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COMMENT TO REVISED DRAFT SUPPLEMENTAL

GENERIC ENVIRONMENTAL IMPACT STATEMENT

ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM

DECEMBER 2011

The New York City Bar Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The Committee on Environmental Law and the Committee on Land Use Planning and Zoning (collectively, the "Committees") focus and deliberate on legal and policy issues relating to the environment and to land use planning and zoning, respectively. The Committees respectfully submit this comment to the New York State Department of Environmental Conservation ("DEC" or "Department") to convey the New York City Bar Association's position regarding the discussion of local law issues in the Revised Draft Supplemental Generic Environmental Impact Statement ("Revised dSGEIS"), for high-volume hydraulic fracturing ("hydrofracking") in the Marcellus Shale and other low-permeability gas reservoirs.

The Department issued the Revised dSGEIS on September 7, 2011. Comments are due by December 12, 2011. We write to comment on the Revised dSGEIS to the extent it addresses whether local municipalities may exercise land-use or zoning control relative to the siting of hydrofracking wells.

Whether intentionally or not, we believe that the Revised dSGEIS could be read to reflect that DEC has taken a position on whether Environmental Conservation Law ("ECL") § 23-0101 supersedes municipalities' zoning authority, although the text could also be read in a more

neutral manner. As this precise issue is currently being litigated in at least two state court proceedings and ultimately will be decided by the courts,[1] and as the purpose of the SGEIS is to provide environmental analysis, we believe that the text of the final SGEIS should be clarified to state that the Department is not taking a position on this issue. Moreover, we do not believe that the relevant statutory provisions contain a clear statement of legislative intent to supersede local zoning ordinances, and analogous precedent under the Mined Land Reclamation Law indicates that municipalities retain their well-settled authority to regulate land use and zoning. For all of these reasons, we believe DEC should clarify that this issue will be settled by the courts and that it is not taking a position on this issue in the SGEIS.

Background

Hydrofracking is a method of extracting natural gas from shale formations under the ground. In broad terms, hydrofracking involves drilling wells into which water containing chemical additives is injected at high pressure. It is often used in conjunction with horizontal drilling and multi-well pad development. Hydrofracking is an extraction method associated with low-permeability gas reservoirs of the Marcellus and Utica shale formations, which underlie much of the Southern Tier counties of New York State (as well as larger sections of Pennsylvania).

As New York State has taken steps to evaluate the environmental risks of hydrofracking, with a view towards developing a regulatory scheme permitting the activity, an issue has arisen concerning whether local land-use or zoning authority can restrict or prohibit the activity. Many upstate towns have pre-existing zoning plans that prohibit heavy industrial uses such as oil and gas extraction. Other towns, in anticipation of the State's permitting of hydrofracking, have adopted resolutions prohibiting all oil and gas exploration and extraction uses within their town, and/or amended their zoning ordinances so as to prohibit all such uses.

The Revised dSGEIS's Discussion of Local Land Use Authority.

The Department, in Section 8.1.1 of the Revised dSGEIS, references a supersession provision of New York State's Oil, Gas and Solution Mining Law, codified in article 23 of the ECL §§ 23-0101 *et seq.*, and states that DEC's "exclusive authority to issue well permits supersedes local government relative to well siting," *id.* Section 8.1.1.5.[2] The related discussion in the Revised dSGEIS seems to suggest that not only is local land-use and zoning authority superseded in this regard, but that local zoning laws have only limited relevance to DEC's permitting process.

While Section 8.1.1.5 requires the applicant "to identify whether the proposed location of the well pad" or ancillary activities "conflicts with local land use laws or regulations, plans or policies," or with a community's "comprehensive plan," and affords the potentially affected local

[1] *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).

[2] Sections 8.1.1 and 8.1.1.5 are reprinted in full in attachments to this comment letter.

government with an opportunity to provide "notice of an asserted conflict," the Section provides that the resolution of any such conflict rests within the exclusive authority of DEC. Section 8.1.1.5 states that, should such a conflict arise, the Department would request "additional information" so that DEC can consider one issue:

> whether significant adverse environmental impacts would result from the proposed project that have not been addressed in the SGEIS and whether additional mitigation or other action should be taken in light of such significant impacts.

