See Finger Lakes LPG Storage, LLC, Underground Storage Facility - October 2014*, DEC, <http://www.dec.ny.gov/permits/71619.html> [hereinafter “DEC Permit Website”] (last visited Apr. 17, 2015). Gas Free Seneca confirmed at oral

argument that they were only able to acquire the letter through FOIL. Transcript at 495-96. Relying on Ms. Nasmith's description of the letter as saying only that "the no action alternative would see the continuation of the activities on the US Salt property" and surrounding properties, this is inadequate. *Id.* at 496. Not only does the letter not seem to be readily publicly available, as described it fails to meet SEQRA's post-1995 requirements.

The DSEIS failed to consider the no action alternative. This is not Petitioners elevating form over substance, as the Applicant claims. Applicant's Response at 19. This is about meaningfully considering the possibility of not doing this here, so the potential impacts can be put in the proper context. The DSEIS does not do that, not even in substance.

### **C. The DSEIS Failed to Consider a Range of Reasonable Alternatives**

SEQRA requires that "all draft EISs must include . . . a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor." The discussion of each alternative needs to be enough to "permit a comparative assessment of the alternatives discussed." 6 N.Y.C.R.R. § 617.9(b)(5)(v). The purpose of this is "to aid the public and governmental bodies in assessing the relative costs and benefits of the proposal." *Webster Assocs. v. Town of Webster*, 451 N.E.2d 189, 192 (N.Y. 1983). To be meaningful, that assessment must be based on "an awareness of all reasonable options other than the proposed action." *Id.*

Reviewing a range of alternatives is fundamental to SEQRA's mandate that decision makers weigh the need for this project as planned against the possibility of meeting that need in a less intrusive manner. See *Watch Hill Homeowners Ass'n, Inc. v. Town Bd. of the Town of Greenburgh*, 226 A.D.2d 1031, 1034 (3d Dep't 1996) (holding that the Town's negative declaration was arbitrary and capricious and that an EIS was required). Indeed, the alternatives

analysis has been described as “the heart of the SEQRA process.” *Shawangunk Mountain Env'tl. Ass'n v. Planning Bd. of the Town of Gardiner*, 157 A.D.2d 273, 276 (3d Dep't 1990).

Despite the significance of the alternatives discussion, the DSEIS's evaluation of alternatives is totally insufficient. Given the objectives and capabilities of the Applicant, an alternatives analysis limited to the brine ponds' configuration does not comply with the regulatory requirements and the fundamental purposes of SEQRA.

**1. The Objectives and Capabilities of the Applicant Are Focused on the Northeast Region as a Whole, Which Must Be Considered in Determining the Reasonableness of the Applicant's Alternatives Analysis and Which Present a Factual Issue in Dispute**

The objectives and capabilities of the project sponsor inform the range of alternatives that sponsor needs to consider in an EIS. The Department's regulations require a consideration of alternatives that are “feasible, considering the objectives and capabilities of the project sponsor.” 6 N.Y.C.R.R. § 617.9(b)(5)(v). What constitutes a “reasonable” alternative depends, in part, on the sponsor of the action. SEQR Handbook at 124.

Reading the DSEIS leads to the conclusion that this project is about the Northeast region. The Applicant fiercely disputes this. “Our objective,” Mr. Alessi claimed at the Issues Conference, “is to store LPG in these caverns. These. Not someplace in Massachusetts for this area of the market. We get to decide that.” Transcript at 468. The goal, their papers assert, is to “us[e] existing caverns as storage to benefit New York consumers [which] could not be achieved by moving the Project to other states.” Applicant's Response at 22.

The Seneca Lake Communities do not dispute that the Applicant wants to use these caverns for storage. But the DSEIS's description of the proposed project's need and benefits is not focused on this site, the Finger Lakes region, or even New York State – it is focused on the Northeast region as a whole. The DSEIS begins that description with a long discussion of the

Northeast market for propane. DSEIS at 12-14. The Northeast market is “approximately 43 million barrels,” it notes, with “[a]pproximately 70% or 1.25bbls [] consumed during the October to March period.” *Id.* It goes on to describe regional supply issues, pointing out that the TEPPCO pipeline has been “fully allocated 9 of the past 10 years for approximately 63 days each year.” *Id.* at 13. Ultimately, it claims, this means increases in retail prices to consumers during the winter months. *Id.* at 13-14. This facility will add storage, reducing pipeline allocations and the need for “spot” product. *Id.* at 14.

Nowhere in that discussion, which is the entirety of the “Purpose and Need for the Proposed Action” subsection, does the discussion leave the regional level. The words “New York” are not used once in that subsection. *See id.* at 12-14.

The DSEIS then goes on to describe the propane industry nationwide. *Id.* at 14. It lays out the sources of demand for propane (residential and industrial), then turns to explaining the “summer to winter ratio.” *Id.* at 14-15. This ratio describes how much more demand there is for propane in winter than in summer. Again, this ratio is discussed in strictly regional terms: the DSEIS notes that “[m]ost areas of the U.S. will result in a ratio of 1:2, and many in the Northeast U.S. will be 1:3.” *Id.* at 15. The ratio, the DSEIS argues, “is a key element to understanding the infrastructure required to meet this seasonal demand.” *Id.* The words “New York” do not appear in this section either. *See id.* at 14-16.

New York State – although not the Finger Lakes region specifically – is eventually discussed, but that conversation still does not indicate this project’s need and benefits are focused on this state. The DSEIS tells us New York has “a great demand for propane” and goes on to describe the many ways New Yorkers get and use propane. *Id.* at 16-17. It states that New

York imports propane during the winter season from “Canada, Midwestern US, and Texas” and does not have enough storage and distribution capacity. *Id.* at 17.

A discussion of actual benefits to New York takes up less than a page. The DSEIS promises that this storage capacity will “[l]ower[] propane supply costs to New York Consumers,” “[i]ncrease[] [e]fficiency” for the pipeline thus “improving total propane supply to the state and region,” and minimizing the risk of a supply disruption. *Id.* at 18. Benefits to the Finger Lakes is one paragraph, promising a handful of jobs and some tax revenue. *Id.* at 18-19.

The picture that emerges from all this is of a project sponsor whose goals and capabilities are fundamentally regional. The Applicant isn’t proposing to build this facility for the Finger Lakes region, or even for New York as a whole. As they methodically lay out in the DSEIS, Applicant thinks this facility is necessary because of economics at the regional level. Even discussions of the benefits to New York are all just local examples of the same regional issues they discussed previously. The Finger Lakes region barely factors in – its needs are not discussed and the benefits it might receive are the kind of general benefits any development could bring.

There is nothing in the DSEIS that suggests the Applicant can only accomplish its goals by building *here*. At minimum, other sites in New York State might work. It also seems likely that other sites in the Northeast could address this regional supply issue and thereby still bring similar benefits to New York consumers.

The fact that the proposed project takes a regional view and is not strictly focused on a local need must inform the DSEIS’s consideration of alternatives. As the SEQR Handbook recognizes, a project sponsor “generally develops its project proposal based solely on its own goals and objectives. These goals and objectives may not include maximum protection of environmental factors.” SEQR Handbook at 123. The alternatives discussion exists to “determine

if the proposed action is, in fact, the best alternative for that project when all environmental factors have been considered.” *Id.* at 123-24. This is not about whether or not the project might have local benefits. It is about making sure that the Applicant has not artificially constrained the range of alternatives by asserting narrower objectives and capability than the record reflects. In making that determination, the regional nature of the proposed project’s need and benefits must be considered.

**2. The DSEIS’s Limited Discussion of Alternatives Is Insufficient Given the Objectives and Capabilities of the Applicant**

The DSEIS does not evaluate a range of feasible alternatives. By far the largest omission is the failure to consider alternate sites. The Handbook explains that “[a]ny case where the suitability of the site for the type of action proposed is a critical issue” is a case where “discussion of alternative sites for a proposed action would be reasonable.” SEQOR Handbook at 125. In that case, “a conceptual discussion of siting should be required.” *Id.*

The DSEIS has done none of that. Essentially the entirety of its discussion of alternatives is focused on the brine ponds. DSEIS at 170-73. There are three sentences on location, and all they do is confirm that the Applicant decided not to consider another site. *Id.* at 170. Aside from these three sentences, alternative sites are not discussed at all. *See id.* at 170-73.

Both the Applicant and the Department offer justifications for this omission. Together, they raise five arguments: (1) the Applicant complied with the Final Scope; (2) the Applicant’s objectives and capabilities limit discussion to this site; (3) Petitioners did not make an offer of proof about a viable alternate site; (4) a private party need not look beyond its own property or options and the Applicant has no other appropriate property; and (5) some alternative sites were actually considered, outside of the DSEIS, but were rejected as unreasonable. None of these explanations are compelling.

The Communities have already addressed the first two arguments. Applicant relies heavily on the Final Scope, but as discussed above that argument is unpersuasive. *See* Applicant’s Response at 20; Transcript at 461-65. The Applicant cannot justify an inadequate draft EIS by pointing to the Final Scope. *See supra* Sections III(D), IV(A). Additionally, Applicant and the Department both claim that the objectives and capabilities of the Applicant limit the discussion of alternatives to this site and only this site. Again, as discussed above, that’s not what the record shows. *See supra* Section IV(C)(1). The Applicant’s capability and objectives seem to be primarily regional, and there is no reason to believe their goals can only be achieved from this exact location.

The Applicant’s and the Department’s other arguments are not convincing either. Counsel for the Applicant repeatedly noted at oral argument that Petitioners did not make an offer of proof about other viable sites. Transcript at 471, 476, 478. Speaking only for the Seneca Lake Communities, that’s true. But the Communities have no reasonable way of determining the alternatives available to the Applicant. Identifying a suitable alternate site means knowing the sites Applicant owns and could option, the sites that the Applicant’s parent company owns and could option, and the technical details of those sites. Some of this information is not going to be publicly available, and the Communities do not have the expertise to evaluate it anyway. Nor should they have to – Applicant can point to no requirement that Petitioners must essentially do the alternatives analysis themselves before challenging the DSEIS’s failure to do an alternatives analysis in a Part 624 hearing.

The Applicant also points to 6 N.Y.C.R.R. § 617.9(b)(5)(v), which says that “[s]ite alternatives may be limited to parcels owned by, or under option to, a private project sponsor.” Mr. Alessi made this point at oral argument, arguing that “[y]ou don’t have to go look beyond

your own property” and claiming that Finger Lakes LPG Storage, LLC owns no other suitable caverns in the area. Transcript at 468-69. First, the DSEIS does not rely on this provision or make any showing that the Applicant owns no other acceptable property. But, significantly, it also does not appear to be correct. At oral argument, your honor asked Mr. Alessi whether there were “other sites owned by the Applicant that maybe have less advantageous rail and pipeline connections, but nonetheless are near such facilities?” *Id.* at 470. Mr. Bacon, an attorney with Crestwood, replied “30 plus miles away.” *Id.* During the Department’s argument, Ms. Schwartz mentioned what may be another potential site – the Savona site. *Id.* at 483-84. It seems clear there are other properties belonging to the Applicant that could have been considered, but were not.

