January 11, 2012

Attn: dSGEIS Comments
Bureau of Oil & Gas Regulation
NYSDEC Division of Mineral Resources
625 Broadway, Third Floor
Albany, New York 12233-6500

Dear Sir or Madam:

This comment letter is submitted on behalf of the Natural Resources Defense Council ("NRDC") in connection with the Revised Draft Supplement Generic Impact Statement ("rDSGEIS") on the Oil, Gas, and Solution Mining Permitting Program – Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (the "Permitting Program"). Specifically, this comment letter focuses on the appropriate role and authority of units of local government in siting and preventing or mitigating impacts from any natural gas hydraulic fracturing wells that may ultimately be permitted by the New York State Department of Environmental Conservation ("NYSDEC" or "the Department").

EXECUTIVE SUMMARY

Much has occurred since the Department issued the 2009 DSGEIS. Numerous detailed and substantive comments were received from many interested groups and stakeholders. A number of units of local government enacted amendments to their land use laws addressing hydraulic fracturing and, in certain instances, banned it altogether. The result of the local bans has been litigation that is still pending as this comment letter is being submitted. Members of the State Legislature submitted legislation proposing to clarify and affirm the power of local governments to apply local land use laws to hydraulic fracturing. That legislation passed the Assembly during the last legislative session and is highly likely to be introduced again. Much technical attention has focused on the potential dangers of hydraulic fracturing (particularly potential impacts on water supplies) due to investigatory work and analysis by technical staff at the Environmental Protection Agency and by experts retained by environmental organizations, including but by no means limited to the NRDC.

What emerges from this intensive focus on hydraulic fracturing is a simple truth. It is not a simple panacea to our energy supply problems and does not come without potential significant adverse impacts and risks under the best of circumstances. This comment letter does not attempt to assess the risks, compare them to the benefits, and make a technical recommendation as to whether hydraulic fracturing should be allowed in New York State. Those matters are addressed in other comment letters submitted by NRDC concurrently with this one. Rather, this comment letter is based upon the hypothetical assumption that some form of hydraulic fracturing may ultimately be allowed in New York State pursuant to regulations issued by the Department. If this hypothetical assumption proves to be incorrect, and the Department determines at the conclusion of the environmental review process that unmitigatable potential significant adverse environmental impacts of hydraulic fracturing outweigh its social and economic utility, then this comment letter would not be of any relevance.

However, if hydraulic fracturing may ultimately be allowed in New York State, then it is respectfully submitted that the Department's affirmative integration of units of local government into the siting process (including prevention/mitigation of potentially significant adverse impacts) is second in importance only to the technical safety and environmental standards for hydraulic fracturing to be included in the Department's regulations. There are multiple reasons why robust local government participation in siting is of critical importance. The most obvious is that it is highly unlikely, if not impossible, for the NYSDEC staff responsible for review of applications for hydraulic fracturing wells and facilities to be aware of all of the matters of local significance that bear on rational and intelligent siting of fracking wells and facilities. Put differently, there is a cogent reason why we have both state and local governments across the United States – matters of local concern including appropriate uses of land are best addressed locally, and those matters requiring uniformity across the state are best addressed by state governments.

The natural gas industry has long advocated the position that uniformity is needed for the cost-effective utilization of the natural gas resources in the Marcellus Shale formation. The logic underlying this position supports uniformity regarding the technical standards for well design, operation, management, etc. Certainly, if each municipality in New York imposed different technical requirements for well design, operation, management, etc., the resulting amalgam of potentially inconsistent regulations would impair the efficient utilization of the natural gas resource. However, the same logic does not extend to decisions about the appropriate locations for fracking wells and related facilities. That decision must be made on a case by case basis, taking into account all of the characteristics of the site and its environs – matters which are inherently non-uniform and, by definition, site specific.

No one, not even the natural gas industry, suggests that approval of a particular location for a hydraulic fracturing well can be rationally undertaken without taking into account the site location and surrounding conditions. Thus, uniformity is not possible when it comes to siting decisions. Each site is unique because each parcel of land and surrounding community is unique. And to the extent that lands may have similar attributes and be similarly situated in a municipality, it is the local government who is in the best position to categorize and group those lands and determine which are inappropriate for fracking wells and facilities and which are appropriate. Few would argue that on the common grounds of a densely populated

condominium development, it would be appropriate to construct an industrial natural gas hydraulic fracturing operation with a detention basin, heavy truck traffic, etc. Municipalities should be empowered by the Department to determine, through their local planning processes, where hydraulic fracturing wells and facilities should be permitted and where they should be prohibited. The status and regulatory effect of those local plans should be recognized by the Department in its regulations and not merely as a component of the environmental assessment of a particular proposed well.

Indeed, determining where particular uses of land are to occur within its jurisdiction is a power that has been vested in units of local government for almost 100 years, ever since New York City adopted the country's first zoning law in 1916. And it is precisely why the State of New York and every other state in the United States has long vested units of local government with local planning, zoning, and other related land use powers and jurisdiction. What is being proposed in this comment letter is nothing new, nor anything that should be feared by or opposed by the natural gas industry.

Nevertheless, the natural gas industry has historically opposed any meaningful involvement of local governments in the approval process for a simple reason – and, in truth, it does not have to do with "uniformity" or "efficiency" of recovering the resource. The natural gas industry simply does not want to have to deal with local governments and would prefer to deal only with the Department because it is easier. The natural gas industry would prefer not to appear before a local planning board or a town board and would prefer to deal with a Department official who does not have to answer to a local constituency.