Id. Similar language appears in Section 7.12 of the Revised dSGEIS. Table 8.1 of the Revised dSGEIS identifies no regulatory jurisdiction of local government associated with hydrofracking, other than with respect to road use.[3] There is no suggestion in any of these provisions that local zoning restrictions on industrial uses will be taken into account in the Department's permitting decision; rather, if a conflict arises, it appears that NYSDEC will simply look to the mitigation provisions of the Revised dSGEIS.

Thus, while the Department may take notice of the fact that local zoning laws restrict the siting of hydrofracking wells, DEC, in its silence regarding any deference to such conflicting zoning restrictions, seems to reserve authority to itself as the ultimate decision-maker concerning the siting of hydrofracking wells. To the extent the Department is suggesting or assuming that local zoning authority is overridden in this regard, DEC should reconsider and clarify this point, for the reasons outlined below.

Until the Courts Have Spoken, the Revised dSGEIS Should Not Suggest that Local Zoning Laws Regulating the Siting of Oil & Gas Operations Are Superseded.

Sections 7.12 and 8.1.1.5 of the Revised dSGEIS appear to suggest that New York's Environmental Conservation Law supersedes local authority to enact and enforce zoning laws to the extent that such laws impact on oil and gas extraction. We believe that New York law provides otherwise.

Initially, we would note that the environmental review process itself does not override local zoning ordinances. In *WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 165 A.D.2d 578, 581 (3rd Dep't 1991), the Appellate Division stated: "SEQRA neither preempts nor interferes with local zoning ordinances (ECL § 8-0103[6] . . .)." On further appeal in that case, the Court of Appeals stated: "[E]xcept where the proposed action is a zoning amendment, SEQRA review may not serve as a vehicle for adjudicating 'legal issues concerning compliance with local government zoning' (*Matter of Town of Poughkeepsie v. Flacke*, 84 A.D.2d 1, 5, *lv. denied*, 57 N.Y.2d 602)." *WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373, 382 (1992).

A. Express Preemption Analysis

[3] Sections 7.12 and Table 8.1 are reprinted in full in attachments to this comment letter.

As the Revised dSGEIS notes, *see supra* at page 2, the Oil, Gas and Solution Mining Law contains an express supersession provision, which reads as follows:

> 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.

ECL § 23-0303(2) (emphasis supplied). The statute thus draws a distinction between local laws or ordinances that relate to "regulation" of oil and gas activities and those that do not; only the former are superseded (at least, to the extent such laws or ordinances do not involve jurisdiction over local roads or local property taxes). Local laws or ordinances that do not relate to "regulation" of such oil and gas activities are not superseded.

As a threshold matter, the Court of Appeals has held that "in the absence of a *clear expression of legislative intent* to preempt local control over land use," statutory language should not be interpreted to supersede local zoning authority. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996) (emphasis added). *See also People v. Winner's Circle Flea Market, Inc.*, 102 Misc. 2d. 355 (Dist. Ct. Suffolk Co. 1979) ("Where … the court is called upon to reconcile an apparent conflict between a grant of authority to regulate an area, and the State's own enactments on the subject, preemption should be denied unless such intent is clearly expressed.") Municipal regulation of local land use is firmly established under the General City Law, Town Law, Village Law, and Municipal Home Rule Law, and we do not believe there is a "clear expression" in ECL § 23-0303(2) that the legislature intended to displace that specific zoning authority. *Compare* ECL § 23-0303(2) *with* ECL § 27-1107 (expressly displacing local zoning authority over the siting of hazardous waste treatment facilities).