Finally, the Department defended the DSEIS’s omission by claiming that at least one alternate site *was* considered, just not in the DSEIS itself. Ms. Schwartz suggested that the Department considered and dismissed the Savona site. She defended that decision by noting that, although “there are some caverns that are storing gas [at Savona] and some that are being expanded,” they “don’t have a salt plant” and “[t]he cavern is already being done at the US Salt site.” Transcript at 483-84. Mr. Weintraub continued by explaining that the Department prefers existing sites, which are “an environmental plus.” *Id.* at 485-86.

This internal consideration of alternatives does not cure the omission in the DSEIS. SEQRA requires an alternatives discussion “to aid the public and governmental bodies in assessing the relative costs and benefits of the proposal.” *Webster*, 451 N.E.2d at 192. The Department evidently engaged in a cost-benefit analysis between the Savona site and the proposed site. But it did so behind closed doors. This kind of private analysis is not what SEQRA intended. An in-house discussion does not aid the public or any governmental body

other than the Department. It also makes it very difficult to determine whether the Department did the alternatives analysis correctly. A Departmental in-house analysis is far from a sufficient discussion of alternatives.

The DSEIS's discussion of alternatives is totally insufficient. There plainly seem to be other potential locations for this facility, in different environmental settings and with their own advantages and disadvantages. There is no way for the public or for decision makers to know whether this is, in fact, the best alternative without considering those other sites. The suitability of this site for the type of action proposed is clearly a critical issue. The possibility that there is a better place to put this facility cannot be completely ignored, and raises a substantive and significant issue for adjudication.<sup>10</sup>

**V. The DSEIS's Failure to Properly Address the Potential Significant Adverse Impacts to Water Quality Is a Substantive and Significant Issue**

Tens of thousands of people rely on Seneca Lake for their drinking water, including all the Seneca Lake Communities on its banks. Despite its significance, the DSEIS's evaluation of this project's potential water quality impacts is inadequate and fails to meet SEQRA's requirements. This raises a substantive and significant issue under 6 N.Y.C.R.R. § 624.4.

Seneca Lake's high salinity remains unexplained and unaddressed by the DSEIS. By ignoring the source of Seneca Lake's uniquely high salinity, the DSEIS has not adequately described the environmental setting of the proposed project. Additionally, that Seneca Lake's salinity remains unexplained is evidence of a potential connection between storage activity at the proposed site and salinity in the lake. That connection remains unexplored but demands

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<sup>10</sup> As with the DSEIS's failure to consider community character impacts, the failure to consider reasonable project alternatives, including a no action alternative, violates SEQRA as a matter of law. Under these circumstances, it is likewise appropriate for the ALJ to find the DSEIS legally deficient and direct DEC to prepare a revised DSEIS. *See supra* note 7 (citing 6 N.Y.C.R.R. § 624.4(b)(5)(iii)).

attention. Finally, the potential human health impacts of further increasing the lake’s salinity remain unaddressed.

**A. Seneca Lake’s High Salinity Remains Unexplained and Unaddressed by the DSEIS, Presenting a Factual Issue in Dispute**

**1. Seneca Lake’s High and Unusual Salinity**

Seneca Lake is very saline. The most recent survey of the lake, from October 2014, found concentrations of sodium at 75 mg/L and concentrations of chloride at 122 mg/L. Affidavit of John Halfman, Ph.D., Communities Petition at Attachment I, ¶ 3 [hereinafter “Halfman Aff.”]. This makes Seneca Lake unique: it is ten times saltier than other Finger Lakes, but has similar levels of other major ions like potassium, calcium, magnesium, and sulfate. *Id.* at ¶ 4. The salt levels stand out.

These levels have not held steady, suggesting a source that has either changed or changed in intensity over time. Concentrations (measured in chloride) began slowly rising in the early 1900s but then spiked rapidly in the mid-1960s to the early 1970s. At its peak, Seneca Lake’s water contained over 180 mg/L of chloride. Since then, levels have been slowly declining. This indicates what Dr. Halfman calls “non-steady-state, non-equilibrium conditions” – the source has not been constant over time. *Id.* at ¶ 10.

**2. All Known Sources of Salinity Together Are Not Enough to Explain Current Levels in the Lake**

A major source of salt is missing and unexplained. Contaminants from streams emptying into the lake, like road de-icing salts, are not enough to explain modern-day levels of chloride and sodium. Again, this is unusual: stream inputs do explain the levels in other Finger Lakes. *Id.* at ¶ 7. Reported mine waste discharges from the salt mines at the southern end of Seneca Lake also cannot explain the concentrations, even when combined with stream inputs. *Id.* at ¶ 8.

And what's missing is substantial. The unidentified source would need to have added the equivalent of 32,000 metric tons of sodium and 54,000 metric tons of chloride per year into the lake under steady-state conditions. *Id.* at ¶ 8. This is a huge amount of chloride. For comparison, modern-day discharges from the salt mines on the lake amount to only about 9,000 metric tons of chloride per year. *See* John Halfman, Ph.D., *A 2014 Update on the Chloride Hydrogeochemistry in Seneca Lake, New York* 22 (2014), Halfman Aff. at Exhibit B [hereinafter "Halfman Report"].

### **3. The Applicant's and Department's Explanations for This Additional Salinity Do Not Explain Current Levels in the Lakes**

None of the explanations offered by the Applicant or the Department explain this missing source of saline. The Applicant and the Department have offered four possible explanations: intersection with the Silurian salt bed at the lake's north end, brine springs, climate change, and unregulated brine discharges into the lake in the past. *See* DSEIS at 95 (Silurian salt bed theory); Donald I. Siegel, Ph.D., *Evaluating The Scientific Plausibility of "Salting" Seneca Lake By Storing Liquefied Propane in a Brine Filled Salt Mine, Watkins Glen, New York* 6 (2015) (brine springs, climate change, and unregulated discharges theories) [hereinafter "Siegel Report"].

The only explanation offered in the DSEIS itself is that "groundwater discharge brings saline water into the lake" from where the lake intersects the Silurian salt beds at its northern end. DSEIS at 95 (citing to Wing et al., *Intrusion of saline groundwater into Seneca and Cayuga Lakes, New York* (1995), available at <http://bit.ly/1JQFmbp>, and Halfman et al., *Major Ion Hydrogeochemical Budgets and Elevated Chloride Concentrations in Seneca Lake, New York* (2006), available at <http://bit.ly/1HAGC34>). This theory cannot be accepted uncritically. As Dr. Halfman cautions in his affidavit, his 2014 paper showing that the source of the salinity has changed or changed in intensity over time complicates this hypothesis. Halfman Aff. at ¶ 10. Groundwater represents the "biggest unknown." Groundwater inputs were formerly postulated to

explain the present-day gap between known chloride inputs and the amount of chloride in the lake. Halfman Report at 25. However, as Dr. Halfman describes in his 2014 report, “recent evidence . . . suggests groundwater inputs are probably not required today.” *Id.*

This complicates things, weakening the salt bed theory. It remains possible that “groundwater inputs were active back then [during the rise in chloride levels],” Dr. Halfman explains, and these findings “do[] not preclude significant groundwater inputs during the past.” *Id.* at 22, 25. However, if the unusual salinity did arrive through groundwater, then the groundwater source changed or changed in intensity over time. The DSEIS does not acknowledge this problem and does not elaborate on the salt bed theory to account for it. Dr. Halfman notes that we are missing information to fully assess the possibility of a groundwater source, including groundwater pressure gradients and information on the permeability of the Salina and neighboring rock formations. Halfman Aff. at ¶ 12. That said, he does offer three possibilities consistent with his most recent observations: earthquakes opening and closing underground fractures and allowing groundwater to travel; solution cavities from salt production providing an avenue for groundwater flow; and pressures from solution mining and the use of solution-mined caverns inducing saline groundwater flow. Halfman Report at 23.

Ultimately, the salt bed theory does not explain Seneca Lake’s unusual salinity and history. It is presented in one sentence in the DSEIS without further elaboration or investigation. *See* DSEIS at 95. It has not taken into account recent scientific findings that the source of the salinity changed in nature or intensity over time. It also does not explain why groundwater interaction with salt beds is a superior hypothesis compared to other hydrogeological explanations like earthquake fractures, solution-mining fractures, or induced saline groundwater flow. It is not enough to put this question to rest.

The other theories also come up short. Dr. Siegel claims that chloride might “travel to the lake, ‘piggie back’ with flowing groundwater near the lake shore.” Examples of such brine springs, he notes, have been identified north of Seneca Lake. Siegel Report at 6. This explanation falls short in several respects, making it difficult to evaluate as a potential source. First, Siegel does not identify any brine springs near Seneca Lake itself. He also does not estimate the amount of sodium and chloride such a spring might produce, giving no indication of whether a brine spring can produce the quantities necessary to explain the lake’s salinity. But this explanation’s greatest weakness is that, without more, it does not fit with the historical evidence of chloride concentrations in the lake. Dr. Halfman’s research strongly suggests the source has not been constant over time, causing a clear spike in contaminant levels in the mid-1960s to 1970s. Dr. Siegel is silent about how – or indeed, whether – a natural spring might appear so relatively suddenly and then taper off.

Climate change is also not a good explanation. Dr. Siegel notes that increasing salinity in the 1960s occurred “during a sequence of droughts, which broke shortly after. Drought increases the “flushing time,” i.e. the time that water spends in the lake, which he suggests may have accentuated the effect of brine discharges. *Id.* Dr. Halfman is prepared to testify, however, that climate change could not cause the significant changes in salinity seen in Seneca Lake. First, nearby lakes like Skaneateles, Hemlock, and Candice Lake all went through the same period of drought and do not share Seneca Lake’s uniquely high salinity. *See* Halfman Report at 19-22. Second, the math here doesn’t work out. Doubling the lake’s salinity by evaporation would mean evaporating *half* of the lake’s water. And that’s not a fanciful example: chloride levels in the lake actually more than quadrupled, going from 40 mg/L in the early 1900s to a height of over 180 mg/L in the 1960s and 70s. *See id.* at 21. For climate change to have played any significant role

in the lake's history of salinity, it would also have lowered the water level by many tens of meters. That's just not a realistic explanation.

Dr. Siegel also argues that the salt industry's largely unregulated disposal of brine into the lake before the 1970s could explain Seneca Lake's unusual concentrations. He notes that "the salt industry periodically disposed of brine in deep rock formations and released it into Seneca Lake." Siegel Report at 6. This was a common theme during the Issues Conference. In oral argument, Mr. Bernstein noted that chloride levels "spiked sometime before the introduction of regulation in 1972 which is when they started to actually drop down." Transcript at 329. Ms. Maglienti argued that mine waste discharges are a "very logical reason" for the chloride spike in the 1960s because "there wasn't regulation[] in the '60s and '70s." *Id.* at 356-57. She mentioned the Himrod mine specifically, which she claimed "had a lot of problems" including discharges, salt pond runoff, and unlined brine lagoons. *Id.* at 357-58.