If the State of New York had vastly greater resources, perhaps the Department could realistically consider taking on the role of fully investigating the local land use patterns and site conditions that bear on the rational siting of hydraulic fracturing wells and facilities. But the Department lacks the personnel, the expertise, and the resources to become a land planning agency. To be fair, the Department has recognized its limitations and the inadequacies of the 2009 DSGEIS. Thus, in the rDSGEIS, the Department has proposed more local government involvement than had originally been proposed. Unfortunately, while well intentioned, the process and regulations outlined in the rDSGEIS still fall well short of what is necessary.

The principal defect is that local government participation is largely limited to providing some input on an applicant's Environmental Assessment Form ("EAF"). This is far from adequate in content, process, or scope. Rational land planning is not reactive, it is proactive. Municipalities should be both able to and encouraged to proactively plan for and identify the appropriate land areas and locations where hydraulic fracturing should be allowed as well as where it would be inappropriate. Such local land planning must precede environmental assessment and be undertaken on a community-wide proactive basis rather than piecemeal in reaction to individual applications. Moreover, until the state courts, and potentially the State Legislature, finally and unambiguously address the power of local governments to enact zoning laws to govern the permitted and prohibited locations of hydraulic fracturing, it will only be the Department, through its regulations, which will determine the type and kind of input that local governments will have into the siting approval process.

The rDSGEIS appears to be based on the incorrect assumption that the Department's regulations must track the most stringent interpretation possible of preemption of local land use powers. To the contrary, even if one assumes that the courts will hand down the most narrow interpretation possible of local land use powers to zone hydraulic fracturing, and that the State Legislature will fail to amend the relevant enabling laws to affirmatively authorize local zoning or other land use controls – the Department still has the affirmative regulatory power to incorporate into its regulations meaningful local government participation in the siting of hydraulic fracturing wells and facilities. This comment letter proposes that the Department do so and authorize a much stronger voice for local government in the siting and approval process for hydraulic fracturing wells and facilities, despite the legal uncertainty in this area.

The regimen currently proposed by the Department does not provide nearly enough of the kind of local government input that is needed, nor does it integrate the Department's approval process with input from local government. Although local governments could comment on an EAF for a specific well by asserting that its location is not consistent with their local plans, the consequence of such a comment is unclear and appears to be left to the discretion of Department staff without any guidance of any significance. Certainly, there is no process mandated – advisory or otherwise – if a hydraulic fracturing well and facility is proposed that is contrary to a municipality's adopted plans. Indeed, the Department appears to tacitly assume the existence of such plans without affirmatively providing for their official recognition by the Department and delineating the consequences of their adoption in relation to review of particular applications.

Specifically, and as discussed in much greater detail below, the Department's regulations should affirmatively authorize the following in addition to the right to comment on the Environmental Assessment:

1. Recognize local master plans adopted by any unit of local government in New York State delineating the land areas or territories where fracking wells and facilities should be prohibited and where they could potentially be approved.

2. if a municipal plan calls for the prohibition of fracking wells and facilities within certain land areas or territories, then the DEC regulations should encourage that such recommended prohibition be accompanied by a detailed statement of the reasons why the planning body has determined that fracking wells and facilities are not an appropriate use of land in that area.

3. if a municipal plan does identify land areas or territories that are potentially suitable for hydraulic fracturing wells and facilities, the DEC regulations should require DEC to work with the local planning body to identify recommended conditions on approval for all proposed fracking facilities in that land area or territory in order to address matters of local concern.

4. if an application is filed which seeks approval of a hydraulic fracturing well and facility in a location which a municipal plan designates as being appropriate, then local government should be given the opportunity to comment on the Environmental Assessment, in a manner similar to what the Department regulations analyzed in the rDSGEIS now propose.

5. in the event that local governments are determined not to have zoning authority over gas drilling, if an application is filed seeking approval of a hydraulic fracturing well and facility in a location where a municipal plan calls for the prohibition of fracking wells and facilities, then the following should occur:

a. a site specific analysis of the proposed well should be required;

b. the local planning body would be empowered to conduct an advisory public hearing on the proposed application and would be empowered to make recommended findings of fact and conclusions of law regarding whether the application should be approved for the site in question; and

c. the Department would be required to consider the recommended findings and conclusions. If the Department acts contrary to any of the recommended findings or conclusions, then the Department would be required to set forth the evidentiary basis for its contrary decisions in the record in writing and the reasons why the recommended findings and/or conclusions should be rejected.

The foregoing would create a meaningful voice and role for local government in the approval process for fracking activities. Proactive planning would be encouraged, rather than only reactive assessment of individual applications. The natural gas industry, as well as lease holders, community organizations, environmental groups and others, would be able to work collectively to shape local plans that delineate where fracking should and should not occur. Applications consistent with local plans would be approved far more readily, while those that are inconsistent with local plans would undergo a more rigorous review. The foregoing would enhance the quality of decisionmaking without burdening Department staff or resources. Indeed, the foregoing would likely reduce the administrative burdens on the Department and allow it to better allocate its limited resources.