Moreover, our analysis suggests that local zoning laws are not superseded by ECL § 23-0303(2) because they are not related to the "regulation of the oil, gas and solution mining industries." Instead, they are an exercise of the town's statutory authority under New York law to decide how its land will be used. This is true whether those zoning laws restrict industrial activity or oil and gas extraction to certain areas of a town or prohibit such uses altogether. Our conclusion rests not just on the plain language of § 23-0303(2), but on Court of Appeals authority drawing the same distinction in the context of a similarly worded supersession clause pertaining to mineral extraction.

The Court of Appeals first drew this distinction in *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987). *Frew Run* involved the New York State Mined Land Reclamation Law, ECL §§ 23-2701 to 23-2727, which established a comprehensive regulatory scheme for DEC to regulate mining and the reclamation of mined lands. The Mined Land Reclamation Law contains an express supersession provision, which provides for the supersession of all state or local laws "relating to the extractive mining industry." ECL § 23-2703(2). In *Frew Run*, an operator of a sand and gravel mine challenged a town zoning law establishing a zoning district, in which sand and gravel mining operations are not a permitted use. The operator argued that the zoning law was superseded because it "related" to extractive mining. The Court of Appeals disagreed, however: "[W]e cannot interpret the phrase 'local

laws relating to the extracting mining industry' as including the [t]own . . . Zoning Ordinance." 71 N.Y.2d at 131. The zoning ordinance relates not to the extractive mining industry, the Court of Appeals held, but rather to "an entirely different subject matter and purpose," *i.e*., regulating the construction and use of buildings and use of land in the town. *Id*.[4]

While acknowledging that regulation of land use by means of zoning ordinances "inevitably exerts an incidental control" over businesses that are allowed in some zoning districts but not in others, *id*., the Court of Appeals held that such "incidental control" resulting from the town's exercise of its right to regulate land use through zoning "is not the type of regulatory enactment relating to the 'extractive mining industry' which the legislature could have envisioned as being within the prohibition of the statute," *id*. By contrast, local laws dealing with "the actual operation and process of mining" would be superseded. *Id.*

In holding that local land use laws were not superseded, the Court of Appeals relied not only upon the plain meaning of the supersession clause, but also upon the desirability of avoiding a construction of the statute that would conflict with the Legislature's express grant of authority to towns to adopt zoning regulations. 71 N.Y.2d at 133 (citing Statute of Local Governments § 10(6); Town Law § 261). "By simply reading ECL § 23-2703(2) in accordance with what appears to be its plain meaning . . . the statutes may be harmonized, thus avoiding any abridgement of the town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10(6) and Town Law § 261." *Id*. at 134.[5]

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[4] The version of ECL § 23-2703(2) before the Court of Appeals in *Frew Run* contained an exemption from supersession, which read:

> [P]rovided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

Notwithstanding that this exemption language refers to "local zoning" the Court of Appeals did not rely on this exemption in upholding the local land use laws and instead drew the distinction between "local legislation which purports to control or regulate extractive mining operations" and regulation of land use through zoning powers. *Frew Run*, 71 N.Y.2d at 134. In reaching its decision, the Court did not construe the exemption language as exempting all local zoning from supersession. Instead, the Court construed the exemption as "excepting local legislation prescribing stricter standards for land reclamation." *Frew Run*, 71 N.Y.2d at 134. For this reason, we believe that the presence of a limited exemption from supersession in the version of ECL § 23-2703(2) that was before the Court of Appeals in *Frew Run* does not affect the clear distinction that the Court drew between local zoning and local laws that regulate operations.

[5] In 1991 the Legislature codified *Frew Run*'s interpretation of the supersession clause in ECL § 23-2702, by amending that section to expressly permit local zoning. The legislature added a provision to the statute which now states that "nothing in this title shall be construed to prevent any local government from: * * * b. enacting or enforcing local zoning ordinances or

The distinction between regulating industrial activity and regulating land use was reaffirmed in the Court of Appeals' decision in *Gernatt Asphalt, supra,* which involved a zoning ordinance that prohibited mining uses anywhere within the town. The Court of Appeals rejected the asphalt company's argument that the zoning ordinance conflicted with the Mined Land Reclamation Law's stated purpose of fostering the mining industry in the State, and that "if the land within the municipality contains extractable minerals, the statute obliges the municipality to permit them to be mined somewhere within the municipality." The Court squarely held that "[n]othing in the [statute]" imposes upon the town the obligation to allow mineral extraction. 87 N.Y.2d at 1235.