The Himrod mine is the only salt industry source the Department points to specifically, and it does not explain what happened to Seneca Lake. Dr. Halfman is aware of the Himrod mine and its many failures, but, as he explains in his 2014 report, the timing does not add up. The chloride spike here occurred from 1965 to 1975. The mine, however, only began construction in 1969. Complaints about improper salt disposal began around 1972. Halfman Report at 23. This is simply too late. As Dr. Halfman's research shows, the chloride spike began before 1969. *See id.* at 20, Fig. 15. The Himrod mine did not cause the spike.

More generally, the assertion that we can dismiss this unique and worrisome issue with the lake because it was the 'bad old days' is underestimating just how much salt is at issue here. Again, we are looking for the equivalent of 32,000 metric tons of sodium and 54,000 metric tons of chloride per year. Chloride levels more than quadrupled to produce the spike in the 1960s and

1970s. One shoddy mine or a few unlined pits is not a very likely explanation. This is a massive increase, and there is no salt industry discharge in the record that explains it.

**B. By Failing to Address the Source of Seneca Lake’s Uniquely High Salinity, the DSEIS Fails to Adequately Describe the Environmental Setting of the Proposed Project**

The response from both the Applicant and the Department has been a shrugging dismissal. At oral argument, Mr. Bernstein complained that Dr. Halfman is “throwing darts at a dartboard,” while Ms. Maglienti informed us she “chuckle[d]” at Dr. Halfman’s opinion that the issue was worthy of additional study. Transcript at 329-30, 348. Dr. Siegel’s report dismisses the salinity as “interesting from a basic science perspective,” but with “absolutely no scientific bearing on whether plausible problems at the proposed LPG facility will lead to additional salinization of the lake.” Siegel Report at 6.

Seneca Lake’s uniquely high salinity is one of the lake’s defining features. It sets Seneca Lake apart from other Finger Lakes in a way that is significant to both the environment and human health. It is not deserving of Applicant’s and the Department’s derision. Indeed, the failure to consider the source of that salinity is a failure to adequately describe the environmental setting of the proposed project.

SEQRA requires more than this. DEC’s regulations state that an EIS must include a concise description of the environmental setting of the areas to be affected. That description must be “sufficient to understand the impacts of the proposed action and alternatives.” 6 N.Y.C.R.R. § 617.9(b)(5)(ii). This makes common sense: if the Department and the public do not know that a proposed site has a vulnerable environmental resource, or prior contamination, or has the potential to change materially in the future, they are planning in the dark. *See In the Matter of Dalrymple Gravel and Contracting Co.*, 2003 WL 21707901, \*18 (DEC 2003) (rejecting a

technique for measuring sound that ignored certain intrusive background sounds because “examination of noise impacts . . . is not merely an exercise in the nature, physics, propagation and attenuation of sound. Rather, it is an examination of these factors as applied to and as impacting the environment wherein the proposed project is located.”).

The SEQR Handbook supports this understanding. It confirms that “a summary of the background or history of a site with respect to previous activities there . . . may have a bearing on what is presently proposed.” SEQR Handbook at 121-122. It goes on to say that “[i]n particular, omission of facts about earlier environmental problems or issues at a site could be a fatal defect with respect to the adequacy of an EIS.” *Id.* at 122. When describing the environmental setting, “[t]he components . . . that relate to potential relevant impacts should receive the most attention.” *Id.* at 123. The DSEIS’s description of the environmental setting need not address everything, but it does need to consider the relevant features of that setting.

This DSEIS does not do that. Seneca Lake as an environmental setting is briefly discussed in Section 4.2.2.1, and it does acknowledge that chloride and sodium concentrations in the lake are “2 to 10 times higher than the other Finger Lakes.” DSEIS at 95. However, as discussed above, it only offers one sentence on why that might be. It claims that “[o]ne explanation . . . relates to the fact that at its northern end, the lake intersects the Silurian salt beds 450 to 600 meters below the ground surface and groundwater discharge brings saline water into the lake.” *Id.* There is no further elaboration. The DSEIS does not attempt to square this theory with the lake’s hydrogeologic history or to support this theory’s plausibility over other potential groundwater sources.

Additionally, no mention is made of the other putative explanations like brine springs, climate change, and/or prior salt industry activity at all. The latter’s omission is especially

puzzling because of how heavily the Applicant and the Department relied on prior industrial activity to address this issue at oral argument. Neither the Applicant nor the Department raised the one explanation offered by the DSEIS. Instead, they both pointed to general industrial malfeasance prior to the 1970s.

The DSEIS and the record, in contrast, do not offer support for that explanation. The DSEIS briefly discusses the historical development of these salt caverns and their prior use for hydrocarbon storage, but nowhere in that discussion is there any acknowledgement of the earlier environmental problems which Applicant and the Department blame for the lake's unusual salinity. Notably, there is no mention of the Himrod mine. *See* DSEIS at 67.

This failure to meaningfully address the lake's salinity is a failure to describe the environmental setting sufficient to understand the impacts of the proposed action and alternatives. Based on the record so far, the Applicant and the Department do not know why Seneca Lake is uniquely saline. Having some understanding of this is not academic. If Dr. Myers is correct, the cause is directly related to storage in these caverns and represents a serious adverse environmental impact.

But the significance of understanding the environmental baseline here is not limited to a direct link between the proposed action and the lake's salinity. Having that understanding will inform any analysis of potential environmental impacts, and it will also inform an evaluation of alternatives to the project. This is best illustrated by an example. Assume the cause of the salinity is natural *and* could reappear independent of the proposed action. In that hypothetical, the lake's concentrations of chloride and sodium would be declining now, but would be potentially subject to sudden and intense spikes in the future. The impacts of, for example, a brine pond spill would be more damaging in that scenario than they would be to the lake at current concentrations.

Knowing that very high contaminant levels were possible in the future would demand a different balance of risks, and would inform the choice between alternative brine pond designs and alternative sites.

In that hypothetical, the DSEIS as it is now – which assumes the cause of the salinity is irrelevant, uses present-day measurements, and assumes contaminant levels are on a permanent decline – would be insufficient.

That is what SEQRA’s requirement that the environmental setting be described “sufficient to understand the impacts of the proposed action and alternatives” is designed to avoid. 6 N.Y.C.R.R. § (b)(5)(ii). An analysis of the lake’s most salient water quality issue – a condition that has been demonstrated to change in intensity or source over time and that directly relates to potential impacts of the proposed action – is not an academic exercise. Without it, discussion of the baseline environmental setting here is incomplete.

**C. Seneca Lake’s Salinity is Evidence of a Potential Connection Between Storage Activity at the Proposed Facility and Salinity in the Lake That Deserves Investigation and Constitutes a Factual Issue in Dispute**

Sources that explain salinity in other Finger Lakes do not explain Seneca Lake’s salinity. Dr. Halfman has shown that stream inputs and recorded mine waste discharges are not enough to explain levels in the lake. The missing sodium and chloride is quite substantial, the equivalent of tens of thousands of metric tons per year. As discussed above, the handful of theories the Applicant and the Department offer to explain this all have serious weaknesses and do not obviously fit with the data.

That salinity is evidence of a potential connection between storage activity at the proposed site and contamination in the lake. As Dr. Halfman notes his affidavit, gas storage in caverns on the US Salt property correlates with the peak in chloride concentrations in Seneca

Lake. The early 20<sup>th</sup> century increase in chloride also correlates with the beginning of solution mining at the southern end of the lake. Halfman Aff. at ¶ 11. In Dr. Halfman's opinion, these correlations raise the potential of a connection. *Id.*.

The Department's attempt to downplay this correlation during oral argument reflects a misunderstanding of the timeline. Ms. Maglienti asked why, if solution mining has been occurring here for 70 years prior to the chloride spike, impacts only occurred in the 1960s. Transcript at 349-50. The answer is that there is also a correlation between the early 20<sup>th</sup> century rise in chloride and the first wells at the US Salt Site, which were drilled in 1893. Halfman Aff. at ¶ 11. Although the large spike in chloride occurred in the 1960s, "chloride concentrations steadily increased from 40 mg/L in the early 1900s." Halfman Report at 20. The Department also claimed that there was a five year gap between historical LPG storage here, which began in 1964, and the spike, which happened "half a decade later." Transcript at 351. This is again a misapprehension of the timeline: Dr. Halfman's report found a "pronounced peak starting at 1965 that lasted for 5 to 10 years." Halfman Report at 20.

Far from being an "indictment by omission," as Applicant has claimed, correlations to prior activity here combined with the lack of compelling alternate explanations is evidence supporting a connection like the one Dr. Myers and Gas Free Seneca proffer. Transcript at 328-329; Gas Free Seneca Petition for Full Party Status at 12-14. Correlating potentially relevant activities to impacts and eliminating unlikely possibilities is not guessing – it is science. This is especially true when, as Dr. Myers explains, the phenomenon in question is difficult to detect or monitor. *Id.* at 13.

Dr. Halfman proposes an experiment that could provide additional evidence. He recommends that the Applicant perform a year-long pressure test on the proposed caverns while

a third party concurrently monitors Seneca Lake for variations in chloride and sodium. Halfman Aff. at ¶ 13; Halfman Report at 24.

**D. The Potential Human Health Impacts of Further Increasing the Lake's Salinity Remain Unaddressed**

High salinity is harmful to human health. High levels of sodium are associated with hypertension – children, the elderly, and others who need low-sodium diets being particularly vulnerable. *See* EPA, *Drinking Water Advisory: Consumer Acceptability Advice and Health Effects Analysis on Sodium* (Feb. 2003) [hereinafter “EPA Sodium Advisory”] *available at* <http://1.usa.gov/1IHNFm>. Recommendations from regulatory agencies reflect this. Department water standards use a 20 mg/L limit for sodium. This is a health-based standard. 6 N.Y.C.R.R. § 703.5(f), Table 1. EPA also has a 20 mg/L limit for sodium, designed for individuals on a restricted sodium diet. EPA generally recommends reducing sodium in drinking water to between 30 and 60 mg/L based on potability. They warn that levels above 120 mg/L are a health risk for people on restricted diets. EPA Sodium Advisory at 1.

Ensuring compliance with such standards is one of the primary objectives of SEQRA itself. In enacting SEQRA, it was “the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached.” E.C.L. § 8-0103(5). A health-based water quality standard, identified by the Department, needs to be taken seriously for SEQRA to operate as intended.

Seneca Lake is already above Department and EPA recommended levels for sodium. At the issues conference, there was some discussion by the Applicant’s attorney about whether this is the case currently. *See* Transcript at 315, 329-330. It is. The most recent sampling, from 2014, found sodium levels of 75 mg/L. Halfman Aff. at ¶ 3. Any increase on those already-elevated

levels would push the lake further into the danger zone and increase the risk to vulnerable populations that rely on the lake.

