New York State Department of Environmental Conservation

In the Matter of the Applications of

Application Number 8-4432-00085

FINGER LAKES LPG STORAGE, LLC

For permits to construct and operate a Liquefied Petroleum Gas Storage Facility at Seneca Lake pursuant to the Environmental Conservation Law

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POST-ISSUES CONFERENCE REPLY BRIEF

by

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

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I. Introduction

Finger Lakes LPG Storage, LLC's (the "Applicant's") proposal to construct a hub for the storage and transportation of millions of barrels of liquefied petroleum gas ("LPG") threatens both Seneca Lake and the municipalities in the region. Despite this, the Draft Supplemental Environmental Impact Statement (the "DSEIS") and the Draft Permit Conditions fail to adequately address and mitigate those environmental threats. Nothing in the Post-Hearing Briefs submitted by the Applicant or by the Department of Environmental Conservation (the "Department" or "DEC") cures the fundamental failings in the environmental review of the proposed project and the Draft Permit Conditions.

The DSEIS's failure to consider the proposed project's material conflict with local and regional community character remains a fatal flaw. The failure to consider a range of reasonable alternatives has still not been cured. The DSEIS's failure to properly address the potential significant impacts to water quality remains a substantive and significant issue. The DSEIS still fails to adequately address the potential impacts on local emergency response resources. And, finally, the Draft Permit Conditions continue to fail to provide an indemnification capable of protecting the people and communities at risk. All of these raise substantive and significant issues that must be addressed through a full adjudicatory hearing.

II. The Project's Material Conflict with Local and Regional Community Character Must Be Addressed Through Adjudication or the Release of a Revised DSEIS for Public Comment

As the Communities have demonstrated, the DSEIS's failure to consider the Project's clear and material conflict with local and regional community character—as expressed in the relevant land use planning documents and the expert reports of Profs. Flad and Christopherson—raises a substantive and significant issue for adjudication. Communities' Post-Hearing Brief at 5-22. Applicant and the Department both attempt to obfuscate that conflict—either through the creation of legally unsupported bright line rules to cabin this Court's consideration of the relevant community character impacts or by belatedly citing and mischaracterizing the relevant local documents—but their efforts are unavailing. Because these impacts require consideration under the State Environmental Quality Review Act ("SEQRA"), and further, are of central concern to all of the communities likely to be affected by the proposed Project, they must either be adjudicated by this tribunal or comprise part of a revised DSEIS made available for public comment.

A. Applicant Attempts to Impose Bright Line Rules on the Consideration of Community Character Contradict Established Case Law and the Purposes of SEQRA

Applicant attempts to restrict this tribunal's consideration of the Project's community character impacts by muddying what is SEQRA's clearest and most fundamental principle—namely, that state agencies must carefully consider the environmental impacts of a proposed project under their jurisdiction where they may have a significant effect. *See* New York Envtl. Conserv. Law ("E.C.L.") § 8-0109(2). These impacts include, unambiguously, those to "community or neighborhood character." E.C.L. § 8-0105(6); 6 New York Code, Rules & Regulations ("N.Y.C.R.R.") § 617.7(c)(1)(v).

Although Applicant acknowledges "that community character impacts must be evaluated under SEQRA and included in the Department's ultimate SEQRA findings," Applicant's Post-Hearing Brief at 14, it seeks to undercut that evaluation by incorrectly asserting that: (1) despite its distinction from other physical conditions like "air" or "noise" in SEQRA's definition of "environment," 6 N.Y.C.R.R. § 617.2(l), community character can nonetheless *never* be adjudicated separately in a 6 N.Y.C.R.R. Part 624 ("Part 624") permit hearing; and (2) there is no legal basis to require consideration of impacts to community character in areas beyond the host municipality—even if those impacts are patently significant. Because these newly invented bright line rules seek to preclude review of the Project's actual significant impacts to community character in violation of SEQRA's bedrock "hard look" requirement, they must be rejected.

1. SEQRA Demands that All Potentially Significant Impacts to Community Character Be Considered

Applicant's first attempt to preclude review of the Project's full range of significant potential community character impacts is its argument that—regardless of SEQRA's statutory text and its regulations at 6 N.Y.C.R.R. Part 617 ("Part 617")—"community character cannot be separately adjudicated under the Department's Part 624 permit hearing procedures."[1] Applicant's Post-Hearing Brief at 11, 14-16. No text in Part 624 supports this proposition and none is cited for it in Applicant's Post-Hearing Brief. Nonetheless, Applicant contends that the rule comes

[1] Applicant's other bright line argument that SEQRA prohibits review of any significant adverse community character impacts not identified in the Final Scope is largely absent from its initial Post-Hearing Brief, incorporated only by reference. Applicant's Post-Hearing Brief at 5 n. 2. The Communities have already demonstrated that this argument contradicts the text and purpose of SEQRA, particularly because community character issues were raised repeatedly by commenters on the Draft Scope. Communities' Post-Hearing Brief at 19-22. The Department admits in its initial brief that "such potential impacts were raised in the comments on the draft scope," but fails to justify its decision to exclude those impacts from the Final Scope without public explanation. Department's Post-Hearing Brief at 13. Perhaps this is why the Department does not attempt to argue that the Final Scope shields the DSEIS from adequate review of community character impacts, but only states, somewhat cryptically, "it is important to keep in mind that the DSEIS went through a scoping process." Department's Post-Hearing Brief at 15.

from the Department's own case law, *id.* at 6, 11, 16—despite the suggestion of the Chief Administrative Law Judge ("ALJ") to the contrary. Transcript at 52 (ALJ: "I don't think we've ever said that community character per se is unadjudicable"). Specifically, Applicant cites three cases as establishing this rule: *St. Lawrence Cement Co, LLC*, Second Interim Decision of the Commissioner, 2004 WL 2026420 (DEC 2004); *Crossroads Ventures, LLC*, Interim Decision of the Deputy Commissioner, 2006 WL 3873403 (DEC 2006); and *Red Wing Properties, Inc.*, Interim Decision of the Commissioner, 2010 WL 3366172 (DEC 2010).