We see no material difference between the Mined Land Reclamation Law's supersession of local laws "relating to the extractive mining industry," and the Oil, Gas and Solution Mining Law's supersession of laws "relating to the regulation of the oil, gas and solution mining industries."

The decision in the only New York case that has addressed ECL § 23-0303(2), *Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432 (N.Y. Sup. Ct. Erie Co.), *aff'd,* 89 A.D.2d 1056 (4th Dep't), *lv. den.*, 58 N.Y.2d 602 (1982), is inapposite. *Envirogas* invalidated a zoning ordinance requiring the payment of a $2500 compliance bond and a $25 permit fee for oil and gas wells, reasoning that the ordinance regulated gas and oil well-drilling operations. 112 Misc. 2d at 433. Unlike the traditional exercise of land use authority at issue in *Frew Run* and *Gernatt Asphalt*, the court held that such express regulation of industrial activity falls squarely within the supersession language of ECL § 23-0303(2).

Nor do we believe that the enumerated exceptions within ECL § 23-0303(2), preserving local regulations over roads and taxes, affect the preceding analysis. Both road use and taxation can fairly be viewed as "regulation of the oil, gas and solution mining industries," *id*., that would be superseded in the absence of the statutory carve-outs. Local zoning, by contrast, controls land use within the town and does not "regulate" oil and gas operations. Accordingly, local zoning is not subject to the statute's supersession provision, and there was thus no need for the Legislature to expressly exempt local zoning from the reach of that provision.[6] In any event, the Court of

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laws which determine permissible uses in zoning districts." ECL § 23-2703(2)(b). As stated in the McKinney's Practice Commentaries to § 23-2703:

> This section (subd. 2) originally preempted all other laws relating to mining, except local laws imposing stricter reclamation requirements. * * * A 1991 amendment codified [the *Frew Run*] result, explicitly allowing local laws of general applicability and local zoning (subd. 2[a], [b[]).

McKinney's ECL § 23-2703, *Practice Commentaries*, 2007 Main Volume.

[6] The statute at issue in *Frew Run* also contained a carve-out from supersession that explicitly allowed municipalities to impose stricter standards on the reclamation of mined land. *See*, *supra*, at fn. 4. The Court of Appeals did not address the *expressio unius* principle in *Frew*

Appeals has held that displacement of local zoning authority should be clear and explicit. *See, supra*, at p. 4.

B. Implied or Conflict Preemption

Alternative preemption theories, such as implied and conflict preemption, do not apply and would not support displacement of local zoning authority.

Implied preemption is where the legislature "has impliedly evinced its desire" to preempt local law, which intent may be implied from a declaration of State policy by the legislature or from the legislature's enactment of "a comprehensive and detailed regulatory scheme in a particular area." *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983). Conflict preemption, by comparison, is found when provisions of local law are inconsistent or in conflict with State law. *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217 (1987) ("[T]he local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law.").

In our view, neither of these alternative preemption theories applies because the Legislature has provided an express supersession provision. *People v. Applied Card*, 11 N.Y.3d 105, 113 (2008), *cert. denied*, 129 S. Ct. 999 (2009) ("When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption."). As provided by the case law, the resolution of the supersession issue turns on the proper construction of the statutory supersession provision. *Id.*; *Frew Run*, 71 N.Y.2d at 130-31 ("Unlike preemption cases which require the court to search for indications of an implied legislative intent to preempt . . . we deal here with an express supersession clause. The appeal turns on the proper construction of this statutory provision."); *Gernatt Asphalt*, 87 N.Y.2d at 681 ("[U]nder the [Mined Land Reclamation Law], the preemption question was one of statutory construction, not a search for implied preemption because the Legislature included within the [Mined Land Reclamation Law] an express supersession clause.").