The DSEIS does not address this potential impact. It briefly discusses the impacts of a brine pond spill on marine life, but it does not address risks to human health as a potential adverse impact. *See* DSEIS at 101. The Applicant and the Department both defended this absence by arguing that Dr. Myers' hypothesis was not plausible, therefore making this impact implausible. *See* Transcript at 313-22, 335-36, 347, 351-65.

The Seneca Lake Communities, of course, dispute this. As discussed above, Dr. Halfman's research provides evidence of a connection between activity in these caverns and impacts to the lake. The Communities also rely on the testimony of Dr. Myers, proffered by Gas Free Seneca, to inform their understanding of the potential risks here.

Additionally, induced groundwater flow is not the only potential source of sodium from the proposed project. The DSEIS itself discusses the potential for a brine pond spill, admitting that a major release could result in concentrations of brine between 35,000 and 50,000 mg/L up to one kilometer from the point of release. DSEIS at 101. That is a massive amount of brine and a wide radius of impact. If even five percent of the brine in question is sodium, that release would violate Department health standards 87 to 125 times over. Despite this, the DSEIS is silent on human health, representing a major omission and a substantive and significant issue for adjudication.

#### **VI. The DSEIS Does Not Properly Evaluate the Potential Significant Adverse Impacts to Local Emergency Resources**

An accident involving either the storage or the transport of LPG would severely tax the limited emergency response capability of nearby local governments, including many of the Seneca Lake Communities. Many local governments may not have the resources or expertise to

respond adequately, putting more lives and property in danger. Despite this risk, the DSEIS does not sufficiently address the potential impacts that a spill, accident, or catastrophic event would have on local emergency resources in the region.

The Communities proffer two witnesses to demonstrate the risk of overwhelming local emergency response capability: Mr. Richard Kuprewicz and Mr. Mark Venuti. Communities' Petition at 19. Mr. Kuprewicz is an expert in risk management with over forty years of experience in the energy sector. *See* Kuprewicz Aff. Mr. Venuti is the Supervisor for the Town of Geneva, and he has personal knowledge of its emergency response capabilities. *See* Affidavit of Mark Venuti, Communities' Petition at Attachment E [hereinafter "Venuti Aff."].

This is a substantive and significant issue. The Communities have made a competent offer of proof of Mr. Kuprewicz's testimony, and the Applicant and the Department are mistaken in suggesting that Mr. Kuprewicz be ignored. Additionally, the 2008 Schuyler County Hazard Mitigation Plan does not change the fact that the DSEIS fails to adequately address the potential impacts of an accident on local emergency preparedness.

**A. The Communities Have Made a Competent Offer of Proof of Mr. Kuprewicz's Testimony**

Both the Applicant and the Department attack the Seneca Lake Communities offer of Mr. Kuprewicz's testimony as being an insufficient offer of proof. At the Issues Conference, Mr. Bernstein claimed that Mr. Kuprewicz's affidavit makes "conclusory statements about things that apparently some of which are not within Mr. Cooperwitz's [sic]<sup>11</sup> expertise" including "salt caverns safety." Transcript at 144. Applicant argued that the affidavit is not an offer of proof because "[w]e have to at least see the words of what the offer of proof will be and those are not here. . . . Mr. Cooperwitz certainly does not substantiate his claims that risk is not being properly

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<sup>11</sup> The transcript spells Mr. Kuprewicz's name phonetically as "Cooperwitz." Here and throughout, the text of the transcript will be quoted verbatim unless otherwise indicated.

addressed.” *Id.* at 145-46. What the Communities offered, Mr. Bernstein says, is “factual testimony by an attorney.” *Id.*

The Department made similar arguments. “The problem is,” Ms. Maglienti declared, “that there is no detailed analysis in the affidavit. What [Kuprewicz] offers is a mere conclusion.” *Id.* at 166-67. There are no “literature references” or “citations of available literature,” and “no analysis of its own.” *Id.* at 167. The Department argued the affidavit fails as an offer of proof because it “doesn’t even give enough detail for the Department to actually respond to it.” *Id.* at 167. Ms. Maglienti cites 6 N.Y.C.R.R. § 624.5(b)(2) as requiring that an offer of proof “actually identify what evidence is intended to be presented by the petitioner and the basis of their opinion.” *Id.*

The Applicant and the Department are wrong. Mr. Kuprewicz’s affidavit and counsel for the Seneca Lake Communities’ proffers at oral argument are competent offers of proof and should not be rejected. Part 624 requires that petitioners’ offers of proof “specify[] the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue.” 6 N.Y.C.R.R. § 624.5(b)(2)(ii). An offer of proof “can take the form of proposed testimony, usually that of an expert.” *Halfmoon Water Improvement Area No. 1*, Decision of the Commissioner, 1982 WL 25856, \*2 (DEC 1982). “Where the proposed testimony is competent and runs counter to the Applicant’s assertions an issue is raised,” provided the proposed testimony has a factual or scientific foundation and isn’t speculation or mere conclusion. *Id.*; see also *Waste Mgmt. of N.Y.*, Decision of the Commissioner, 2006 WL 3053441 at \*2 (DEC 2006). There is no requirement that an offer of proof include extensive evidence, cite to literature, or comprehensively outline the proposed argument. It is an *offer* of proof, not the proof itself.

ALJs in other contexts have accepted offers of proof that are similar to the one at issue here. In *Scott Paper Co. and Finch, Pruyn & Co. Inc.*, Rulings of the ALJ, 1994 WL 1735340 (DEC 1994), a judge accepted the proffered testimony that a proposed landfill could not be adequately monitored as sufficient to warrant an adjudication. *Id.* at \*13. The petitioner there proposed that an expert testify and proffered a “summary of [that expert’s] review of the application.” *Id.* The expert concluded “it will be impossible to properly monitor (detect the source of leaks) due to the close proximity of two landfills on the site” and the difficulty of tracing leaks back to the source. *Id.* Ultimately the expert recommended that “only one landfill be placed [there]” because of the monitoring issue and because of the likelihood that the neighboring landfills would “pass the buck” to the other landfill if and when problems arose. *Id.* The ALJ there concluded that petitioner’s offer of proof “raise[d] a doubt about the Applicant’s ability to demonstrate the monitorability of the site such that a reasonable person would inquire further.” *Id.*

In *In the Matter of Mirant Bowline, LLC*, Ruling on Proposed Adjudicable Issues and Petitions for Party Status, 2001 WL 429863 (DEC 2001), petitioners argued that an application for a SPDES permit must be denied because it did not propose to use the best technology available for cooling water intakes. *Id.* at \*9-10. Petitioners presented an offer of proof identifying two expert witnesses that would “provide testimony that dry cooling [a method of water intake] uses significantly less Hudson River water than the proposed technology.” *Id.* at \*10. They would also “dispute DEC Staff’s assessment” and show that “the adverse environmental impacts of dry cooling would be much less than DEC Staff has represented.” *Id.* The ALJ found this to be a “sufficient offer of proof” because petitioners, through expert testimony, will “contend that the impacts on the fishery and fishery system will differ with dry

cooling versus the proposed . . . system” and that “dry cooling more effectively will minimize adverse impacts.” *Id.*

These acceptable offers of proof are similar to the offer of proof the Seneca Lake Communities have made concerning Mr. Kuprewicz’s testimony. Mr. Kuprewicz is an expert in the area in question – he runs a risk management consulting firm working with oil and gas infrastructure specifically, and he has over forty years of experience in the energy field. Kuprewicz Aff. at ¶¶ 1-7. He reviewed relevant portions of the record and proposes to testify to two expert opinions: that the risk assessments here are not adequate or appropriate given the nature of the proposed facility, and that state and local emergency response plans and personnel are not likely to be able to respond effectively. *Id.* at ¶ 8, 9, 15.

The Communities’ offer of proof also explained the basis of those opinions. Mr. Kuprewicz’s affidavit states that the safety risks of storing LPG are “substantially different and orders of magnitude greater” than those of natural gas, as are the consequences of a release. *Id.* at ¶ 10, 11. Underground storage, specifically, is much more dangerous than either aboveground storage or transportation. *Id.* at ¶ 12. As Ms. Sinding explained during oral argument, “[t]his is a direct repu[di]ation of the Applicant’s reliance on the history of storage of other hydrocarbons in other kinds of facilities within the region and the adequacy of the region’s ability to respond to emergencies from those in opposite types of facilities.” Transcript at 190. Additionally, she proffered that Mr. Kuprewicz would testify that the risk assessments here have not done a “chain of events” assessment to fully consider “cumulative risks presented by a number of potential failures along a chain . . . [that] together . . . could lead to a catastrophic event at a much higher rate of probability.” *Id.* at 117. Finally, Mr. Kuprewicz offered to testify that the liability

associated with a catastrophic failure here would “likely number in the hundreds of millions if not billions of dollars.” Kuprewicz Aff. at ¶ 16.

This is a valid offer of proof. It is competent proposed testimony by a highly qualified expert. Consistent with Section 624.5(b)(2)(ii), it specifies the witness (Mr. Kuprewicz), the nature of the evidence (expert testimony on risk assessment), and the grounds it is based on (a review of the record and substantive disagreements with the Applicant and the Department’s assessment this project’s risk versus previous activity, especially their reliance on the region’s prior experience with natural gas and hydrocarbon transportation). Similar to *Scott Paper* and *Mirant Bowline*, it does not *prove* the expert’s opinion but instead proffers what it is and what it is based on.

The Applicant and the Department both level other, secondary charges at Mr. Kuprewicz and the Communities. Mr. Bernstein claimed that Mr. Kuprewicz “didn’t have the chance to read the 2012 risk assessment.” Transcript at 145. Ms. Maglienti also argued that the Seneca Lake Communities’ Petition limited Mr. Kuprewicz’s opinion by using “words like perhaps, maybe” and “[w]e do not go to costly adjudication on perhaps and maybe.” *Id.* at 167-68.

These objections are mistaken. The Communities never claimed that Mr. Kuprewicz “didn’t have the chance” to review the relevant risk assessments. He did, and will continue to do so as he prepares his report. Kuprewicz Aff. at ¶ 8. Similarly, we don’t have to go to adjudication on “perhaps and maybe” because the Communities do not caveat Mr. Kuprewicz’s opinions with “perhaps and maybe.” His opinions are clear. *See* Kuprewicz Aff. at ¶¶ 9, 15.

Mr. Kuprewicz’s affidavit was necessarily brief given the late date of his – and counsel’s – retention. But brevity is not insufficiency. Between Mr. Kuprewicz’s affidavit, the Communities’ Petition, and the Communities’ argument at the Issues Conference, the

Communities have made a competent offer of proof regarding Mr. Kuprewicz’s testimony. That proffer meets the standards of Part 624 and is similar in substance to other offers of proof found acceptable in similar proceedings. It should not be rejected.