As the Communities have demonstrated, this argument misconstrues this relevant case law in order to evade SEQRA's well-established definition of community character as comprised of both physical and non-physical elements. Communities' Post-Hearing Brief at 5-8. While immediate physical nuisances like traffic and noise are no doubt relevant to an appropriate community character analysis, consideration of only these impacts is insufficient where a project may cause non-physical community injuries such as the "long-term secondary displacement of residents and businesses." *Id.* at 5-6 (citing to *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 368 (1986)). Given the difficulty in quantifying these potential injuries, or even anticipating them from an outsider's perspective, both the Department and the courts have long recognized that reference to the self-described character and development goals found in local comprehensive planning documents is critically important. *Id.* at 8-10.

Applicant now apparently recognizes the importance of these documents as well. *See* Applicant's Post-Hearing Brief at 7-8, 10, 11, 16-17, 20 (stating, at p. 20, that the Reading and Schuyler County comprehensive plans are "controlling" in the consideration of whether the Project may have a significant impact on community character). Oddly, however, Applicant does not attempt to explain why the DSEIS does not contain a single mention any of these crucially

important documents.[2] Instead, it tries to mask this omission by introducing a new rule forbidding review of community character in Part 624 proceedings as a separate issue—a rule cobbled together from bits and pieces of administrative cases, none of which in any way support such a sweeping position. While this argument fails on its face, the Communities nonetheless respond with three short points.

First, the Part 624 regulations incorporate SEQRA's established standard for determining the significance of impacts to community character in cases like the present one. Where, as here, the Department requires the preparation of a DEIS as lead agency, "the determination to adjudicate issues concerning the sufficiency of the DEIS . . . will be made in accordance with the same standards that apply to the identification of issues generally." *Crossroads Ventures*, 2006 WL 3873403 at *5 (citing to 6 N.Y.C.R.R. § 624.4(c)(6)(i)(b)). Specifically, those issues must be "substantive and significant." 6 N.Y.C.R.R. § 624.4(c)(1)(iii).

As already shown, the DSEIS's failure to consider significant community character impacts in light of the relevant local planning documents raises a substantive and significant issue for adjudication. *See* Communities' Post-Hearing Brief at 5-22. It is substantive because the consideration of discrete impacts without reference to a single local land use law or comprehensive plan raises sufficient doubt that Applicant took the requisite "hard look" at the Project's community character impacts. *Id.* at 10-11.[3] And it is significant because consideration of the Project's impacts in light of those laws and plans—nearly all of which demonstrate the

[2] Indeed, as noted earlier, the DSEIS does not even use the words "land use," "zoning," or "comprehensive plan." Communities' Post-Hearing Brief at 14.

[3] This "hard look" standard is the same, whether it applies to the sufficiency of either a negative declaration or an EIS. *See Save Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 206-07 (1987) (citing to *Chinese Staff* in nullifying EIS for failure to adequately consider cumulative impacts and holding that an EIS must "identif[y] any factor upon which the proposed action might have a significant effect and take[] a 'hard look' at it" (citing to *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416–417 (1986)).

Project's material conflict with local character and development goals—may result in the denial of the permit or the imposition of new, significant permit conditions. *Id.* at 11.

Second, none of the cases cited by the Appellant support its sweeping categorical rule that community character may *never* be considered as a distinct issue by this tribunal. On the contrary, *St. Lawrence Cement*, *Crossroads Ventures*, and *Red Wing Properties* all stand for the proposition that community character impacts *may* be addressed in the context of discrete physical impacts in a Part 624 hearing, as opposed to that they *must*. *St. Lawrence Cement*, 2004 WL 2026420 at *48-50 (concurring with ALJ determination that the ruling that "impacts to community character will be adequately addressed in conjunction with other identified environmental impacts . . . is limited to the specific factual circumstances at issue here"); *Crossroads*, 2006 WL 3873403 at *26 ("Impacts on community character *are often* intertwined with other environmental issues and *can* be addressed in the context of those specific issues." (emphasis added)); *Red Wing Properties*, 2010 WL 3366172 at *6 ("[*W]here impacts on community character are intertwined with other discrete impacts*, the record on community character *can* be further developed through an adjudicatory hearing on those other impacts." (emphasis added)).

Further, those three cases emphasize the central role that local laws and planning documents play in the required community character analysis, and all address situations where those documents were in the record or would otherwise be developed by a full adjudicatory hearing. Communities' Post-Hearing Brief at 10-11. The only other somewhat relevant community-character-related case cited by Applicant, *Horn v. IBM*, also involved a situation where extensive consideration of local laws and planning documents was contained in the record. *See* 493 N.Y.S.2d 184, 191 (2nd Dep't 1985) ("The DGEIS and FGEIS are replete with lengthy

studies, analyses and discussions of the potential impact of the proposed project and zoning changes on the surrounding areas. Moreover, serious consideration was given to the issue of whether the proposed action was in accordance with the New Castle town plan.").

Accordingly, none of these cases shield Applicant from explaining why the DSEIS contains no mention of any local zoning or planning documents. Indeed, as the Communities have shown, knowing whether consideration of discrete nuisance-like impacts are sufficiently "intertwined" with the relevant overall community character impacts requires a baseline understanding of community character and development goals. Communities' Post-Hearing Brief at 15-16. Analyzing these impacts without that baseline—gleaned either from local laws and planning documents or comprehensive study[4]—is analysis in a vacuum, devoid of the factual foundation upon which to adequately assess the actual impacts to community character.

Third, Applicant makes no attempt in its Post-Hearing Brief to distinguish other relevant cases where the Commissioner has sanctioned consideration of community character as a separate issue in a Part 624 proceeding, such as *Palumbo Block Co.*, Interim Decision of the Commissioner, 2001 WL 651613 (DEC 2001), or *WHIBCO, Inc.*, Interim Decision of the Deputy Commissioner for Air and Waste Management, 1998 WL 389014 (DEC 1998). *See* Communities' Post-Hearing Brief at 9. Although Applicant commented in a footnote in its initial response that these cases were somehow silently "superseded by the cases cited by [Applicant]," a satisfactory explanation of how or why these cases are "no longer . . . good law on th[is] point" is conspicuously absent from its Post-Hearing Brief. Applicant's Response at 6 n. 2.