C. Sections 7.12 and 8.1.1.5 of the Revised dSGEIS
Should be Revised to Remain Neutral on Local Law Issues

For the foregoing reasons, Sections 7.12 and 8.1.1.5 of the Revised dSGEIS should be reconsidered and revised. As we conclude above, we do not believe ECL § 23-0303(2) was intended to deprive towns of the authority, conferred by New York statute, to make land use decisions within their towns with respect to industrial uses (such as hydrofracking). Moreover, the Legislature has not granted the Department authority to make land use decisions.

Given that these issues are now the subject of litigation, we believe the courts, and not DEC, should determine the validity of particular zoning or land use ordinances as they may apply to hydrofracking. We, therefore, believe it would be inappropriate for DEC to make local

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Run and did not find that the express carve-out from supersession meant that there were no other exceptions from supersession, including the exercise of local zoning power by the municipality.

land use decisions and that DEC should clarify the SGEIS to make clear that it is not asserting authority to do so.

* * * * *

The New York City Bar Association shares the commitment of the Department to study and evaluate the extraction of natural gas and to ensure that any such extraction in New York State takes place in an environmentally sound manner. We greatly appreciate the opportunity to contribute to what appears to be a meaningful environmental review process, and to express our thoughts regarding the extent to which local land-use and zoning authority and decision-making should be respected in the Department's environmental impact assessment and permitting decisions.

Respectfully submitted,

Committee on Environmental Law[*]
Committee on Land Use Planning and Zoning
New York City Bar Association

[*] Carolyn Jaffe, a member of the Committee on Environmental Law, dissented from the Committees' analysis of municipal authority to ban hydrofracking through local zoning ordinances for the following reasons:

> The Oil, Gas and Solution Mining Law places comprehensive authority in the DEC to regulate hydrofracking and the statute includes an express provision preempting local laws. The Committees' three arguments that this broad preemption excludes local zoning are not well taken. First, the Committees' interpretation of this broad preemption provision is contrary to the plain language of the statute and undermines the legislative intent to develop New York State's natural gas resources in a comprehensive and environmentally sound manner under DEC oversight and control. Second, the Committees' reliance on the preemption provision contained in the Mined Land Reclamation Law is misplaced because that law, unlike the preemption provision at issue here, provides an express carve-out for local zoning ordinances. Third, the *Gernatt* decision provides no support for the Committees' conclusion because that case involved a preemption provision with an express carve-out for local zoning authority.

ATTACHMENTS

New York State Department of Environmental Conservation

Revised Draft

Supplemental Generic Environmental Impact Statement

On The Oil, Gas and Solution Mining

Regulatory Program

Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs

Lead Agency:

NYSDEC, 625 Broadway, Albany, NY 12233

Lead Agency Contact:

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Action Location: **Statewide**

Comments Due By: **December 12, 2011**

Prepared By:

NYSDEC, with Assistance from Alpha Environmental, Inc., Ecology and Environment Engineering, P.C., ICF International, URS Corp, NTC Consultants and Sammons/Dutton LLC.

Date of Completion of dSGEIS: **September 30, 2009**

Date of Completion of Revised dSGEIS: **September 7, 2011**

construction of new facilities. The majority of financing for improvements is provided by the rail companies or through partnerships and investment partnerships with major users. At the same time, there can be a significant demand for public investment as well. The variety of financing and investment instruments can be drawn from Pennsylvania's experience, for example SEDA-COG Joint Railway Authority, which financed roughly $16 million of projects in six counties through a combination of USDOT grants ($10 million), a $3.8 million PennDOT grant, and a $2.2 million public-private partnership.

7.12 Community Character Mitigation Measures[99]

Local and regional planning documents are important in defining a community's character and are the principal way of managing change within a community. These plans are used to guide development and provide direction for land development regulations (e.g., zoning, noise control, and subdivision ordinances) and designation of special districts for economic development, historic preservation, and other reasons.