**B. The Schuyler County Hazard Mitigation Plan Does Not Cure the DSEIS’s Failure to Adequately Address the Potential Impacts of an Accident on Local Emergency Preparedness**

The DSEIS does discuss local emergency response, but it does so only in a limited and inadequate way. It is very general, noting that local responders would be called if there were a fire or accidental release and describing the Watkins Glen Fire Department by listing some basic facts about it. The DSEIS mentions that the Applicant will coordinate with the Watkins Glen Fire Department, which has a “predetermined response plan for a progressive response,” and offers a small table summarizing which engines might respond. DSEIS at 167-68. What it does not do is put this information in a meaningful context. It does not analyze the potential impacts of an accident on these local resources or discuss how prepared they actually are. Essentially, the DSEIS presents a list of trucks and local first responders but provides little to demonstrate that these local first responders are actually prepared.

The belatedly-introduced Schuyler County Hazard Mitigation Plan does not change the fact that the DSEIS fails to adequately address the potential impacts of an accident on local emergency response. Although not in the record before the Issues Conference, Mr. Bernstein provided your honor with a copy and pointed the other parties to Schuyler County’s website. Transcript at 155-156. First and most significantly, this plan is from 2008. *See Schuyler County, Hazard Mitigation Plan* (2008) Issues Conference Exhibit 00031 [hereinafter “Schuyler County Plan”], available at <http://www.schuylercounty.us/DocumentCenter/View/1632>. It predates the earliest communication about this facility available on the Department’s website by nearly a

year. *See* DEC Permit Website (earliest correspondence listed from Feb. 24, 2009). It does not address the proposed facility at all. *See* Schuyler County Plan at 94-95 (discussing risks from “Hazardous Material Released from a Fixed Site” and mentioning other specific facilities). In fact, there is apparently a new draft plan that has been “tabled . . . for further consideration.” Transcript at 129. Given all this, the Plan adds very little to our understanding of local capability. It was created before the Applicant even applied for these permits, it does not address the proposed facility, and at any rate it is seven years out of date.

Even if it were current, the Schuyler County Plan does not do the kind of analysis the DSEIS is missing. Its “Hazard Mitigation Strategy” is focused on “reduc[ing] the county’s vulnerability to a broad range of hazards” generally, and on “the three highest ranked hazards for Schuyler County (flash flood, severe storm, and ice storm)” specifically. Schuyler County Plan at 28. It does not provide the missing analysis of the impacts of an LPG accident on local emergency responders. It is also necessarily focused on Schuyler County, which does not cover all the local governments on or near Seneca Lake.

The DSEIS does not analyze the potential impacts of an accident on local first responders. The outdated and general Schuyler County plan does not change that. This remains a substantive and significant issue for adjudication.

**VII. The Draft Permit’s Failure to Provide Adequate Assurance to Protect the Seneca Lake Area Municipalities Against the Risk of Catastrophic Harm Presents an Adjudicable Issue**

As the Seneca Lake Communities offer to prove through the affidavits and proposed testimony of Dr. Halfman and Mr. Kuprewicz, Communities’ Petition at Attachments F and I, bolstered by the expert reports and proposed testimony of H.C. Clark and Dr. Rob Mackenzie proffered by Gas Free Seneca, GFS Petition at Exhibits 1 and 2, the Project presents the real and

substantial risk of the salinization of Seneca Lake, a catastrophic explosive incident, or both. The Seneca Lake Communities further offer to prove that these types of calamities threaten to overwhelm not only the emergency resources of the region's municipalities, as described above, but also their ability to provide adequate drinking water supplies to their residents. *See* Affidavits of Matthew Horn, City Manager of the City of Geneva, Communities' Petition at Attachment G [hereinafter "Horn Aff.,"] and James Bromka, water treatment plant operator for the Town of Waterloo, Communities' Petition at Attachment H, (citing the prohibitive costs of replacing or supplementing water treatment systems or of providing temporary potable water before new treatment comes online).

Because these threats are not mitigated by Condition 9 of the draft permit conditions proposed by DEC ("Condition 9") or by any other proposed permit conditions, Document V.1 (2014-11-10, DEC Staff Draft Permit Conditions), they present an adjudicable issue as to whether the DSEIS provides sufficient mitigation to satisfy SEQRA and the purposes Article 23 of the E.C.L.

Both Article 23 and SEQRA demand that the catastrophic environmental impacts of any LPG storage facility be mitigated to the maximum extent practicable. Although the protective criteria that Article 23 applies to some LPG facilities does not apply to those storing or transporting propane or butane "at their respective normal temperatures," E.C.L. §§ 23-1703, 23-1705(1), the E.C.L. nonetheless recognizes "the hazards posed by liquefied . . . petroleum gas storage and transportation" because of the inherent nature of LPG as "an extremely volatile, highly flammable and dangerous substance which . . . is capable . . . of causing severe damage even in areas distant from the point of release." E.C.L. § 23-1703. Accordingly, even in the context of permitting underground storage facilities, courts have interpreted Title 13 of Article

23 as evincing a purpose to “protect landowners' rights and the general public.” *See Bath Petroleum Storage, Inc. v. Sovas*, 309 F.Supp.2d 357, 375 (N.D.N.Y. 2004) (finding DEC acted within its discretion to require sonar testing of proposed LPG storage salt cavern facility, even though it was not explicitly authorized to do so by Title 13).

SEQRA likewise seeks to prevent damage to “the health and safety of the people of the state,” *see* E.C.L. § 8-0103(5), (9), which is why even though Article 23’s requirement that the Department consider “the environmental impacts of [a] proposed [LPG] facility,” E.C.L. § 23-1709(3)(e), does not apply to the Project, review of its potential significant impacts is nonetheless required. E.C.L. § 8-0109(2). Relevantly, to achieve its protective purpose, SEQRA also provides that before approval of any action, an agency must certify that “adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.” 6 N.Y.C.R.R. § 617.11(d)(5); *see also* E.C.L. § 8-0109(1), (8). This insistence on reasonable maximum protections is consistent with Article 23. *Cf.* E.C.L. § 23-1703 (expressing the desire that “transportation of liquefied natural or petroleum gas be effected under *maximum safeguards* to protect [residential] areas and populations against possible catastrophic danger in the mishandling or possible escape thereof.” (emphasis added)).

In imposing Condition 9 as a part of its SEQRA review and Article 23 permit approval process,<sup>12</sup> DEC implicitly acknowledges that indemnification against risk of disaster at the proposed facility is a practicable mitigative measure to protect the State of New York,

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<sup>12</sup> Condition 9 provides that the Applicant, referred to therein as “Permittee,” must “accept[] the full legal responsibility for all damages, direct or indirect, of whatever nature, and by whomever suffered, arising out of the storage facility's construction and operation to the extent such liability is attributable to the actions of the Permittee, its employees, agents, contractors or subcontractors, and to the extent the Permittee is liable under the law for such actions. The Permittee must indemnify and save harmless the State from suits, actions, damages, and costs of every nature and description resulting from such actions.”

notwithstanding that Title 13 provides no explicit authorization to do so. *See* E.C.L. §§ 23-1301 to 23-1307. While the Department has not explicitly identified the basis of authority for imposing the condition, that authority may derive either from SEQRA’s mandate to require such mitigation, *see* E.C.L. § 8-0109(1), (8); *Town of Henrietta v. Dep’t of Env’tl. Conservation of N.Y.*, 76 A.D.2d 215, 223-24 (4th Dep’t 1980) (finding SEQRA provides authority to attach permit conditions “necessary to minimize or avoid all adverse environmental impacts revealed in the EIS”), or from the permitting process designed to effectuate the protective purposes of Article 23. *See Bath Petroleum*, 309 F.Supp.2d at 375; *cf.* E.C.L. §§ 23-1305 (imposing liability on operator for costs necessary to bring an abandoned underground storage reservoir to a satisfactory condition), 23-1717 (imposing “strict liability on the part of any person” responsible for the release of LPG from a facility regulated under Title 17 of Article 23, excused by “[n]either compliance with the requirements of this title, nor the exercise of due care”).

The Department likewise has the authority to afford similar protection to the region’s municipalities, the entities most vulnerable to a potential catastrophic incident. *See Town of Henrietta*, 76 A.D.2d at 223 (when conducting SEQRA analysis relating to identification of reasonable permit conditions, “[d]ecision makers are not precluded from forecasting future needs; indeed, they are encouraged to make reasonable forecasts.”). Yet DEC clarified at the Issues Conference that it had no intention to provide such protection to municipalities or anyone beyond the state. Transcript at 603 (explaining Condition 9 does not provide “indemnification from the applicant for any [other] party . . . [including] municipalities.”). Although perhaps the Department considers this acceptable given the insufficient risk analysis found in the present draft of the DSEIS, as the Seneca Lake Communities and other petitioners have identified, that analysis underestimates or fails to analyze the risks associated with the project. *See supra*

Sections V, VI. Because the magnitude of those risks present a factual issue for adjudication, the sufficiency of the assurances contained in the draft permit conditions as appropriate mitigation under SEQRA and Article 23 – the consideration of which may result in the addition of conditions, modification to Condition 9, or the denial of the permit – is a substantive and significant issue for adjudication. *See* 6 N.Y.C.R.R. § 624.4(c).

Further, Applicant’s argument that the issue of providing adequate assurances to the region’s municipalities is “purely economic” and therefore unreviewable under SEQRA, Applicant’s Response at 16-17, Transcript at 587-93, is unavailing. As an initial matter, because DEC’s authority for imposing Condition 9 derives from Article 23 as well as SEQRA, to the extent that Applicant hangs its argument solely on the unreviewability of adequate assurances under SEQRA, that argument must fail.

More importantly, Applicant’s argument fails to recognize that the harms for which the Seneca Lake Communities seek appropriate mitigation are fundamentally environmental in nature as defined by SEQRA. *See* E.C.L. § 8-0105(6). While Applicant is correct that “pure” economic impacts are not reviewable under SEQRA, the authorities it cites clearly recognize that economic considerations must be considered when bound up with other environmental impacts. *St. Lawrence Cement*, 2001 WL 1587361 at \*109 (“Under SEQRA, economics are relevant to a determination of significance. The statute requires an inquiry into ‘whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be considered in determining the significance of an environmental effect.’” (quoting E.C.L. § 8-0113(2)(b))); *Sun Co., Inc. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 50 (4th Dep’t 1995) (dismissing petitioner’s claims that related only to “purely competitive economic factors”). As discussed, the Seneca Lake Communities offer to prove that in the event

the genuine threat of accident or salinization of Seneca Lake is realized, the region's municipalities will not have the available resources to mitigate immediate environmental harms – such as those presented by the loss of potable water for the many thousands of the region's residents without an adequate temporary solution. *See Horn Aff.* at ¶¶ 3, 9-10 (“Depending upon the intensity of the salinization,” the 15,500 people who depend on the City of Geneva water system “could be left without a viable drinking water solution for over a year” during which costs of temporary water would be substantial). Under these circumstances, not even the most hardened economist would characterize the lack of practicable assurances to prevent these harms as “purely economic.” Accordingly, the failure to provide these assurances presents an issue ripe for adjudication.