[4] Contrary to the Department's assertions, Department's Post-Hearing Brief at 6, the Communities do not rely solely on the reports of Profs. Flad and Christopherson. While the cultural landscape and socioeconomic analyses performed by Profs. Flad and Christopherson do correctly identify and describe the Project's likely significant adverse impacts to the relevant local and regional character, the Communities also proffer substantial additional support from local comprehensive planning documents and the testimony of local land use experts. *See* Communities' Post-Hearing Brief at 10-19.

Accordingly, because Applicant attempts to create a new and sweeping prohibition against review of community character as a standalone issue in Part 624 proceedings that: (1) is not directly supported by SEQRA, its regulations, or any case Applicant cites; (2) is not consistent with longstanding SEQRA case law recognizing community character as an appropriate standalone issue for adjudication; and (3) in practice, attempts to subvert, as here, review of significant community character impacts in defiance of SEQRA's "hard look" requirement. It should be rejected by this tribunal.

2. SEQRA Demands that Impacts to the Environment Be Evaluated in the Places Where They May Be Significant

The second broad assertion that Applicant introduces is that there is "no legal basis" under SEQRA to require consideration of environmental impacts for a proposed project beyond those occurring in the host municipality. *See* Applicant's Post-Hearing Brief at 23-26. Again, the Applicant provides no statutory or regulatory support for this strict "municipal-boundary rule" and fails to explain how it comports with SEQRA—specifically, with SEQRA's requirements that all "relevant environmental impacts, facts and conclusions [be] disclosed in the final EIS," 6 N.Y.C.R.R. § 617.11(d)(1), and that the relevance (i.e. significance) of an impact "should be assessed in connection with . . . its geographic scope." 6 N.Y.C.R.R. § 617.7(c)(3)(v).

Instead, Applicant unsuccessfully tries to distinguish *Vill. of Chestnut Ridge*. Applicant's Post-Hearing Brief at 23-26. There, the Second Department upheld the standing of villages adjacent to an area proposed for a rezoning to challenge that rezoning under SEQRA, correctly finding that "[s]ubstantial development in an adjoining municipality can have a significant detrimental impact on the character of a community." *Vill. of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 94 (2d Dep't 2007). In attempting to dismiss the case as a ruling on standing alone, Applicant glosses over this significant insight—namely, that SEQRA does not

arbitrarily cut off review of significant potential environmental injuries at local borders. *See* 6 N.Y.C.R.R. § 617.7(c)(3). Indeed, under the Applicant's logic, review of the Project's potential water quality impacts to Seneca Lake would be limited to only the portion of the lake lying within the Town of Reading's jurisdictional boundaries. While such a rule would make that review easier for the Applicant, it would fail to ensure that all "relevant areas of environmental concern" are "thoroughly analyze[d]." *New York City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347 (2003).

Moreover, Applicant's municipal-boundary rule is directly undercut by *St. Lawrence Cement*, the sole case it cites for its otherwise unsupported position. *See* Applicant's Post-Hearing Brief at 25. That case's cogent explanation of where significant impacts must be analyzed is quoted in the Communities' Post-Hearing Brief, but it bears repeating:

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

2004 WL 2026420, *51. The Commissioner in that case rejected attempts to cabin review of visual and air impacts from a proposed cement manufacturing facility to only the two host municipalities and one adjacent municipality. *Id.* While Applicant is correct that adjudication of the facility's potential impacts on local trends in the greater Hudson Valley Region was ultimately denied, this is because those trends were already documented in the record. *Id.* at *34-35, *50 (finding that the relevant DEIS considered both physical and cultural landscape of Hudson Valley – such as its role as "geographic center of the American Romantic Movement," and the "historic character of the regional landscape [that] ha[d] spurred a trend for local municipalities . . . to market themselves as tourist and second-home destinations").

The current DSEIS contains no such information, despite the fact that community impacts from a large loading and storage facility—designed to provide the greater Northeast Region with "large scale truck, rail, and pipeline access" to 2.1 million barrels of LPG—are likely to be more broad-ranging than those at issue in *St. Lawrence Cement* and more noxious than the construction of student housing at issue in *Vill. of Chestnut Ridge. See* Communities' Post-Hearing Brief at 11-19. Accordingly, Applicant's attempts to subvert review of legitimate significant impacts to community character with its unsupported municipal-boundary rule must be rejected.

B. The Relevant Land Use Plans that Applicant and the Department Now Belatedly Cite Demonstrate that the Project Materially Conflicts with Local and Regional Community Character

In their initial Post-Hearing Briefs, Applicant and the Department speak out of both sides of their mouth: on the one hand emphasizing the importance of local planning documents in SEQRA's required analysis of impacts to community character, while on the other explaining how it is nonetheless unimportant that the DSEIS contains no mention of them. *Compare* Applicant's Post-Hearing Brief at 16-17 (discussing critical importance of such documents) *with id.* at 6 ("the Project's consistency with community character is not adjudicable"); and *compare* Department's Post-Hearing Brief at 7 n.8 (local comprehensive plan is "the single most important statement from which staff can identify local . . . character") *with id.* at 13 (rationalizing unexplained omission of these documents on fact that DEC staff "did not believe" Project would have significant community character impact).

As the Communities have demonstrated, however, this omission is significant because the construction of a high-risk, heavy industrial facility located on—and transporting substantial volumes of hazardous materials along—the shores of the region's defining natural asset directly

and materially conflicts with those plans. Communities' Post-Hearing Brief at 16-19. While the Communities proffer additional information and testimony at a future adjudicatory hearing that will further establish this conflict, *id.*, they nonetheless will respond to the mischaracterization of some of the relevant planning documents belatedly cited by Applicant and the Department.