As discussed in Section 3, the Department would require the applicant to prepare an EAF Addendum for gathering and compiling the information needed to evaluate high-volume hydraulic fracturing projects (≥300,000 gallons) in the context of this SGEIS and its Findings Statement, and to identify the required site-specific mitigation measures.

The EAF Addendum would be required as follows:

- With the application to drill the first well on a pad constructed for high-volume hydraulic fracturing, regardless of whether the well is vertical or horizontal;
- With the applications to drill subsequent wells for high-volume hydraulic fracturing on the pad if any of the information changes; and
- Prior to high-volume re-fracturing of an existing well.

The EAF Addendum would require the applicant to identify whether the location of the well pad, or any other activity under the jurisdiction of the Department, conflicts with local land use laws, regulations, plans, or policies. The applicant would also be required to identify whether the well

[99] Section 7.12, in its entirety, was provided by Ecology and Environment Engineering, P.C., August 2011 and was adapted by the Department.

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).

Where the project sponsor indicates that the location of the well pad, or any other activity under the jurisdiction of the Department, is either consistent with local land use laws, regulations, plans, or policies, or is not covered by such local land use laws, regulations, plans, or policies, no further review of local land use laws and policies would be required.

In cases where a project sponsor indicates that all or part of their proposed application is inconsistent with local land use laws, regulations, plans, or policies, or where the potentially impacted local government advises the Department that it believes the application is inconsistent with such laws, regulations, plans, or policies, the Department intends to request additional information in the permit application to determine whether this inconsistency raises significant adverse environmental impacts that have not been addressed in the SGEIS.

In addition, a supplemental site-specific review is required when an applicant proposes to construct a well pad on a farm within an Agricultural District when the proposed disturbance is larger than 2.5 acres. In such cases, the Department would consult with the DAM to develop additional permit conditions, best management practice requirements, and reclamation guidelines to be followed.

Examples of the proposed Agricultural District requirements include but are not limited to the following:

- decompaction and deep ripping of disturbed areas prior to topsoil replacement;
- removal of construction debris from the site;
- no mixing of cuttings with topsoil;
- removal of spent drilling muds from active agricultural fields;
- location of well pads/access roads along field edges and in nonagricultural areas (where practicable);
- removal of excess subsoil and rock from the site; and

- fencing of the site when drilling is located in active pasture areas to prevent livestock access.

Implementation of these measures would lead to successful reestablishment of agricultural lands when well pads are no longer productive.

The socioeconomic, visual, noise, and transportation impacts discussed in Sections 6.8, 6.9, 6.10, and 6.11, respectively, also impact community character. To the extent that these impacts are mitigated as discussed in Sections 7.8 (Socioeconomic), 7.9 (Visual), 7.10 (Noise), and 7.11 (Transportation), impacts on community character would also be mitigated.

7.13 Emergency Response Plan

There is always a risk that despite all precautions, non-routine incidents may occur during oil and gas exploration and development activities. An Emergency Response Plan (ERP) describes how the operator of the site will respond in emergency situations which may occur at the site. The procedures outlined in the ERP are intended to provide for the protection of lives, property, and natural resources through appropriate advance planning and the use of company and community assets. The Department proposes to require supplementary permit conditions for high-volume hydraulic fracturing that would include a requirement that the operator provide the Department with an ERP consistent with the SGEIS at least 3 days prior to well spud. The ERP would also indicate that the operator or operator's designated representative will be on site during drilling and/or completion operations including hydraulic fracturing, and such person or personnel would have a current well control certification from an accredited training program that is acceptable to the Department.

The ERP, at a minimum, would also include the following elements:

- Identity of a knowledgeable and qualified individual with the authority to respond to emergency situations and implement the ERP;
- Site name, type, location (include copy of 7 ½ minute USGS map), and operator information;
- Emergency notification and reporting (including a list of emergency contact numbers for the area in which the well site is located; and appropriate Regional Minerals' Office), equipment, key personnel, first responders, hospitals, and evacuation plan;

Chapter 8 PERMIT PROCESS AND REGULATORY COORDINATION

8.1 Interagency Coordination

Table 8.1, together with Table 15.1 of the 1992 GEIS, shows the spectrum of government authorities that oversee various aspects of well drilling and hydraulic fracturing. The 1992 GEIS should be consulted for complete information on the overall role of each agency listed on Table 15.1. Review of existing regulatory jurisdictions and concerns addressed in this revised draft SGEIS identified the following additional agencies that were not previously listed and have been added to Table 8.1:

- NYSDOH;
- USDOT and NYSDOT;
- Office of Parks, Recreation and Historic Preservation (OPRHP);
- NYCDEP; and
- SRBC and DRBC.