Finally, the rDSGEIS does not provide adequate information or analysis to enable local governments to assess potential impacts as to those matters which the proposed regulatory regimen (tracking the state statutes) does leave almost exclusively to local government control: roads and taxes. The analysis of these potential impacts in the rDSGEIS is inadequate. Regarding potential traffic impacts, the rDSGEIS does not mandate site specific analysis of a well permit application if a road agreement is not agreed to with a unit of local government. Traffic impacts cannot be assessed in the absence of such an agreement and the failure to require a site specific review in its absence is a very significant defect in the rDSGEIS. Nor does the rDSGEIS take a "hard look" at potential fiscal impacts due to multiple omissions from the analysis.

COMMENTS

A. The Department Has the Power to Include Local Governments in the Review Process

The Department has forthrightly acknowledged that it does not have the resources needed to process the large volume of hydraulic fracturing permit applications anticipated,[1] let alone make highly localized and fact-specific determinations relating to zoning, road usage and other topics of traditionally local concern. Thus, an effective division of authority between state regulators and local officials is critical to fulfilling SEQRA's mandate of detailed environmental analysis and practicable mitigation.

An analysis of local powers relating to hydraulic fracturing must begin, as it does in the rDSGEIS, with the Oil, Gas and Solution Mining Law ("OGSML"), which provides: "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[2] Unfortunately, the analysis in rDSGEIS largely ends with that provision as well, leaving local governments with little guidance over their express jurisdiction and little role in other areas where they have relevant experience and expertise. Indeed, relying on the supersession of local laws other than those governing local roads or the right to collect real property taxes,[3] the table of "Regulatory Jurisdictions Associated With High Volume Hydraulic Fracturing" included in the rDSGEIS assigns local governments authority over only roads and the response to complaints about private water wells.[4] The scope of ECL § 23-0303(2) and whether that statute precludes use of local zoning laws to ban high volume hydraulic fracturing, however, is a highly contentious issue, and is currently being litigated in at least two state court proceedings.[5]

Additionally, the Department appears to overlook is that it is not precluded by state law, in the ECL or elsewhere, from allowing local government participation in the permit process concerning issues and matters as to which that local government cannot affirmatively legislate – regardless of the interpretation of the ECL that is ultimately propounded by the Courts. Moreover, the greater the breadth of preemption of local laws by state statute, the greater justification there is for including local governments in an advisory or similar role within the Department's administrative review process.

Notably, the analysis in the rDSGEIS fails to discuss, in any significant way, the power of the Department to affirmatively include local government participation in the approval process independent of the scope and reach of the above-referenced prohibition on local laws relating to

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[1] See Testimony of Alexander B. Grannis, Commissioner, New York State Department of Environmental Conservation before the New York State Assembly Standing Committee on Environmental Conservation (October 15, 2008) ("If a large number of permit requests for this type of drilling come in, we will certainly need additional staff in order to timely process the applications.")

[2] N.Y. Envtl. Conserv. Law ("ECL") § 23-0303(2) (McKinney 2011).

[3] DSGEIS, at 8-1.

[4] Id., at 8-3, Table 8-1.

[5] *See Cooperstown Holstein Corp. v. Town of Middlefield*, Index No. 2011-0930 (Sup. Ct. Otsego Co.) (filed Sept. 15, 2011); *Anschutz Exploration Corp. v. Town of Dryden*, Index No. 2011-0902 (Sup. Ct. Tompkins Co.) (filed Sept. 16, 2011).

the regulation of oil and gas drilling. Thus, it appears that, at minimum, the Department has not fully focused on the regulatory authority it possesses to incorporate local governments into the permitting process regardless of whether local laws are preempted in whole or in part. Nothing in the OGSML or any court decision interpreting that statute precludes or limits the power of the Department to incorporate local governments into the permitting process in a meaningful manner and to a significant extent.

In the absence of any such preclusion or limitation, there is no good reason why the rDSGEIS and the Department's proposed review process both fail to create a meaningful and significant role for local governments and fail to provide clear guidance concerning when and how an affected local government may come to the table during the application, analysis, and approval process proposed by the Department. The scope and role of local governments should be expanded significantly. What follows is a discussion of the very limited role of local governments in the review process analyzed in the rDSGEIS, followed by a proposal for a comprehensive and meaningful review process incorporating the insight and expertise of local governments – without compromising the authority of the NYSDEC to regulate hydraulic fracturing.

B. Local Government Participation as Analyzed in the rDSGEIS

The Department, in using a generic environmental impact statement ("GEIS") to assess the environmental impacts of natural gas drilling in the Marcellus and Utica Shale, chose to forgo, for the most part, site-specific review of environmental impacts. A GEIS is appropriate in cases, such as the development of the Marcellus Shale, where separate actions have generic or common impacts. However, a GEIS must still provide a meaningful review of environmental impacts, and should set forth specific conditions or criteria under which future actions will be undertaken or approved.

Therefore, even in using a GEIS, the NYSDEC should provide for meaningful and significant input from local governments in the permitting and approvals processes for siting hydraulic fracturing wells in order to provide meaningful review of future applications. In addition to being appropriate under SEQRA, as a practical matter, the DEC would greatly benefit by tapping into the resources that local governments could provide throughout the process of reviewing proposed applications. Precisely because the rDSGEIS does not attempt to address many potential inherently site-specific environmental impacts, including community character impacts, the rDSGEIS must provide much more meaningful and significant input from local government with regard to all issues of relevance to siting when a particular application is submitted for approval.