### **VIII. Conclusion**

The high-risk heavy industrial development this Project represents, and its proposed location on the shores of a vital and defining regional natural asset, are simply out of place and out of step with the Seneca Lake region. As illustrated in the Communities' Petition, at the Issues Conference, and above, it poses serious risks – to the health, safety, and identity of the Seneca Lake Communities and the lake itself – that have not been adequately considered in the DSEIS or in the Draft Permit Conditions. These failures raise substantive and significant issues requiring adjudication. Accordingly, the Communities respectfully request the opportunity to present evidence, expert testimony, and supporting documentation at an adjudicatory hearing incorporating, either during or afterward, ample opportunity for the public to comment on a full and sufficient SEQRA record for the Project.

Dated: April 17, 2015  
New York, New York

Respectfully Submitted,

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Katherine Sinding, Esq.

/s/ Daniel Raichel  
Daniel Raichel, Esq.

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# ATTACHMENT A

THE GENEVA CITY COUNCIL

ACTION MINUTES

REGULAR COUNCIL MEETING

JUNE 1, 2011 – 7:00 PM

Presiding - Stu Einstein, Mayor

Present - Matt Horn, City Manager

David Lee Foster, City Attorney

1. ROLL CALL

Present: Clr. Valentino, Clr. D'Amico, Clr. Augustine, Clr. Hagerman,  
Clr. O'Malley, Clr. Cosentino, Clr. Greco and Clr. Alcock

2. APPROVED MINUTES OF April 27 and May 4 & 11, 2011 MEETINGS

ACTION TAKEN by Clr. O'Malley; seconded by Clr. Alcock  
MOVED THAT the minutes of the April 27 and May 4 & 11, 2011  
Council meetings be approved  
MOTION CARRIED UNANIMOUSLY

3. CLAIMS/CORRESPONDENCE

The City Clerk reported there were no claims filed against the City during the  
month of May 2011.

4. PUBLIC COMMENT

5. COMMUNITY DISCUSSION AND STRATEGY DEVELOPMENT EFFORT

6. REQUEST FOR INVESTIGATION INTO GENEVA POLICE DEPARTMENT BE HANDLED  
OUTSIDE OF ONTARIO COUNTY

ACTION TAKEN by Clr. Greco; seconded by Clr. Hagerman  
MOVED THAT this resolution be adopted  
MOTION CARRIED UNANIMOUSLY (9)

7. FIRST READING OF AN ORDINANCE AMENDING PARKING RESTRICTIONS ON  
ROSE STREET

City Manager Horn presented the following ordinance for first reading:

WHEREAS, throughout the northeast, energy companies operate hydro-fracking wells that generate flow back fluid or "frack water," for which these firms are seeking plants capable of treatment; and

WHEREAS, the City of Geneva operates two wastewater treatment plants that discharge treated water into Seneca Lake; and

WHEREAS, the Geneva City Council seeks to preserve the sensitive ecosystem of the Seneca Lake watershed, while also protecting assets charged with proper treatment of wastewater.

NOW, THEREFORE BE IT RESOLVED, that the Geneva City Council, hereby and in due form, does direct the City Manager to refrain from entering into any agreement, or otherwise effectuate the treatment of wastewater from hydro-fracking or related ventures at any wastewater treatment or other facility owned or operated by the City of Geneva.

ACTION TAKEN by Clr. D'Amico; seconded by Clr. Alcock

MOVED THAT this resolution be adopted

MOTION CARRIED UNANIMOUSLY (9)

10. DISCUSSION REGARDING LEAD AGENCY FOR COUNTY LANDFILL EXPANSION

11. ESTABLISHING A PUBLIC HEARING FOR SALE OF PUBLIC PROPERTY FORMERLY KNOWN AS MOHAWK DRIVE

City Manager Horn presented the following resolution:

WHEREAS, the City of Geneva owns real property formerly known as Mohawk Drive; and

WHEREAS, the Geneva City Council has deemed that the property no longer serves a public purpose and should be sold to a private party; and

WHEREAS, staff is reviewing a private offer for purchase for this property; and

WHEREAS, if a proposal is determined to be in the best interest of Geneva residents, City Council anticipates a sale of the property.

NOW, THEREFORE BE IT RESOLVED, that a public hearing for the sale of the property formerly known as Mohawk Drive be held at the regular City Council meeting on July 6, 2011.

ACTION TAKEN by Clr. Greco; seconded by Clr. Valentino

MOVED THAT this resolution be adopted

MOTION CARRIED UNANIMOUSLY (9)

**FILING LOCAL LAW**

New York State Department of State  
41 State Street, Albany, NY 12231

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**(Use this form to file a local law with the Secretary of State)**

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

County  
City  
**Town of Geneva**  
Village

Local Law No. **2** of the year **2011**

A local law **"Amending Chapter 165 (Zoning) of the Code of the Town of Geneva"**  
(Insert Title)

Be it enacted by the **Town Board** (Name of Legislative Body)

County  
City  
**Town of Geneva** as follows:  
Village

Section 1. **STATEMENT OF LEGISLATIVE INTENT:**

It is the purpose of this local law to prevent serious detrimental health and environmental effects posed by the practices of horizontal or directional gas drilling and hydraulic fracturing, also known as hydro-fracking, which could threaten the Town of Geneva through potential contamination of aquifers and fresh water supply, the use of massive quantities of water, the storage, processing, handling and disposal of the fracking fluids and other by-products or waste, the release of chemicals used in the processes and the impact upon local landscapes which could result in the degradation of the Town of Geneva's significant environmental, natural, aesthetic and agricultural resources as well as to the Town of Geneva's infrastructure.

Section 2. Section 165-3 of Chapter 165 (Zoning) of the Code of the Town of Geneva is hereby amended with the insertion of new definitions for "Horizontal or Directional Drilling" and "Hydraulic Fracturing or Hydro-fracking" to read as follows:

**HORIZONTAL OR DIRECTIONAL DRILLING** – The practice of digging a well, first, down vertically to a depth above the target gas-bearing rock formation, then, on a curve so that the hole is drilled horizontally or at an angle within the gas-bearing rock.

*Local Law Filing*

NEW YORK STATE DEPARTMENT OF STATE

162 WASHINGTON AVENUE, ALBANY, NY 12231**(Use this form to file a local law with the Secretary of State.)**

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

Village of Penn Yan

*proposed* Local Law C of the year 2013

A Local Law to impose a further six (6) month moratorium on the installation, construction, operation of and the submission and processing of applications for High Impact Industrial Use within the Village of Penn Yan.

Be it enacted for a period of Six (6) months by the Village of Penn Yan as follows:

**Section 1. Authority**

This Local Law is adopted pursuant to the provisions of the Municipal Home Rule Law of the State of New York and Article 16 of the Village Law of the State of New York, with the procedural provisions of the Municipal Home Rule Law controlling.

**Section 2. Short Title**

This local law shall be known as the "Village of Penn Yan High Impact Industrial Use Moratorium Law of 2013."

**Section 3. Definition:**

For the purposes of this Local Law the following shall have the meanings indicated:

1. **Ambient Sound Level** – The measured (L90) sound pressure level in dBA on an "A" weighted scale at the property line of any non-participating property owner who are subject to noise impacts from the High Impact Industrial Use being proposed.
2. **Code Enforcement Officer (CEO)** – The duly appointed Code Enforcement Officer of the Village of Penn Yan or any Deputy or Assistant appointed or designated by the Village Board.
3. **Deleterious Substance** – Any of the following in any form, and whether or not such items have been excepted or exempted from the coverage of any federal or state environmental protection laws, or have been excepted from statutory or regulatory definitions of 'industrial waste', 'hazardous', 'toxic', or similar substances so long as such items are employed by persons in one or more specific businesses or industries: (a) below regulatory concern radioactive material, or any radioactive material which is not below regulatory concern, but which is in fact not being regulated by the regulatory agency otherwise having jurisdiction over such material in the Village, (b) crude oil or natural gas drilling fluids, (c) crude oil or natural gas exploration, drilling, production of processing wastes, (d) crude oil or natural gas drilling treatment wastes (such as oils, frac fluids, produced water, brine, flowback, sediment and/or any

(50) one-way trips by high-impact truck to or from the site of the proposed use during any seven (7) day period at any time during the duration of the use; or (c) more than seven hundred (700) one-way trips by high-impact truck to or from the site of the proposed use during any three hundred sixty five (365) day period during the duration of the use.

- a. **GROSS VEHICLE WEIGHT RATING**--- The weight specified by the manufacturer as the maximum load weight (truck plus cargo) of a vehicle.
- b. **HIGH-IMPACT TRUCK**--- A truck or tractor, as defined in the Vehicle and Traffic Law, with three or more axles, or ten or more wheels, and capable of hauling a gross vehicle weight of 34,000 pounds or more. High-impact truck ***does not include*** exempted vehicles.
- c. **EXEMPTED VEHICLES** --- Any of the following: (a) vehicles for agricultural or logging use, (b) school buses or other mass transit buses, (c) emergency vehicles, (d) military vehicles driven by active duty military personnel, or (e) trucks used in the construction, repair or maintenance of state, county, or Village roads or other public structures or property (f) Vehicles driven as part of a daily commute between home and a worksite or delivery destination.

**8. Injection Well** - A bored, drilled or driven shaft whose depth is greater than the largest surface dimension, or a dug hole whose depth is greater than the largest surface dimension, through which fluids (which may or may not include semi-solids) are injected into the subsurface and ninety (90) percent or more of such fluids do not return to the surface within a period of ninety (90) days. The definition of Injection Wells does not include: (a) single family septic systems that receive solely residential waste, (b) drainage wells used to drain surface fluids, primarily storm runoff, into the ground, (c) geothermal wells associated with the recovery of geothermal energy for heating or production of electric power, or (d) bore holes drilled to produce potable water to be used as such.

**UNDERGROUND INJECTION**--- Subsurface emplacement of Natural Gas and/or Petroleum Extraction, Exploration or Production Wastes by or into an injection well.

**9. Large Scale Water Use** - Any water withdrawal or sequestering water use of over 100,000 gallons of water in any thirty (30) day period from water resources within the Village or elsewhere. Large scale water use does not include water withdrawn for agriculture use, for emergency uses such as fire fighting, or for drinking, recreational, cooking, washing, or sanitary purposes and used within the Village.

- a. **WATER; WATER RESOURCES** --- All streams, ditches, lakes, ponds, marshes, vernal pools, watercourses, waterways, wells, springs, drainage systems, and all other bodies or accumulations of water, surface or underground, intermittent or perennial, which are contained in, flow through or border upon the Village or any portion thereof.
- b. **WATER WITHDRAWAL**--- Removal or capture of water from water resources within the Village.

natural gas or oil from production fields or natural gas processing facilities in pipelines or into storage; the term shall include equipment for liquids separation, natural gas dehydration, and tanks for the storage of waste liquids and hydrocarbon liquids.