Following is a discussion on specific, direct involvement of other agencies in the well permit process relative to high-volume hydraulic fracturing.

8.1.1 Local Governments

ECL §23-0303(2) provides that the Department's Oil, Gas and Solution Mining Law supersedes all local laws relating to the regulation of oil and gas development except for local government jurisdiction over local roads or the right to collect real property taxes. Likewise, ECL §23-1901(2) provides for supersedure of all other laws enacted by local governments or agencies concerning the imposition of a fee on activities regulated by ECL 23.

8.1.1.1 SEQRA Participation

For the following actions which were found in 1992 to be significant or potentially significant under SEQRA, the process will continue to include all opportunities for public input normally provided under SEQRA:

Table 8.1
Regulatory Jurisdictions Associated With High-Volume Hydraulic Fracturing
(Updated August 2011)

Regulated Activity or Impact	DEC Divisions & Offices							NYS Agencies				Federal Agencies			Local Agencies		Other	
	DMN	DEP	DOW	DER	DMM	DFWMR	DAR	DOH	DOT	PSC	OPRHP	EPA	USDOT	Corps	Local Health	Local Govt.	NYC DEP	RBCs
General																		
Well siting	P	-	-	-	-	-	-	-	-	-	*	-	-	-	-	-	*	*
Road use	-	-	-	-	-	-	-	-	A	-	-	-	-	-	-	P	-	-
Surface water withdrawals	S	*	P*	-	-	P	-	-	-	-	-	-	-	-	-	-	-	P*
Stormwater runoff	S	-	P	-	-	-	-	-	-	-	-	-	-	-	-	-	*	*
Wetlands permitting	-	P	-	-	-	S	-	-	-	-	-	-	-	P	-	-	*	*
Transportation of fracturing chemicals	-	-	-	S	-	-	-	-	P	-	-	-	P	-	-		-	-
Well drilling and construction	P	-	-	-	-	-	-	-	-	-	-	-	-	-	-	*	-	*
Wellsite fluid containment	P	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Hydraulic fracturing/ refracturing	P	-	*	-	-	-	-	*	-	-	-	-	-	-	-	-	-	*
Cuttings and reserve pit liner disposal	P	-	-	A	A	-	-	*	-	-	-	-	-	-	-	-	-	-
Site restoration	P	-	-	-	-	S	-	-	-	-	-	-	-	-	-	-	-	-
Production operations	P	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Gathering lines and compressor stations	S	S	-	-	-	-	S	-	-	P	-	-	-	-	-	-	-	-
Air emissions from all site operations	S	-	-	-	-	-	P*/A*	*	-	-	-	-	-	-	-	-	-	-
Well plugging	P	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Invasive species control	S	-	-	-	-	P	-	-	-	-	-	-	-	-	-	-	-	-
Fluid Disposal Plan 6NYCRR 554.1(c)(1)																		
Waste transport	-	-	-	P	-	-	-	-	-	-	-	-	-	-	-	*	-	-
POTW disposal	-	*	P	-	-	-	-	-	-	-	-	-	-	-	-	-	*	*
New in-state industrial treatment plants	-	P	S	-	-	-	-	-	-	-	*	-	-	-	-	-	*	*
Injection well disposal	S	P	S	-	-	-	-	-	-	-	-	P	-	-	-	-	-	*
Road spreading	-	-	-	-	P	-	-	*	-	-	-	-	-	-	-	P	-	-
Private Water Wells																		
Baseline testing and ongoing monitoring	P	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Initial complaint response	S	-	-	-	-	-	-	*	-	-	-	-	-	-	P	-	-	-
Complaint follow-up	P	-	-	-	-	-	-	-	-	-	-	-	-	-	S	-	-	-