The Permitting Process as it is laid out in the current rDSGEIS would proceed as follows: an applicant seeking a well drilling permit must submit: (1) an application, including various site plans showing the proposed well location, the boundaries of the lease or unit containing the well and information about other nearby wells; and (2) an environmental assessment form ("EAF") (set forth in rDSGEIS Appendix 5) along with the EAF Addendum (set forth in rDSGEIS Appendix 6). An EAF is required for all applicants proposing to use 300,000 or more gallons of water per stage, whereas smaller operations are found to be covered by the mitigation

requirements set out in the 1992 GEIS. This process is the basis for analyzing the permit applicant's SEQRA compliance.

The rDSGEIS anticipates three scenarios regarding future SEQRA compliance for specific well permitting projects. First, based on the information provided in the well permitting application and accompanying EAF and EAF Addendum, a well permitting project might be found to conform to both the 1992 GEIS and the final SGEIS, in which case additional review would not be required. Second, a subsequent findings statement might need to be issued if a proposed action conforms to the GEIS and SGEIS but is not addressed in the Findings Statements. Third, a permit application that is not adequately addressed in the 1992 GEIS or in the SGEIS would require that additional information be submitted to the NYSDEC to determine whether the project would have the potential to generate one or more additional significant adverse environmental impacts. The DSGEIS specifies that this information might include an EAF or other analyses that would enable the NYSDEC to determine the potential for a significant adverse impact. Upon review of the additional information, NYSDEC would either issue a negative declaration, or a positive declaration that would require the preparation of a site-specific SEIS for the drilling application.

Significantly, local governments have virtually no role in any of the three scenarios laid out above. Despite the fact that local governments might be best-equipped to provide critical information or analyze some of the additional information provided in an environmental assessment form, they are conspicuously excluded from the scenarios anticipated in the rDSGEIS. A more prudent approach would involve local governments in the decision-making process even before the site-specific review stage. This would ensure that the concerns of local government are considered when the NYSDEC decides whether a site-specific review is merited.

In addition to the three scenarios described above, a GEIS may identify specific types of projects that categorically require additional environmental impact review. For such cases, a GEIS may include thresholds and criteria identifying triggers for supplemental review due to significant impacts that are site specific and are not adequately addressed or analyzed in the GEIS. The rDSGEIS for the Marcellus Shale permitting process includes a set of specific triggers for supplemental environmental review. For example, the rDSGEIS requires additional environmental impact assessment and a SEQRA determination of significance for the following types of projects:

1. Issuance of a permit to drill when high-volume hydraulic fracturing is proposed shallower than 2,000 feet anywhere along the entire proposed length of the wellbore;

2. Issuance of a permit to drill when high-volume hydraulic fracturing is proposed where the top of the target fracture zone at any point along the entire proposed length of the wellbore is less than 1,000 feet below the base of a known fresh water supply;

3. Issuance of a permit to drill when high-volume hydraulic fracturing is proposed at a well pad within 500 feet of a principal aquifer (to be re-evaluated two years after issuance of the first permit for high-volume hydraulic fracturing);

4. Issuance of a permit to drill when high-volume hydraulic fracturing is proposed on a well pad within 150 feet of a perennial or intermittent stream, storm drain, lake or pond;

5. Issuance of a permit to drill when high-volume hydraulic fracturing is proposed and the source water involves a surface water withdrawal not previously approved by the Department that is not based on the NFRM as described in Chapter 7;

6. Any proposed water withdrawal from a pond or lake;

7. Any proposed ground water withdrawal within 500 feet of a private well;

8. Any proposed ground water withdrawal within 500 feet of a wetland that pump test data shows would have an influence on the wetland; and

9. Issuance of a permit to drill any well subject to ECL 23 whose location is determined by NYCDEP to be within 1,000 feet of its subsurface water supply infrastructure.

C. Defects in the Proposed Review Process

Notably, the categorical triggers for environmental review do not include any land use impacts or other environmental impacts that represent potential significant burdens on local communities, such as traffic, noise, or community character impacts. At minimum, the Department should include in the categorical trigger for site-specific review, any instance in which an application for a permit is sought in a location where a local land use plan calls for the prohibition of hydraulic fracturing wells and facilities or other industrial use. This step is of critical importance in meeting SEQRA's requirement that the lead agency take a "hard look" at all of the potential environmental impacts, even those that are based on qualitative review.

The foregoing would not deprive or limit NYSDEC's superior authority to issue well permits or abandon its authority in favor of local government.[6] Rather, by implementing its superior regulatory authority, the Department would include local governments in the state administrative permit review process.

In this regard, it should be noted that the EAF Addendum requires the applicant to identify whether the proposed location of the well pad, or any other activity under the jurisdiction of the NYSDEC, conflicts with the local land use laws or regulations, plans or policies. Thus, the Department has already acknowledged the presumed existence of such plans. Rather than do so in this oblique manner, however, the Department should affirmatively authorize units of local government to engage in appropriate land planning activities and delineate the land areas potentially appropriate for fracking and those which are not.

By requiring information about compatibility with local plans on the EAF, the applicant would be required to identify whether the well pad is located in an area where the affected community has adopted a comprehensive plan or other local land use plan, and whether the proposed action is inconsistent with such plan(s).[7] If the applicant indicates that the proposed action is consistent with such plans or is not covered by any such local land use law, regulation, plan or policy, the NYSDEC would proceed to permit issuance. This makes sense.

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[6] "The Department's exclusive authority to issue well permits supersedes local government authority relative to well siting." rDSGEIS at p. 8-4.

[7] Id.