Initially, the Comprehensive Plan of the Town of Reading ("Reading Plan") and the Land Use Law for the Town of Reading ("Reading Law") plainly contradict Applicant's and the Department's assertions that construction of the Project is consistent with the character of Reading.[5] Indeed, the Reading Plan was developed, in part, in response to the threat of "large-scale development that could change [Reading's] character," which created "a sense of urgency about planning in order to make development fit into Reading's existing character." Reading Plan at 2. Accordingly, both the plan and the Reading Law embody the Town's desires to "[d]iscourage large-scale development that changes the Town's character" and "[p]rotect Seneca Lake water quality." *Id.*; Reading Law §§ 1.4-8, 1.4-9. To this end, large-scale uses are only permitted as special uses that must meet strict performance standards. Reading Law § 6.3 (incorporating the standards from § 4.1 at § 6.3-2). Relevantly, these standards prohibit the "storage of any materials either indoors or outdoors that *may* endanger public health and safety or the natural environment" or activities that "create a safety or health hazard, by reason of fire [or] explosion." Reading Law §§ 4.1-2, 4.1-4 (emphasis added).

As such, while the Applicant and the Department are correct in asserting that specially permitted uses are generally deemed "appropriate" if they meet the relevant performance standards, they are remiss in failing to recognize that such uses are clearly inappropriate where they do not. *See, e.g., Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead*, 98

[5] Counsel for the Communities misspoke when indicating that the Town of Reading does not have a comprehensive plan at the Issues Conference.

N.Y.2d 190, 194-96 (2002) (upholding denial of special permit for mall expansion because potential traffic conditions would adversely affect health, safety comfort, and convenience in violation of special use performance standards); *Schadow v. Wilson*, 191 A.D.2d 53, 56-59 (3d Dep't 1993) (upholding denial of special permit for mining operation, *inter alia*, because increased traffic "would be inconvenient to the neighborhood and conflict with the normal traffic of the neighborhood" in violation of performance standards). Not only is it highly unlikely that the Project meets stringent local performance standards in the present case, but, as already shown, the Reading Law also prohibits the storage of hazardous materials in the "Seneca Lake Protection Area" where the Project is proposed, suggesting that the Project may altogether be prohibited under local law. *See* Communities' Post-Hearing Brief at 18 (citing Reading Law § 4.10-2). Neither Applicant nor the Department venture an explanation of how the Project comports with the Reading Law in contravention of its plain text, but it would be hard to imagine a more clear or material conflict with local comprehensive planning.

The Schuyler County Comprehensive Plan ("Schuyler Plan") likewise expresses concern for the injuries that inappropriate heavy industrial development may inflict on local and regional character. At the outset, the Schuyler Plan describes the County as a predominantly rural and "comprised of a vibrant community of small towns and villages supported by a flourishing agricultural, winery and tourist industry." Schuyler Plan at 6 (May 2014) *available at* http://bit.ly/1Au7a52. Noting the key importance of these industries, *id.* at 37 (the "two primary industries [are] agriculture and tourism"), the Schuyler plan clearly recognizes the importance of protecting its small town character as well as defining natural resources, such as Seneca Lake. *Id.* at 6, 23 ("[t]he defining feature of the Schuyler County landscape is Seneca Lake," and "[the] natural environment is [the County's] biggest asset and it is important to protect it in the best

possible way"). As such, the plan is keenly aware of the problems posed by heavy industrial development along the Seneca Lake waterfront, *id.* at 6 (legacy industrial development on waterfront "present[s] current challenges as the push for redevelopment and community revitalization continues to grow"), particularly industry creating significant industrial traffic. *Id.* at 26 (identifying as a "challenge" the fact that "[i]ndustrial traffic must go through local villages, often causing congestion and noise"). Accordingly, while the Schuyler Plan may envision some light industrial development, it does not support Applicant's high-risk, transportation-heavy industrial use on the shores of Seneca Lake.

In an effort to "confirm" information not present in the Schuyler Plan, the Applicant cites from the outdated 2004 county plan. Applicant's Post-Hearing Brief at 19-20. It is telling that in order to find support for its position that industrialization of Seneca Lake waterfront is consistent with local and regional development goals, the Applicant must reach back more than a decade to an obsolete comprehensive planning document. Indeed, both Applicant and the Department seem to misunderstand that the Seneca Lake region has dramatically departed in the last several decades from its early to mid-twentieth century identity as an industrial hub. *See id.*; Department's Post-Hearing Brief at 14. Today, nearly every local plan in the region, including that of Reading and Schuyler County, support movement away from heavy industrial development toward the compatible and sustainable industries that now define its character. Communities' Post-Hearing Brief at 10-19.

Beyond the Reading and Schuyler Plans, the Communities have demonstrated the Project's similar material conflict with the land use plans of adjacent municipalities—like Watkins Glen and the Town of Starkey—and other municipalities likely to be affected by the

transportation of hazardous materials through their communities or potential impacts to Seneca Lake. Communities' Post-Hearing Brief at 11-19.

Full and accurate consideration of the Project's true impacts in light of these relevant local documents—long-used as the lodestar for appropriate community character analysis under SEQRA—is not "a mechanism to veto local land use policies." Applicant's Post-Hearing Brief at 5; *see also* Department's Post-Hearing Brief at 10-11. Rather it is exactly the opposite—ensuring that the relevant information in those documents, omitted from the DSEIS, is taken into account before a decision to construct Applicant's industrial LPG storage and regional transportation facility is made.