Key:
P = Primary role
S = Secondary role
A = Advisory role
* = Role pertains in certain circumstances

DEC Divisions
DMN = Division of Mineral Resources
DEP = Division of Environmental Permits (DRA in GEIS Table 15.1)
DOW = Division of Water (DW in GEIS Table 15.1)
DER = Division of Environmental Remediation (DSHW in GEIS Table 15.1)
DMM = Division of Materials Management
DFWMR = Division of Fish, Wildlife and Marine Resources
DAR = Division of Air Resources

8.1.1.2 NYCDEP

The Department will continue to notify NYCDEP of proposed drilling locations in counties with subsurface water supply infrastructure to enable NYCDEP to identify locations in proximity to infrastructure that might require site-specific SEQRA determinations.

8.1.1.3 Local Government Notification

ECL §23-0305(13) requires that the permittee notify any affected local government and surface owner prior to commencing operations. Many local governments have requested notification earlier in the process, although it is not required by law or regulation. The Department would notify local governments of all applications for high-volume hydraulic fracturing in the locality, using a continuously updated database of local government officials and an electronic notification system that would both be developed for this purpose.

8.1.1.4 Road-Use Agreements

The Department strongly encourages operators to reach road use agreements with governing local authorities. The issuance of a permit to drill does not relieve the operator of the responsibility to comply with any local requirements authorized by or enacted pursuant to the New York State Vehicle and Traffic Law. Additional information about road infrastructure and traffic impacts is provided in Sections 6.11 and 7.13.

8.1.1.5 Local Planning Documents

The Department's exclusive authority to issue well permits supersedes local government authority relative to well siting. However, in order to consider potential significant adverse impacts on land use and zoning as required by SEQRA, the EAF Addendum would require the applicant to identify whether the proposed location of the well pad, or any other activity under the jurisdiction of the Department, conflicts with local land use laws or regulations, plans or policies. The applicant would also 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). For actions where the applicant indicates to the Department that the location of the well pad, or any other activity under the jurisdiction of the Department, is either consistent with local land use laws, regulations, plans or policies, or is not covered by such local land use laws, regulations, plans or policies, the

Department would proceed to permit issuance unless it receives notice of an asserted conflict by the potentially impacted local government.

Applicants for permits to drill are already required to identify whether any additional state, local or federal permits or approvals are required for their projects. Therefore, in cases where an applicant indicates that all or part of their proposed project is inconsistent with local land use laws, regulations, plans or policies, or where the potentially impacted local government advises the Department that it believes the application is inconsistent with such laws, regulations, plans or policies, the Department would, at the time of permit application, request additional information so that it can consider whether significant adverse environmental impacts would result from the proposed project that have not been addressed in the SGEIS and whether additional mitigation or other action should be taken in light of such significant adverse impacts.

8.1.1.6 County Health Departments

As explained in Chapter 15 of the GEIS and Chapter 7 of this document, county health departments are the most appropriate entity to undertake initial investigation of water well complaints. The Department proposes that county health departments retain responsibility for initial response to most water well complaints, referring them to the Department when causes other than those related to drilling have been ruled out. The exception to this is when a complaint is received while active operations are underway within a specified distance; in these cases, the Department will conduct a site inspection and will jointly perform the initial investigation along with the county health department.

8.1.2 State

Except for the Public Service Commission relative to its role regarding pipelines and associated facilities (which will continue; see Section 8.1.2.1), no State agencies other than the Department are listed in GEIS Table 15.1. The NYSDOH, NYSDOT, along with the Office of Parks, Recreation and Historic Preservation, are listed in Table 8.1 and will be involved as follows:

- *NYSDOH:* Potential future and ongoing involvement in review of NORM issues and assistance to county health departments regarding water well investigations and complaints;