However, if the applicant fails to note the inconsistency, the local government would have an opportunity to correct the record by asserting an inconsistency at this stage, in which case the NYSDEC would respond as if the applicant had identified an inconsistency. This also makes sense.

Presumably, at this point, the NYSDEC would then request additional information in order to consider whether significant adverse environmental impacts would result from the proposed project that had not been addressed in the SGEIS. This is where the process breaks down. The Department's inquiry would be limited to whether a supplemental EIS would be required. And its inquiry would be based solely on the EAF and the materials submitted to a Department Staff member by the applicant and the local government. No public process is provided in the rDSGEIS to identify how serious the inconsistency is, the important issues raised by the inconsistency, and whether there are concerns that require consideration *independent of those that would trigger a supplemental EIS.* In other words, there is more to the review process than only determining whether a supplemental EIS is required. By limiting local government participation to that aspect of the process, the Department unduly truncates and circumscribes local government input.

Based on the inherent local elements of the siting decision when an applicant proposes a well in a location that is contrary to the local government's plan, it is essential to create a role for both local government and the public in identifying not only potential significant adverse environmental impacts and a need for a SEIS, but also appropriate conditions to protect neighbors and the public generally. Such a role for local governments is natural based on the expertise and experience of these entities that deal with local planning documents and decision-making regularly.

Thus, while local governments do have a role in the review process, that role is limited to notifying the NYSDEC that the application is inconsistent with local planning documents. In order to provide a meaningful review of local impacts resulting from such inconsistencies, the permit review process should include a more meaningful role for local governments in assessing these localized impacts, as discussed above. The local government is in the best position to understand and analyze the impacts a proposed action would have on truly local assets, and removing the local government from the decision-making process, especially on these local issues, is contrary to the "hard look" requirement for reviewing all potential environmental impacts under SEQRA.

While the rDSGEIS does improve upon the September 2009 DSGEIS by including new sections describing the general existing community character and analyzing potential impacts on community character, these sections provide only a cursory overview of the potential impacts large-scale development of natural gas resources might have on a local community. The rDSGEIS itself concedes that "the determination of whether these impacts are positive or negative cannot be made," tacitly acknowledging that the rDSGEIS simply isn't the appropriate vehicle for a comprehensive assessment of community character impacts. Such impacts, in order to be given a "hard look," must be also considered on a site-specific, local level.

In analyzing the baseline existing community character of the region underlain by the Marcellus Shale, the rDSGEIS breaks the analysis into three regions – Regions A, B, and C. Each of the regions is discussed in great detail, including information about the general land uses (mostly rural and agricultural), the historic areas, and the primary industries.[8] The community character analysis includes mention of a significant number of local planning documents including town comprehensive plans and master plans, most of which share the following characteristics: emphasis on the importance of conservation and preservation of natural areas and open space, including both agriculture land use and future expansion of recreational community areas; protection and maintenance of agricultural activities as a land use option in order to preserve open space; balance between the need to use and the need to preserve resources; the promotion historic preservation; the promotion and celebration of small town, rural character and natural beauty; and maintenance of open spaces and the pristine nature of the environment. The policy excerpts in the rDSGEIS that were extracted from municipal comprehensive and master plans demonstrate the difficulty of conducting a community character analysis on such a broad level. Without the details of a specific project in an identified location, it is impossible to engage in an analysis of environmental impacts.

The rDSGEIS does mention some impacts, including potential for increased employment opportunities, population growth, and general demographic changes in areas where the drilling would take place. Such impacts cannot fully be addressed in the context of a generic impact statement and must be addressed on a site-specific, case-by-case basis. Similarly, the impact of increased housing needs cannot be conceptualized without an initial understanding of the open space, public service capacities, and local aesthetic of the affected community, among many other factors.

The Department must seriously consider community character impacts, and involve the local government in the analysis of these impacts, especially given the extent to which natural gas development conflicts with the general character of the areas in question. The following section provides a proposal whereby local governments would provide a crucial resource throughout the Permitting Process.

D. <u>A Proposed Structure Providing for Meaningful Input By Local Governments</u>

1. The Department, in its regulations, should be required to recognize and consider the local master plans adopted by units of local government delineating the land areas or territories where fracking wells and facilities should be prohibited and where they could potentially be approved.

2. To promote thoughtful and comprehensive local planning with respect to gas drilling activities, where a municipal plan recommends prohibitions on drilling activities in one or more areas, the Department should encourage that recommended prohibitions be supported by a detailed statement of the reasons why the planning body has determined that fracking wells and

[8] Notably, while the rDSGEIS claims to apply for drilling on both the Marcellus and Utica shale formations, there is no community character analysis of the areas where drilling in the Utica Shale might take place. This deficiency is a fatal flaw to the analysis provided for impact on community character.

facilities are not an appropriate use of land in that area. These reasons would identify the policy bases for the recommended prohibition, grounded in fact.

3. Similarly, where a municipal plan identifies land areas or territories that are potentially suitable for hydraulic fracturing wells and facilities, the DEC regulations should require the Department to work with the local planning body to identify recommended conditions on approval for all proposed fracking facilities in that land area or territory which would address matters of local concern. These could include, but would not be limited to, traffic concerns and the need for a road agreement. Matters such as the presence of critical environmental areas, water supplies, flood plains, non-DEC regulated wetlands, noise limitations, etc., could also be addressed.

4. When an application is filed seeking approval of a hydraulic fracturing well and facility in a location which a municipal plan designates as being appropriate, then local government should be given the opportunity to comment on the Environmental Assessment, as the Department regulations analyzed in the rDSGEIS now propose.