Both Applicant and the Department seem to fundamentally misunderstand both Communities' arguments and the nature of this Part 624 proceeding. *See* Applicant's Post-Hearing Brief at 5-6, 26; Department's Post-Hearing Brief at 10, 11 & n.10. The purpose of this proceeding is to determine whether the Project's environmental review or proposed permit conditions fail to meet the statutory and regulatory criteria of SEQRA and E.C.L. Article 23, and whether that failure has the potential to affect the Department's ultimate permitting decision under Article 23. It is not to "decide the Town of Reading's zoning or land use patterns" or "say that that [sic] Reading should not permit a use because it is industrial." DEC's Post-Hearing Brief at 11 n.10. The Communities fail to understand how Applicant and the Department confuse the relationship between the State's environmental review of the activities it permits and the jurisdiction of local governments over land use matters. Indeed, both the Department and the Applicant appear to support the proposition that by permitting a use in its land use code, a municipality may "veto" statutorily mandated SEQRA review. *See id.*; Applicant's Post-Hearing Brief at 5-6 (citing *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 742-43 (2014)). This position is

absurd, and should be rejected. Because an honest hard look at the Project in light of those documents demonstrates its clear and material conflict with local and regional community character, the issue is appropriate for adjudication. Communities' Post-Hearing Brief at 10-19.

C. The Significant Adverse Impact to Local and Regional Character Is an Issue that Must Be Adjudicated and/or Addressed in a Supplemental DEIS Released for Additional Public Comment

By arguing against the adjudication of the Project's community character impacts despite the fact that the DSEIS admittedly omits "most important" information relevant to those impacts, *see* Department's Post-Hearing Brief at 7 n.8, Applicant and the Department seek an end run around the public comment process that is essential to SEQRA. The Court of Appeals has held that because of the fundamental role of "public and agency scrutiny . . . the omission of a required item from a draft EIS cannot be cured simply by including the item in the final EIS." *Webster Associates v. Town of Webster*, 59 N.Y.2d 220, 228 (1983). The only exception is the very special circumstance in which the "general public" has become "thoroughly familiar with" the missing item because it has "been the subject of extensive publicity and [] debate." *Id.* (citing E.C.L. § 8-0109(4)).

Indeed, the factual circumstances of *Webster* demonstrate how rarely this exception is applicable. In that case, the "required item" omitted from a town board's consideration of a proposal to construct a mall (the "Second Mall Proposal") was an earlier previously approved mall proposal whose approval was vacated by the Supreme Court of Monroe County (the "First Mall Proposal"). Although the Court of Appeals noted that the First Mall Proposal should have been considered in the alternatives analysis for the Second Mall Proposal under SEQRA, it held the error not fatal because "the issue of which shopping center project should be constructed" was the subject of intense public debate and was even "central to the 1979 town board elections,

which saw a new majority elected." The factual circumstances of the present case—where Applicant and DEC attempt to sweep significant community character impacts under the rug by first omitting, and then belatedly misinterpreting, critically relevant local planning documents—could not be more different.

Because the DSEIS's failure to adequately consider community character is both substantive and significant, and has not been the subject of extensive public debate, the public must have an opportunity to comment on this issue. The three ways in which it can be afforded an opportunity to do so are through: (1) an adjudicatory hearing, *see* 6 N.Y.C.R.R. § 624.13 ("[w]here a DEIS has been the subject of the hearing, the hearing report together with the DEIS will constitute the FEIS."); (2) submission of an adequate revised DSEIS to the public for further review and comment; [6] or (3) both (1) and (2).

Applicant and the Department argue otherwise—specifically, that the DSEIS's omission of critical information on local character is curable by including in the record the Issues Conference transcript, the various parties' petitions and briefs, and the documents cited therein. Applicant's Post-Hearing Brief at 12-13; Department's Post-Hearing Brief at 15-17. Neither party, however, cites a single case in which an unadjudicated substantive and significant defect in an EIS, not otherwise subject to extensive public debate and scrutiny, was cured by the inclusion of issues-conference-related documents in the record.

Most of the cases cited by Applicant and the Department simply stand for the obvious—namely, that issues which are not substantive and significant will not be adjudicated. *See Buffalo Crushed Stone, Inc.*, 2008 WL 5955358, *1, *7, Decision of the Commissioner (DEC 2008)

[6] As noted in the Communities' Post-Hearing Brief, the DSEIS's utter failure to adequately consider significant adverse impacts to local and regional community character violates SEQRA as a matter of law. *See* Communities Post-Hearing Brief at 16 n.7 (citing *Chinese Staff*, 68 N.Y.2d 359). Accordingly, the Chief ALJ may use his authority under 6 N.Y.C.R.R. § 624.4(b)(5)(iii) to find the DSEIS legally deficient and direct DEC to prepare a revised DSEIS for public comment.

(affirming ALJ PIC ruling "that no adjudicable issues had been raised."); *St. Lawrence Cement*, 2004 WL 2026420 at *49-*50 (holding no adjudicable issue was raised because the "DEIS recognize[d] and consider[ed] the factual background that [petitioner] seeks to develop concerning the characteristics of the community"); *see also, cf., Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 308 (2009) (investigation of "matters of *doubtful relevance* is an insufficient reason for prolonging the [review] process further" (emphasis added)); *Horn v. Int'l Bus. Machines Corp.*, 110 A.D.2d 87, 97 (2d Dep't 1985) ("[T]he allegedly new information contained in the FGEIS was not sufficiently novel or probative as to require a circulation of a supplemental DGEIS. Most or all of the additional information in question was merely an amplification of that which was contained in the DGEIS."). Accordingly, while it is true that where a "DEIS contains sufficient information" adjudication is unnecessary, Department's Post-Hearing Brief at 5 (citing *Crossroads Ventures, LLC*, 2006 WL 3873403 at *6 (DEC 2006)), this is not the case where, as here, a glaring omission in the DEIS bears directly on the Department's ultimate decision to approve or deny a permit or impose substantial permit conditions.