**16. Natural Gas Processing Facility** - Those facilities that separate and recover natural gas liquids (NGLs) and/or other non-methane gases and liquids from a stream of produced natural gas, using equipment for any of the following: cleaning or stripping gas, cooking and dehydration, residual refinement, treating or removing oil or condensate, removing water, separating NGLs, removing sulfur or carbon dioxide, fractionation of NGLs, or the capture of CO<sub>2</sub> separated from natural gas streams.

**17. Open Air Industrial Use** – An industrial use that includes storage outside of an enclosed building of raw materials, components, equipment, products, byproducts, waste, deleterious substances or other materials, either as a primary activity, or as an accessory use or incidental to another activity or use.

**18. Open Storage** – The holding, keeping or storage outside of an enclosed building of any chemicals, petroleum products, or deleterious substances, in total quantities of greater than two hundred (200) pounds or two hundred fifty (250) hours at any time during the use.

**19. Private Electric Power Generation Facility** – One or more power generators of more than 1000 horsepower in the aggregate, fueled by diesel, oil gas, propane or other fossil fuel, the primary function of which is the provision of electricity to an industrial use.

**20. Staging Facility** – A vehicle storage or parking facility or location capable of use for the storage, parking or operation of more than twenty (20) high impact trucks at the same time.

**21. Substantial Surface Disturbance** – A development activity which will likely disturb the existing surface or more than two (2) acres of land.

**22. Village** – The Village of Penn Yan

**23. Village Board** – The duly elected Village Board of the Village of Penn Yan

#### **Section 4. Legislative Purpose**

A. The purpose of this Local Law is to enable the Village of Penn Yan to prevent High Impact Industry as well as the processing of any application for High Impact Industry within the Village of Penn Yan for a reasonable time pending the Village Planning Board and Village Board completing and adopting regulations controlling High Impact Industrial Uses in the Village of Penn Yan.

B. It is further the purpose of this Local Law to fulfill the Village's pre-construction constitutional, statutory and legal obligations to protect and preserve the public health, welfare and safety of the citizens of the Village of Penn Yan, as well as to protect the value, use and enjoyment of property in the Village by temporarily prohibiting the submission and processing of applications for and commencement of operation of any High Impact Industrial Use within the Village.

G. The Board of Trustees hereby finds that a moratorium of six (6) months duration, coupled with a hardship waiver procedure and mechanism for persons seeking to begin high impact industrial uses within the Village of Penn Yan, will achieve the balancing of interests between the public need to safeguard the resources and character of the Village of Penn Yan, the health, safety and general welfare of its residents, and the rights of individual property owners, persons or businesses engaging in the high impact industry uses during such period.

**Section 5. Imposition of Moratorium**

A. For a period of six (6) months from and after the effective date of this Local Law: (i) no applications for the commencement of high impact Industrial uses shall be accepted or processed by the Village of Penn Yan; (ii) no previously submitted applications for any purpose related to high impact industrial uses will be further processed by the Village of Penn Yan; (iii) the granting of any permit for same by any Board or Officer of the Village is prohibited; and (iv) installation, construction or erection of equipment or apparatus for High Impact Industry uses is prohibited within the geographic limits of the Village of Penn Yan, except as provided in Section 6 of this Local Law.

B. For the purpose of this Local Law, an application shall be deemed to mean any pending or future request for official action by the Village Board, Village Code Enforcement Officer, Village Highway Superintendent or other Officer, official, employee, agent or designee thereof of the Village of Penn Yan which request and/or approval would in any way commence, further or continue a process whereby High Impact Industry Use, or any part or component thereof, is or may be undertaken, commenced, constructed or erected.

C. Exempted herefrom are existing businesses and/or operations in the Village of Penn Yan which would presently fall into the definition of high impact industrial use or fall into that definition by expansion or increase of any present use or operation. Also specifically exempted are any agricultural, municipal or educational uses or activities.

**Section 6. Alleviation of Extraordinary Hardship**

A. The Village Board of the Village of Penn Yan may authorize exceptions to the moratorium imposed by this Local Law when it finds, based upon evidence presented to it, that deferral of action on an application for high impact industrial use, the delay in commencement of directional drilling and/or hydraulic fracturing operations for production of natural gas, or any part or component thereof for the duration of the moratorium, would impose an extraordinary hardship on a landowner or applicant.

B. An application for an exception based upon extraordinary hardship shall be filed with the Code Enforcement Officer of the Village of Penn Yan, including a fee of One Thousand and 00/100 Dollars (\$1,000.00) for each geographic site proposed for High Impact Industrial uses claimed to be subject to extraordinary hardship, by the landowner or the applicant upon the consent of the landowner. The application shall provide a recitation of the specific facts that are alleged to support the claim of extraordinary hardship and shall contain such other information and/or documentation as the Village Board or its designee, shall prescribe as necessary for the Village Board to be fully informed with respect to the application.

**Section 8. Superseding and Repealer Provisions**

This local law shall supersede the applicable sections of Article 16 of the Village Law, including, but not necessarily limited to Sections, 130, 261, 262, 263, 264, 265, 267, 268, 269 and 274-a, and Executive Law Section 381 to the extent inconsistent with the same and to the extent permitted by the New York State Constitution, the Municipal Home Rule Law or any other statute determined to be in conflict with the provisions hereof as pertains to industrial wind turbine towers, and/or industrial wind energy facilities, as defined herein.

**Section 9. Validity**

In the event that any section, sentence, clause or phrase of this Local Law is held to be invalid or unconstitutional by any court of competent jurisdiction, said holding shall in no way affect the validity of the remaining portions of this Law.

**Section 10. Effective Date**

This Local Law shall become effective upon filing with the Secretary of State of the State of New York subsequent to having been duly adopted by the Village Board of the Village of Penn Yan.

*Complete the certification in the paragraph that applies to the filing of this local law and strike out that which is not applicable.)*

1. (Final adoption by local legislative body only)

I hereby certify that the local law annexed hereto, designated as Local Law No. of the year 2013, of the Village of Penn Yan was duly passed by the Board of Trustees on , in accordance with the applicable provisions of law.

I further certify that I have compared the preceding local law with the original on file in this office and that the same is a correct transcript therefrom and of the whole of such original local law, and was finally adopted in the manner indicated in paragraph 1 above.

---

Mary Ann Martin – Deputy Clerk

(SEAL)

Date:

TOWN BOARD  
TOWN OF MILO  
RESOLUTION # 22 - 11

At a regular meeting of the Town Board of the Town of Milo, Yates County, New York, held at Town of Milo Town offices, 137 Main Street, Penn Yan, New York on May 16, 2011, 2011 at 7:00 p.m. there were:

Members Present     John P. Socha  
                             Dale Hallings  
                             James Harris  
                             Arden Sorensen

ABSENT:             Leslie Church

being all the members of the town/village board.

Mr. Dale Hallings, offered the following Resolution and moved its adoption:

WHEREAS, the Town of Milo is currently considering various options concerning the drilling for , or extractions of, natural gas, in the Town of Milo, within the subterranean area known as the Marcellus Shale by the process commonly known as high-volume hydraulic fracturing, and

WHEREAS, the State of New York, through the Department of Environmental Conservation, has been directed to inquire into this matter and to issue a Report on this matter, which Report is still pending, and

WHEREAS, the Town Board is of the opinion that an additional period of time is needed in order to adequately review, study and plan for such land use regulations, and

WHEREAS, legislation in regard to a moratorium, on this subject, is now in final form, a draft of which is attached hereto, as a proposed Local Law,

NOW, THEREFORE BE IT

RESOLVED, that the proposed legislation to impose regulations regarding drilling for , or

Local Law Filing

NEW YORK STATE DEPARTMENT OF STATE  
41 STATE STREET, ALBANY, NY 12231

---

(Use this form to file a local law with the Secretary of State.)

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

Town of Milo

Local Law No. \_\_\_\_\_ of the year 2011

A local law to enact a moratorium on the drilling for or extraction of natural gas within that subterranean area known as the Marcellus Shale by the process commonly known as high-volume hydraulic fracturing.

---

Be it enacted by the \_\_\_\_\_ Town Board \_\_\_\_\_ of the

Town of Milo as follows:

See Schedule AA@, which is attached hereto and made a part hereof.

(If additional space is needed, attach pages the same size as this sheet, and number each.)  
DOS-239 (Rev. 2/89)

1. The Town Board of the Town shall not grant any approvals that would have as the result the drilling for or extraction of natural gas within the Town of Milo from that subterranean area known as the Marcellus Shale by the process known as hydraulic fracturing.

2. The Town Planning Board shall not grant any preliminary or final approval to a subdivision plat, site plan, special use permit or other permit that would have as a result the drilling for or extraction of natural gas within the Town of Milo from that subterranean area known as the Marcellus Shale by the process known as hydraulic fracturing.

3. The Town Zoning Board of Appeals shall not grant any variance or other permit for any use that would result in the drilling for or extraction of natural gas within the Town of Milo from that subterranean area known as the Marcellus Shale by the process known as hydraulic fracturing.

4. The Code Enforcement Officer of the Town shall not issue any permit that would result in the drilling for or extraction of natural gas within the Town of Milo from that subterranean area known as the Marcellus Shale by the process known as hydraulic fracturing.

B. Notwithstanding the foregoing, this local law does not affect the drilling for or extraction of natural gas within the Town of Milo from other subterranean areas using means that have previously used within the town; provided that if hydraulic fracturing has been previously used in Milo, it may not be used with the volume or intensity now proposed for use within the Marcellus Shale.

### Section 3. No Consideration of New Applications

No applications for permits prohibited by this Local Law or for approvals for a site plan, subdivision, variance, special use permit or other permit prohibited by this Local Law shall be considered by any board, officer or agency of the Town while the moratorium imposed by this Local Law is in effect.

### Section 4. Term

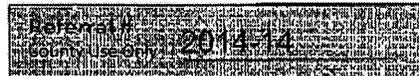
The moratorium imposed by this Local Law shall be in effect for a period of one year from the time when the Supplemental Generic Environmental Impact Statement (SGEIS) relating to the extraction of natural gas by the process of high-volume hydraulic fracturing now under review by the New York State Department of Environmental Conservation is final and permits for such extraction may be issued so far as the New York State Environmental Conservation Law is concerned.