5. In the event that local governments are determined not to have zoning authority over gas drilling, and where an application is filed seeking approval of a hydraulic fracturing well and facility in a location where a municipal plan calls for the prohibition of fracking wells and facilities, then a site specific analysis of the proposed well should be required. This is of critical importance and causes a local government's plan to have some real effect on the review process. In addition to triggering site specific review, the Department's regulations should authorize a local planning body to conduct an advisory public hearing on the proposed application and make recommended findings of fact and conclusions of law regarding whether the application should be approved for the site in question. Although advisory in nature, the Department's regulations should require the Department to consider the recommended findings and conclusions and further require that if it acts contrary to the recommended findings or conclusions, that the Department would be required to set forth the evidentiary basis in writing for it's contrary decision.

While this proposed regulatory regime would not give units of local government a veto power over any application nor require the Department to follow any unit of local government's recommendation, it would institutionalize the process of local government input, provide an opportunity for meaningful public comment, and require the Department to consider responsibly raised and articulated local concerns. By creating such a review structure, proactive local planning would be encouraged, rather than only reactive assessment of individual applications by the Department. The natural gas industry, as well as lease holders, community organizations, environmental groups and others, would be encouraged to work positively to shape local plans that delineate where fracking should and should not occur. Indeed, the natural gas industry would have a strong incentive to work with local planning bodies.

Applications consistent with local plans would be approved far more readily, while those that are inconsistent with local plans would undergo a more rigorous review which builds on what the Department currently proposes. The foregoing would enhance the quality of decisionmaking

without burdening Department staff or resources. Indeed, the foregoing would likely reduce the administrative burdens on the Department and allow it to better allocate its limited resources.

E. The rDSGEIS Fails to Include Analyses and Data Local Governments Require to Exercise Their Designated Authority Over Roads and Real Property Taxes

The rDSGEIS does not provide adequate information or analysis to enable local governments to effectively exercise their authority to regulate local roads and real property taxes under ECL § 23-0303(2). Regarding potential traffic impacts, the rDSGEIS does not mandate site-specific analysis of a well permit application if a road agreement is not agreed to with a unit of local government. Traffic impacts cannot be assessed in the absence of such an agreement and the failure to require a site specific review in its absence is a very significant defect in the rDSGEIS. Nor does the rDSGEIS take a "hard look" at potential fiscal impacts due to multiple omissions from the analysis.

The rDSGEIS acknowledges that truck traffic associated with hydraulic fracturing may cause significant adverse impacts upon rural highways and roads, many of which are not engineered to withstand high volumes of trips by oversized vehicles.[9] NYSDEC also states that "the majority of impacts on roads would occur on local roads near the wells," which are regulated and maintained by units of local government.[10] Thus, effective local regulation is needed to mitigate these impacts.

While relying upon local governments to oversee and enforce such mitigation, the DSGEIS fails to provide municipalities with the guidance, information, and participatory authority they require to do so. Without this necessary support, NYSDEC cannot mitigate transportation impacts "to the maximum extent practicable," as SEQRA requires.[11]

In Section 7.11.1.2, the DSGEIS correctly identifies several such sources of local regulation, including:

- NYS Vehicle and Traffic Law § 1640(a)(5), which authorizes cities and villages to exclude certain vehicles from highways specified by local authorities;
- NYS Vehicle and Traffic Law § 1640(a)(10), which authorizes cities and villages to establish a system of truck routes for trucks in excess of 10,000 pounds gross weight;
- NYS Vehicle and Traffic Law § 1640(a)(20), which authorizes cities and villages to establish weight, height, length and width criteria for the use of local highways;
- NYS Vehicle and Traffic Law §§ 1650, and 1660, which, in relevant part, authorize counties and towns to "exclude trucks, commercial vehicles, tractors, etc., in excess of designated weight, length, height, and width from [local or county] highways, or set limits for the hours of operation of such vehicles;"
- NYS Town Law § 130(7), which, in relevant part, authorizes town boards to regulate the use of streets and highways, and to restrict parking of all vehicles therein.

In the final SGEIS, NYSDEC should consider the addition of, inter alia:

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[9] DSGEIS, Executive Summary at 12; DSGEIS at 6-311.
[10] DSGEIS, at 7-135; DSGEIS, at 7-137.
[11] See NY Envtl. Conservation Law § 8-0109(1); 6 NYCRR § 617.11(d)(5).

- NYS Vehicle and Traffic Law § 385(15)(b), which authorizes units of local government to impose permit systems for and to collect fees from oversized vehicles travelling on local roads;
- NYS Municipal Home Rule Law § 10(i)(2)(a)(6), which authorizes units of local government to regulate the "acquisition, care, management and use of its highways, roads, streets, [and] avenues;"
- NYS Highway Law § 136 and General Municipal Law § 239-f, which authorize county and local officials to require driveway permits for constructing a new driveway or installing a construction entrance within a public right-of-way. Such permits may be conditioned upon an application for a 911 address which contains a site plan for the proposed drill site.