The other group of cases cited by Applicant and the Department are those addressing situations where the issue raised has already been the subject of adjudication or extensive public debate. *See Webster*, 59 N.Y.2d 220 (discussed, *supra* pp. 15-16); *Dudley Rd. Ass'n v. Adirondack Park Agency*, 214 A.D.2d 274, 280 (3d Dep't 1995) (denying petition for second hearing where "eight-day public hearing" had already been held "at which substantial testimony, documentary submissions and many exhibits were received and considered" covering "all aspects of the adverse impact of the proposed project" and which "adequately reflect[ed] the spectrum of public concern with respect to all aspects of the project."). This includes the

Crossroads Ventures matter, which involved "three days of testimony on community character issues." 2006 WL 3873403 at *36 n. 21. Although this testimony took place in the context of an issues conference proceeding, as acknowledged at the Issues Conference in the present matter, the *Crossroads Ventures* issues conference was fundamentally an adjudicatory hearing with respect to many of the issues addressed. *See* Transcript at 12, 87 (Applicant noting that the *Crossroads Ventures* issues conference "spill[ed] into an adjudicatory hearing" and that "[a]n issues conference is not a hearing at which testimony and evidence are presented").

Here, the ALJ made clear that the issues conference proceeding was not intended to act as an adjudicatory hearing under a different name. *See* Transcript at 85-92 (noting criticism of the *Crossroads Ventures* issues conference, and clarifying that purpose of issues conference was not to solicit factual testimony). In other words, the Issues Conference in the present matter was held to determine whether petitioners had presented "triable issues of fact"—not to resolve those issues. Transcript at 85.

Resolution of those issues without adjudication or public comment, however, is exactly what Applicant and the Department now propose. Although Communities believe they have amply shown the Project's material conflict with local and regional community character, at the very least, Applicant's and the Department's disagreement over the correct scope of inquiry and belated mischaracterizations of some of the relevant land use documents demonstrate that the Project's community character impacts present an important triable issue of fact. Accordingly, in the absence of the release of a revised DSEIS adequately addressing that issue, it must be resolved at an adjudicatory hearing. The Issues Conference proceeding is not a substitute for an adjudicatory hearing, nor is it a substitute for SEQRA's "comprehensive procedures for public and agency scrutiny of and comment on the draft EIS." *Webster*, 59 N.Y.2d at 228 (citing E.C.L.

§ 8-0109(4)). As noted earlier, the Communities are prepared to present additional information and expert testimony at such a hearing and respectfully request the opportunity to do so in accordance with SEQRA and Part 624.

III. The DSEIS Still Fails to Consider a Range of Reasonable Alternatives, Presenting a Substantive and Significant Issue for Adjudication

The alternatives analysis is the "heart of the SEQRA process." *Shawangunk Mountain Envtl. Ass'n v. Planning Bd. of the Town of Gardiner*, 157 A.D.2d 273, 276 (3d Dep't 1990). Despite this, the DSEIS failed to consider both the no action alternative and a range of reasonable alternatives. This failure is a violation of SEQRA and a fatal defect. The possibility that there is a better location for this facility cannot be completely ignored.

Applicant and the Department raise several objections: that petitioners are barred from raising the alternatives issue by scoping regulations; that the record reflects the substance of the no action alternative, that there are no alternate sites consistent with the Applicant's objectives and capabilities, and that Petitioners have not proffered any specific alternate sites for consideration.

These objections are not compelling. First, petitioners are not forbidden from raising alternatives as an issue by scoping regulations. Second, the no action alternative remains unaddressed. Third, the objectives and capabilities of the Applicant do not preclude looking at other sites. Finally, the record itself shows at least one alternate site, and there are very likely several more in New York State alone.

A. Scoping Regulations Do Not Prohibit Petitioners from Raising the Failure to Consider Reasonable Alternatives

According to the Applicant, although a Part 624 hearing can absolutely adjudicate the sufficiency of an alternatives analysis in a draft EIS, the Petitioners here are not allowed to raise

that issue. *See* Applicant's Post-Hearing Brief at 35, 36. Crafting a theory of exhaustion of administrative remedies in all but name, the Applicant argues that because Petitioners did not raise this issue during the scoping process they "cannot now seek to adjudicate the sufficiency of the DSEIS on those grounds." *Id.* at 36-37. This is necessary, Applicant claims, to "harmonize[]" the "substantive requirements of SEQRA and the Department's permit hearing regulations" with "the provisions of the scoping regulations." *Id.* at 36.

Specifically, the Applicant believes that this hearing must harmonize "SEQRA scoping rules under 6 NYCRR § 617.8(g, h);" "Section 617.11(d)(5) mandating the Department . . . certify in its findings whether the Project is the alternative that avoids or minimizes adverse environmental impacts to the maximum extent practicable;" and "Section 624.4(c)(6)(i)(b) of the Department's permit hearing procedures, which provides for the potential adjudication of the sufficiency of a DEIS." *Id.* at 32. Pointing to "well-settled principles of statutory and regulatory construction," the Applicant claims that allowing Petitioners to argue the sufficiency of the alternatives analysis "would render the 'discretion' granted to Finger Lakes LPG Storage by the scoping regulations completely illusory and leave [Sections 617.8] (g) and (h) meaningless nullities." *Id.* at 34, 37. In the Applicant's view, Petitioners' submissions "must be treated as comments on the DSEIS under Section 617.8(h)." *Id.* at 38.

There is no such requirement. The Applicant has created a conflict out of whole cloth and, in an effort to resolve it, invented a procedural burden for Petitioners that has no basis in law. First and most significantly, there is absolutely no regulatory requirement that Petitioners in a Part 624 hearing limit their proposed issues to those they raised during the scoping process. Part 624 clearly defines the standard for adjudicable issues here. When raised by a potential party, an issue must be "substantive and significant." 6 N.Y.C.R.R. § 624.4(c)(1)(iii).

Substantive and significant are both clearly defined terms.[7] *See id.* § 624.4(c)(2), (3). Those definitions do not require an issue to have been raised in the scoping process to be substantive and significant. *See id.* In fact, Section 624.4(c)'s subsection specifically about evaluating proposed SEQRA issues makes it clear that "the determination to adjudicate issues concerning the sufficiency of [a] DEIS . . . will be made according to the standards set forth in paragraph (1) of [6 N.Y.C.R.R. § 624.4(c)]." *Id.* § 624.4(c)(6)(i)(*b*). Paragraph (1) is the substantive and significant standard. *Id.* § 624.4(c)(1)(iii). Petitioners challenging the adequacy of a draft EIS are subject to the substantive and significant standard – a standard that says absolutely nothing about what those petitioners did during the scoping process.