### Section 5. Penalties

Any person, firm or corporation that shall establish, place, construct, enlarge or erect any structure within the Town for the purpose of engaging in the extraction of natural gas by the process of high-volume hydraulic fracturing in violation of the provisions of this Local Law or shall otherwise violate any of the provisions of this Local Law shall be subject to:



# Yates County Planning Board Referral Form



Date Received 3/13/14

Revised 1/2014

Municipality and Referring Agency Town of Starkey

Project Address Town of Starkey Project Tax Map # \_\_\_\_\_

Zoning District \_\_\_\_\_

Applicant (Name & MAILING) Town of Starkey

40 Seneca Street, Dundee Email starkeytownclerk@yahoo.com

Property Owner (Name & MAILING) \_\_\_\_\_

Email \_\_\_\_\_

Reason for Referral (Prox. to Cty Rd., State Rd., Muni Boundary, etc.) \_\_\_\_\_

### Application Type

- Area Variance
- Use Variance
- Special Use Permit
- Site Plan
- Subdivision
- Text Amendment
- Map Amendment
- Other

### Project Description

Third moratorium to allow the Town of Starkey to research and implement responsible zoning on natural gas development in the town.

### Supporting Documents Required (IF N/A, include explanation)

- Municipal Application
- Tax Map or Plat
- SEQR
- Site Plan \*
- Variance Criteria \*\*
- Subdivision Plat  For Subdivision Referrals Only
- Other

Copy of moratorium

\*If Site Plan Review, Site Plan **MUST** be detailed and meet the municipal requirements.  
 \*\*All Variance referrals (Area/Use) **MUST** include detailed justifications associated with reason/s for appeal.

Certification: *With the following signature I certify that this application provides a complete description of the proposed local action and is a complete application pursuant to NYS General Municipal Law Article 120, Section 239-m, part c.*  
*James v. Ritter, Supervisor*, Referring Official



Provision of required information is the responsibility of the referring agency. Failure to provide such information may result in a significant delay in processing.



Local Law 1 of 2012 also prohibited, during its effective term, any Person, as defined in Local Law 1 of 2012, from using, causing or permitting to be used any land, body of water, building or other structure located within the Town of Starkey for any of the following: (i) any Natural Gas and/or Petroleum Exploration Activities; (ii) any Natural Gas and/or Petroleum Extraction Activities; or (iii) any Natural Gas and/or Petroleum Support Activities, such terms being defined in Local Law 1 of 2012.

The Town of Starkey needed the time afforded by Local Law 1 of 2012 to study the impacts, effects and possible controls over the following activities: (i) any Natural Gas and/or Petroleum Exploration Activities; (ii) any Natural Gas and/or Petroleum Extraction Activities; or (iii) any Natural Gas and/or Petroleum Support Activities, such terms being defined in Local Law 1 of 2012. The Town of Starkey also needed the time afforded by Local Law 1 of 2012 to consider amendments to the Town's Zoning Laws to address the same.

The Town Board of the Town of Starkey established a second one-year moratorium entitled, "A local law Establishing a Second Moratorium and Prohibition Within the Town of Natural Gas and Petroleum Exploration and Extraction Activities, Underground Storage of Natural Gas and Disposal of Natural Gas or Petroleum Extraction, Exploration and Production Wastes", effective April 25, 2013 with the filing of Local Law No. 1 of 2013 with the New York State Department of State.

**After consideration of the scope of the review and possible revisions to the Town's Zoning Laws, the Town Board deems it necessary to adopt a third one (1)-year moratorium and prohibition on these specified activities to complete its studies and to complete its consideration and enactment of amendments to the Town's Zoning Laws.**

**Section 2.** INCORPORATION OF PARTS OF LOCAL LAW 1 OF 2012

All provisions contained in Local Law 1 of 2012 of the Town of Starkey in Section 2 (Authority and Intent; Findings; Purpose), Section 3 (Definitions), Section 5 (Penalties), Section 6 ("Grandfathering" of Legal, Pre-Existing Non-Conforming Use), Section 7 (Invalidity of Any Conflicting Approvals or Permits), Section 8 (Hardship Use Variance) and in Appendix A, attached to and forming a part thereof, are incorporated into this Local Law by reference and shall have full force and effect relative to this Local Law during the effective term of this Local Law.

**Section 3.** MORATORIUM.

A. From and after the date of this Local Law, no application for a permit, zoning permit, special permit, zoning variance, building permit, site plan approval, subdivision approval or other Town-level approval shall be accepted, processed, approved, approved conditionally or issued for the construction, establishment, or use or operation of any land, body of water, building or other structure located within the Town of Starkey for any of the following: (i) any Natural Gas and/or Petroleum Exploration Activities; (ii) any Natural Gas and/or Petroleum Extraction Activities; or (iii) any Natural Gas and/or Petroleum Support Activities.

Section 6. EFFECTIVE DATE.

This Local Law shall take effect immediately upon filing with the New York Department of State and shall remain in force and effect for a period of one (1) year from the date of such filing.

**G.M. L. 239 REFERRAL TO THE YATES COUNTY PLANNING BOARD**

YCPD Office Log # 2012-1

Date Received December 28, 2011

From: Town of Torrey Clerk Dec 28, 2011

To: Yates County Planning Board, 417 Liberty St., Penn Yan, NY 14527

Applicant: Town of Torrey

1. Location: 56 Geneva Street Dresden NY

2. Tax Map #: \_\_\_\_\_ 2a. Zoning District: ALL

3. Type of Application or Proposal:

- |                                                          |                                           |                                                |
|----------------------------------------------------------|-------------------------------------------|------------------------------------------------|
| <input type="checkbox"/> Use Variance                    | <input type="checkbox"/> Area Variance    | <input type="checkbox"/> Special Use Permit    |
| <input type="checkbox"/> Subdivision Review              | <input type="checkbox"/> Site Plan Review | <input type="checkbox"/> Zoning Text Amendment |
| <input type="checkbox"/> Zoning Map Amendment (Rezoning) |                                           | X Other                                        |

3b. Date of meeting at which the local board expects to take final action: 01/10/12

4. Applicable Sections of Zoning Code: Entire

5. Description: Local Law Moratorium on Directional Drilling and Hydrofracking in the Town of Torrey

Reason Referred: Local Law

7. Enclose the complete application including the following:

- |                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> SEQR Documentation                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                    |
| <input type="checkbox"/> Detailed Description                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                    |
| <ul style="list-style-type: none"> <li>• Type of Business</li> <li>• Hours of Operation</li> </ul>                                                                                                                                                                                            | <ul style="list-style-type: none"> <li>• Number of Employees</li> <li>• Anticipated Traffic</li> </ul>                                                                                                                                                                             |
| <input type="checkbox"/> Site Plan                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                    |
| <ul style="list-style-type: none"> <li>• Title, Scale, North Arrow, Dimensions</li> <li>• Portion of the Property to be Developed</li> <li>• Streets, Easements, Utilities</li> <li>• Driveways, Parking (Existing &amp; Proposed)</li> <li>• Structures (Existing &amp; Proposed)</li> </ul> | <ul style="list-style-type: none"> <li>• Landscape Features (i.e., streams, ponds, hedges) (Existing &amp; Proposed)</li> <li>• Lighting &amp; Signage (Location and content)</li> <li>• Grading Plan, Drainage &amp; Erosion Control (During &amp; After Construction)</li> </ul> |

*As declared in G.M.L. §239-l, m, and n, it is in the public interest to have the Yates County Planning Board review certain actions that may have inter-community and countywide impacts. Within thirty days of a complete submittal of the referred matter (or at least two days before the referring board's final action), the County Planning Board shall report its recommendations thereon to the referring agency. If the County Planning Board fails to report within 30 days, the body having jurisdiction to act may do so without such report.*

fracking), or the disposal, storage, or dumping of waste, contaminated or otherwise, or other waste by-products created by the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking).

B. This moratorium shall be in effect for a period of one (1) year from the effective date of this Local Law and shall expire on the earlier of (i) the date one (1) year from said effective date, unless renewed; or (ii) the enactment by the Town Board of a resolution indicating the Town Board is satisfied that the need for the moratorium no longer exists.

C. This moratorium shall apply to all real property within the Town.

D. Pursuant to this moratorium, the Planning Board shall not review any applications for any new wells, projects or businesses within the Town involving the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking) and shall not grant any preliminary or final site plan approval to any property on which is intended to have on it any well, project or business involving the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking), or the disposal, storage, or dumping of waste, contaminated or otherwise, or other waste by-products created by the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking).

E. Pursuant to this moratorium, the Building Inspector shall not issue Building Permits for the construction of any well involving the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking), or facilities for the disposal, storage, or dumping of waste, contaminated or otherwise, or other waste by-products created by the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking) anywhere within the Town.

F. Pursuant to this moratorium, no applications for variances, special use permits or other approvals involving any new wells, projects or businesses involving the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking), or facilities for the disposal, storage, or dumping of waste, contaminated or otherwise, or other waste by-products created by the practices of horizontal or directional drilling or hydraulic fracturing (hydro-fracking) anywhere within the Town shall be processed or granted.

#### Section 5. PENALTIES.

Any person, firm, entity or corporation which shall violate the provisions of this Local Law, shall be subject to:

1. A penalty in the amount of a minimum of \$100.00 and a maximum of \$250.00 for each day that such violation shall exist; and
2. Injunctive relief in favor of the Town to cease any and all such actions which conflict with this Local Law and, if necessary, to remove any construction or improvements which may have been built in violation of this Local Law.

It shall be the duty of the Building Inspector to enforce the provisions of this Local Law

New York State Department of Environmental Conservation

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In the Matter of the Applications of

Application Number  
8-4432-00085

FINGER LAKES LPG STORAGE, LLC  
For the Liquefied Petroleum Gas Storage Facility at Seneca Lake  
for permits to construct and operate pursuant to the  
Environmental Conservation Law  
-----

**AFFIRMATION  
OF SERVICE**

I, Daniel Raichel, an attorney duly admitted to practice law before the Courts of the State of New York, affirm under penalty of perjury:

That I am over 18 years of age, and am employed by the Natural Resources Defense Council, 40 W. 20<sup>th</sup> St., 11<sup>th</sup> Fl., New York, NY 10011.

That on April 17, 2015, the foregoing Post Issues Conference Brief of the proposed parties Seneca Lake Communities—Seneca County, Yates County, the City of Geneva, the Town of Fayette, the Town of Geneva, the Town of Ithaca, the Town of Romulus, the Town of Starkey, the Town of Ulysses, the Town of Waterloo, the Village of Waterloo, and the Village of Watkins Glen—was served on the following by email, with a hardcopy of the foregoing petition being mailed to the same (except for those parties for who email-only service was authorized by the April 15, 2015 email order of Chief Administrative Law Judge James T. McClymonds, as indicated below):

James T. McClymonds  
Chief Administrative Law Judge  
New York State Department of Environmental Conservation  
Office of Hearings and Mediation Services  
625 Broadway, 1st Floor  
Albany, New York 12233-1550  
TEL: (518) 402-9003  
FAX: (518) 402-9037  
Email: [james.mcclymonds@dec.ny.gov](mailto:james.mcclymonds@dec.ny.gov)

COUNSEL FOR THE DEPARTMENT (email-only service authorized)

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Moneen Nasmith  
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