Well operators may also enter "road use agreements" with units of local governments, which set permissible truck routes for a particular operator; limit hours of intensive trucking; and require a bond or escrow payment to cover the costs of road repair. NYSDEC "strongly encourages operators to reach road use agreements with governing local authorities" prior to application for a drilling permit.[12] To strongly incentivize such cooperation, a site-specific SEQRA analysis should be required whenever an application is submitted without a road use agreement. This site-specific analysis is needed to support any subsequent determination that "despite the absence of such agreement, the traffic associated with the activity can be conducted safely and that the owner or operator would reduce the impacts from truck traffic on local road systems to the maximum extent feasible."[13]

Moreover, local governments must be expressly included in the development and review of the transportation plans, baseline surveys and traffic studies accompanying permit applications. The rDSGEIS requires applicants to submit transportation plans that would identify, inter alia, "the number of anticipated truck trips," "the proposed routes for such truck trips," and "the ability of roadways located on such routes to accommodate such truck traffic."[14] Applicants are also responsible for "conduct[ing] a baseline survey of local roads," forming the basis for a road condition study.

However, the rDSGEIS does not provide a defined role for local officials in reviewing these studies and plans, despite their express jurisdiction over local roads. Instead, such approval is left to the Department and the New York State Department of Transportation.[15] Omitting local officials from local road assessments is indefensible, particularly given NYSDEC's expectation that "local governments would ... be proactive in exercising their authority under NYS highway vehicle traffic laws." To enable effective local regulation, all transportation plans, baseline surveys and traffic studies must be reviewed by the relevant local decision-makers. Moreover, to the extent that such plans affect the use of local roads which lie beyond the state jurisdiction, relevant local officials warrant a clear role in the approval of such plans, alongside NYSDEC and the Department of Transportation.

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[12] DSGEIS, at 8-4.
[13] DSGEIS, at 7-138.
[14] DSGEIS, at 7-136.
[15] Id.

As with roads, the rDSGEIS recognizes that the OGSML does not preempt local governments from exerting their jurisdiction in the realm of real property taxes. Carving out this power for local governments is appropriate and necessary given the fact that the tax system provides a significant revenue source for local governments and the impacts of high-volume hydraulic fracturing will also present a significant financial burden in myriad forms, from infrastructure costs to costs associated with the need for more emergency services, among others. Due to the complexity and importance of this issue, the rDSGEIS should have addressed the potential revenue and burdens associated with hydraulic fracturing in a way that would give local governments the basis for crafting effective and fair real property tax laws. However, in its current form, the rDSGEIS does not provide local governments with the necessary tools to effectively harness their power to mitigate fiscal impacts through their authority under the Real Property Tax Law.

The Economic Assessment appended to the rDSGEIS ("Economic Assessment") provides a comprehensive outline of how natural gas properties are taxed under the New York Real Property Tax Law. This analysis is invaluable to local governments that will be relying on the assessments from these properties for funding. However, the rDSGEIS does not take the extra step to identify the potential issues and obstacles the current tax structure presents for local governments. Natural gas producing properties are taxed based on a unit of production value, which is calculated based on the Office of Real Property Tax Service's ("ORPTS") discounted net cash flow approach. The ORPTS approach takes into account depreciation, depletion, income and other taxes, capital investments, royalty interests not retained by the producer, operating and maintenance costs, other pertinent costs, and a rate of capitalization. The unit of production is multiplied by the annual production of the well, and then the equalization rate for the town (which is a set rate, and does not vary based on the type of property being taxed). The resulting number would be the assessed value of the natural gas producing property, and the local tax rates would apply.

The Economic Assessment explains the taxation framework very thoroughly,[16] but does not address the most critical problem local governments will face based on this tax structure. Namely, since the wells are not taxed until they start producing natural gas, local governments are unable to realize any benefit from the increased value of the natural gas drilling areas within their jurisdiction to mitigate any impacts resulting from drilling, construction and other industry activities that occur prior to the actual production of natural gas. Put another way, "while the magnitude of potential tax revenues seems impressive, the tax revenues expected from production do not alleviate the perceived cost-burden from exploration and development phases in the near term."[17]

The problem of delayed proceeds is compounded by the fact that the enforcement mechanism for this tax structure is deficient; a point entirely ignored in the rDSGEIS Economic Assessment. For most types of real property tax, the government's enforcement capacity includes the ability to put a lien on the delinquent property. However, because the real property taxes are assessed for natural gas wells based on production, and thus could be zero if no gas is produced, a lien on

[16] Economic Assessment, at p. 4-117 to 4-118.

[17] Sullivan County Gas Drilling Task Force, "Preparing for Natural Gas Development: Understanding Impacts and Protecting Public Assets," at p. 35 (February 13, 2009).

the intangible product of the well isn't possible. Seizure or lien is not available against natural gas wells, introducing additional uncertainty into the local government's calculation of tax revenues.

The rDSGEIS further frustrates the ability of the local governments to effectively utilize their authority under the real property tax law by giving unequal weight to the positive and negative fiscal impacts of the industry. The Economic Assessment provides a stark illustration of this deficiency, devoting almost twenty-two pages to tables with the estimated tax revenue dollar amounts for various regions and counties, while spending less than a single page discussing the associated costs that will deplete those funds.[18] In order to provide a meaningful review of the fiscal impacts of hydraulic fracturing in New York State, the rDSGEIS must do more than sum the potential increased revenues and brush aside the burdens as an afterthought.

Natural gas drilling could lead to positive economic impacts including increased employment and associated economic stimulus due to population growth. However, with the benefits come costs, and while the benefits of natural gas drilling are largely enjoyed by the private sector, the costs come at the expense of the public. The rDSGEIS Economic Assessment provides a lop-sided discussion of how these costs and benefits are balanced, and is therefore inadequate.