Second, there is precedent addressing this exact situation and concluding that no such restriction exists. *St. Lawrence Cement Co.*, Initial Rulings of the ALJ on Party Status and Issues, 2001 WL 1587361 (DEC 2001), clearly rejects the Applicant's contention here. In *St. Lawrence Cement*, an applicant objected to petitioners raising issues like particulate matter impacts, noise, and other impacts because petitioners "failed to raise [them] in the scoping process." *Id.* at *47. The ALJ there held "[w]e disagree with this conclusion based upon our reading of the precedent . . . and our review of the applicable regulations." *Id.* "[T]he Department's intent regarding changes to 617.8," the judge concluded, "was to limit the scoping process by requiring information raised after the preparation of the final written scope and prior to the completion of the DEIS to meet a strict test for inclusion. This period does not include the Part 624 issues conference and hearing." *Id.* (internal quotations omitted). The ALJ explained that, "[g]iven

[7] "An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. . . An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." 6 N.Y.C.R.R. § 624.4(c)(2), (3).

SEQRA's mandate to consider all potentially significant environmental impacts," holding otherwise "does not comport with statutory requirements." *Id.*

The Applicant's attempt to distinguish *St. Lawrence Cement* is unpersuasive. Applicant claims that "Finger Lakes LPG Storage is not arguing that a petitioner is precluded from 'addressing matters in their petition that they failed to raise in the scoping process.'" Applicant's Post-Hearing Brief at 38 n.41 (quoting Transcript at 448-49). "Petitioners are of course free to 'address' whatever issues they like in their party status petitions," the Applicant argues, "but they cannot seek to adjudicate the sufficiency of the DSEIS on grounds they failed to raise during the scoping process." *Id.*

This distinction is irrelevant given the reasoning in *St. Lawrence Cement.* The ALJ there squarely rejected the interpretation of Sections 617.8(g) and (h) that the Applicant here advances. Based on the text and the Final Generic Environmental Impact Statement for relevant amendments to those sections, the *St. Lawrence Cement* ALJ concluded that "the Department's intent regarding changes to 617.8 was to limit the scoping process by requiring information raised after the preparation of the final written scope and prior to the completion of the DEIS to meet a strict test for inclusion." *St. Lawrence Cement,* 2001 WL 1587361 at *47. "This period," the ALJ concluded, "does not include the Part 624 issues conference and hearing." *Id.* Clearly, under *St. Lawrence Cement*'s reasoning, Sections 617.8(g) and (h) are limited to the scoping process.

There is no conflict here that requires harmonization. The Applicant believes that unless its drastic and limiting interpretation is adopted, Sections 617.8(g) and (h) will be "meaningless nullities." Applicant's Post-Hearing Brief at 37. But those sections can be given meaning without compromising Petitioners' ability to seek review of the DSEIS or limiting an administrative law

judge's ability to hear evidence on issues he or she finds to be substantive and significant. The Final Generic Environmental Impact Statement for Sections 617.8(g) and (h) clarifies the reason those sections exist, a reason that gives those sections meaning without compromising the permit hearing process. *See* N.Y. State Dep't of Envtl. Conservation, *Final Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) Regulations* 56-62 (1995) [hereinafter the "FGEIS"], *available at* http://on.ny.gov/1CUvyIC. The FGEIS explains that "[t]o address the issue that scoping has no definitive end, the Department is proposing that substantive information raised after the preparation of the final written scope and prior to the completion of the draft EIS meet a strict test for inclusion." *Id.* at 58. The Department felt this was necessary because "[p]roject sponsors are hesitant to participate in scoping due to the perception that it presently has no definitive end point." *Id.* at 56. The change helped give "definite closure to the scoping process." *Id.* at 58.

This is a perfectly rational interpretation of Sections 617.8(g) and (h), one that does not require any limitations on the Part 624 issue conference and hearing. Those sections exist because project sponsors were concerned that scoping never clearly ended. With those sections in place, scoping has a definite end because the project sponsor has the discretion to accept or reject changes to the scoping document after the final scope is issued. They were never meant to bind the Part 624 hearing process.

The Applicant warns that unless their interpretation is adopted, project opponents will not be "incentivized" to take part in scoping "but would instead wait to attack the DEIS during permit hearing procedures under Part 624 since there would be no repercussions to ignoring the scoping process." Applicant's Post-Hearing Brief at 38. Far more likely than this cynical prediction is what will happen here if Applicant's interpretation is adopted: New York citizens,

municipalities, and non-profit groups will regularly be excluded from Part 624 hearings. Such a result is unnecessary, unsupported by law, and not in the interests of environmental protection.

B. The No Action Alternative Has Not Been Sufficiently Addressed

Both the Applicant and the Department argue that, although the DSEIS did not include 'no action' among the alternatives, it discussed the substance of the no action alternative. The Applicant asserts that "the DSEIS satisfies the substantive requirements for a no action discussion," while the Department claims that "it did discuss the environmental baseline or current setting." Applicant's Post-Hearing Brief at 27-29; Department's Post-Hearing Brief at 92. As the Communities have shown in previous filings, the DSEIS failed to consider the no action alternative, even in substance. *See* Communities' Post-Hearing Brief at 23-26. Describing the existing environmental setting is not a sufficient discussion of the no action alternative because it does not address the "'capability of a site to environmentally improve, recover or be amenable to restoration and remediation in the absence of the proposed project.'" *Id.* at 24-25 (quoting FGEIS at 79).