F. Other Matters of Local Importance

In addition to all of the foregoing, the Department should acknowledge that there are other matters of local concern which its regulations are not intended to preclude from local government control and which are likely to lie outside the Department's regulatory focus.

As a consumer protection matter, municipalities may enact "Green River" ordinances that mandate the registration and regulate the practices of "land men" tasked with soliciting leases from property owners on behalf of drilling companies.[19] There have already been reports of perceived abuses and misrepresentations by such leasing agents.[20] While this could be considered a potential community character impact, certainly it is a matter that units of local government should not be precluded from addressing via business registration and "Green River" ordinances.

The rDSGEIS proposes "directing noise generating equipment" away from populated areas and "scheduling the more significant noise generating during daylight hours" as recommended mitigation activities.[21] With respect to light pollution, the rDSGEIS suggests "encouraging local agencies (towns, counties, and regions) to identify areas of high visual sensitivity, which may require additional visual mitigation" under SEQRA.[22] Generally-applicable local noise and light

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[18] Compare, discussion at pp. 4-119 to 4-137, with the last paragraph on p. 4-138.

[19] *See, e.g., People v. Bohnke*, 287 N.Y. 154 (1941) (upholding local law prohibiting solicitation and distribution of pamphlets or advertising matter on private residential property without consent of occupants previously given).

[20] Martha T. Moore, 'Fracking' Fractures N.Y. County, USA Today, Aug. 24, 2010; Mireya Navarro, Signing Drilling Leases, and Now Having Regrets, N.Y. Times, Sept. 23, 2011 ("Some property owners argue they were misled by representatives of gas companies who never uttered the words 'hydraulic fracturing.'")

[21] DSGEIS, at 7-128.

[22] DSGEIS, at 7-126.

pollution ordinances are specifically designed to address these precise impacts, however, and many affected communities already have such regulations in place. It is not sufficient to encourage permit applicants to "review" these ordinances;[23] NYSDEC should mandate compliance with them. These also are considerations that a local government could address as part of its overall planning.

Moreover, relying solely upon "supplementary permit conditions" and "additional site-specific noise mitigation measures"[24] leaves a regulatory gap for those impacts that many not exceed SEQRA's threshold for significance but are still subject to local regulations. NYSDEC should thus clarify that local governments are empowered to enforce generally-applicable noise and light pollution laws.

To preserve areas of environmental, agricultural, social, historic, or recreational value, local officials may designate "Critical Environmental Areas" ("CEA") pursuant to 6 NYCRR § 617.14(g). To designate a CEA, a local agency must hold a public hearing, map the area, and provide NYSDEC with a written description of its "exceptional or unique character."[25] Following such a designation, any hydraulic fracturing application that impacts the CEA must undergo its own Site specific review, with such impacts mitigated to the maximum extent practicable. The rDSGEIS should affirm this pre-existing SEQRA requirement, and DEC should consultant with relevant local officials in determining appropriate mitigation measures to preserve CEAs.

Local governments also play a critical role in regulating floodplain development. While NYSDEC proposes to prohibit the siting of well pads within the 100-year floodplain, fracturing activities may still impact other areas of heightened flood risks, including but not limited to the 500-year floodplain. Flooding is a particular concern for high-volume hydraulic fracturing, which often involves bulk supplies of chemical additives that "might accidentally enter the environment in large quantities" as a result of severe flooding.[26] Thus, to the extent that local zoning ordinances impose additional restrictions beyond the 100-floodplain, NYSDEC should affirm that such local controls are preserved and enforceable.

The foregoing examples are meant to be illustrative, not exhaustive, of the many potential hydraulic fracturing impacts that involve matters of historically local jurisdiction. NYSDEC's High Volume Hydraulic Fracturing Proposed Regulations do not, and cannot, adequately regulate all of these areas. Similarly, relying solely on SEQRA mitigation is also insufficient, because it limits regulatory authority to only those impacts deemed significant under that statute and relies upon state officials to impose and enforce permit conditions covering inherently matters of local concern. Thus, the DSGEIS should clarify that noise control ordinances, light pollution limits, and other similar local laws of general applicability remain enforceable as applied to hydraulic fracturing.

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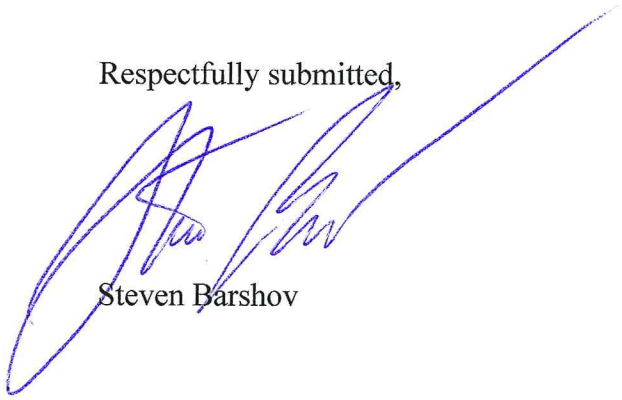
[23] See DSGEIS, at 7-135.
[24] See id.
[25] 6 NYCRR § 617.14(g)(2).
[26] rDSGEIS, at 6-66.

CONCLUSION

If high volume hydraulic fracturing is to be allowed, then the permit process proposed by the Department should be modified to significantly strengthen local government and local public participation as set forth in detail above.

Respectfully submitted,



Steven Barshov