The Applicant also notes that the DSEIS "clearly identifies the direct financial effects of not undertaking the project," which it contends is an adequate method to satisfy the no action alternative for "many private actions." Applicant's Post-Hearing Brief at 28; SEQR Handbook at 124. However, as the Communities explained in their post-hearing brief, a purely fiscal discussion does not establish a baseline for community character, water quality, cavern integrity, noise, traffic, or any of the major concerns raised about the proposed project. Communities' Post-Hearing Brief at 25. Additionally, the Applicant's financial discussion in the DSEIS is not a discussion of the "direct financial effects of not undertaking the project" but instead a discussion

of the project's benefits. The DSEIS lacks a meaningful evaluation even if a purely financial discussion were appropriate. *Id.*

The February 16, 2012 letter from the Applicant to the Department does not cure this defect. The Applicant and the Department both point to the letter, saying it supplemented the DSEIS by discussing the no action alternative. Applicant's Post-Hearing Brief at 29-30; Department's Post-Hearing Brief at 92. That letter is not available on the Department's website, weakening its ability to supplement the record for the public. *See Finger Lakes LPG Storage, LLC, Underground Storage Facility - October 2014*, N.Y. State Dep't of Envtl. Conservation, http://on.ny.gov/1FOufQg (last visited May 25, 2015). And the letter suffers from the same issues as the DSEIS itself: it does not consider the capability of a site to environmentally improve, recover, or be amenable to restoration and remediation in the absence of the proposed project. *See* Department's Post-Hearing Brief, Appendix I, at 8-11. As discussed in the Communities' post-hearing brief, that is not a satisfactory discussion of the no action alternative. Communities' Post-Hearing Brief at 24-25.

The FGEIS for the Oil, Gas, and Solution Mining Regulatory Program is also no cure here, despite its discussion of "the effect of prohibition of developing resources like those used in the Project." Applicant's Post-Hearing Brief at 30. A high-level discussion of the economic benefits of LPG development does not address the adverse or beneficial site changes that are likely to occur here in the absence of the project. *See* 6 N.Y.C.R.R. § 617.9(b)(5)(v).

C. The Objectives and Capabilities of the Applicant Do Not Prohibit Considering Alternative Sites

The DSEIS did not consider any alternative sites, and therefore failed to consider a range of reasonable alternatives as SEQRA requires. Communities' Post-Hearing Brief at 26-27, 30-33. Essentially the entirety of its discussion of alternatives is focused on the brine ponds. DSEIS at

170-73. There are three sentences on the project's location, and all they do is confirm that the Applicant decided not to consider another site. *Id.* at 170.

In its post-hearing brief, Applicant claims that this is justified because there are no reasonable alternate sites "consistent with the objectives and capabilities of the project sponsor." Applicant's Post-Hearing Brief at 31 (internal quotations omitted). "The objective of the Project," according to the Applicant, "is using existing caverns as storage to benefit New York consumers." This "could not be achieved by moving the Project to other states." *Id.* at 39.

Based on the record, Applicant is a project sponsor whose goals and capabilities are fundamentally regional. *See* Communities' Petition at 27-30. The Communities understand that the Applicant wants to use these particular caverns for storage. But, as discussed in their previous filing, the Applicant's description of the proposed project's need and benefits is not focused on this site, the Finger Lakes region, or even New York State—it is focused on the Northeast region as a whole. *Id.* There is nothing in the DSEIS, or the record, to suggest that the Applicant can only accomplish its goals by building here and only here. Other sites in New York, or in the Northeast propane market generally, should not be excluded from consideration for that reason alone.

D. The Record Identifies at Least One Alternate Site, And There Are Very Likely Several More in New York State Alone

Finally, the Department objects to Petitioners' not providing specific alternatives for consideration. *See* Department's Post-Hearing Brief at 89, 90-91. However, the situation here is significantly distinct from the cases the Department uses to support this argument. Unlike in those cases, there is at least one alternate site already identified in the record, and there are very likely several more sites under the control of the project sponsor in New York State alone.

The Department cites to *Matter of TransGas Energy Sys., LLC*, Interim Decision of the Commissioner, 2004 WL 598991 (DEC 2004) and *Matter of Gilles Bouchard*, Decision of the Commissioner, 1986 WL 26307 (DEC 1986), but the facts of those cases are materially different from the facts here. In *TransGas*, several proposed intervenors appealed from a Part 624 issues ruling that found that the analysis of alternatives did not warrant adjudication. *TransGas*, 2004 WL 598991 at *1. One of the challenges focused on the applicant's analysis of alternate sites. *Id.* at *8. The Commissioner concluded that the proposed intervenors' offer of proof did not raise an adjudicable issue. Although the Commissioner notes that the proffer "failed to specify the locations they proposed," he explains that "more fundamentally, [] Petitioners failed to allege that any of the alternative sites they propose are available to TransGas." *Id.* at *9. Intervenors "implicitly concede that the alternative sites they would offer are not owned or controlled by TransGas." *Id.* Since the alternatives analysis requirement at issue there (under Part 231) requires sites to be "owned or controlled by a private applicant," the proposed intervenors had no acceptable alternate sites. *Id.* at *8-9.

In *Gilles Bouchard*, the Commissioner issued a determination after an adjudicatory hearing to decide whether the applicant met the 'weighing standards,' a cost-benefit analysis to determine whether a permit to dredge in a wetland is warranted. *Gilles Bouchard*, 1986 WL 26307 at *7. Importantly, the standard at issue there was not the substantive and significant standard for adjudication under Part 624. Instead, intervenors argued that the weighing standards "cannot be met essentially because the activity satisfies no compelling economic or social need, and that there must be numerous alternatives to the proposed Site." *Id.* at *8. The Commissioner rejected this argument out of hand, concluding that "no specific sites or details were provided for

the record by the Intervenor and the Applicant's evaluation and the Department Staff's evaluation both concluded that all the weighing standards are satisfied." *Id.*

The situation here is very different from either of those cases. In *TransGas*, the proposed intervenors admitted their alternate sites were not under the control of the project sponsor, making them unacceptable because the project sponsor was a private party. In *Gilles Bouchard*, the alternatives argument the Commissioner rejected was purely hypothetical and under a different standard than Petitioners face here. Unlike those cases, potential alternate sites under the control of this project sponsor are not merely hypothetical.

The record already includes some discussion of one alternate site: the Savona site. *See, e.g.*, Transcript at 470, 483-84; Communities' Post-Hearing Brief at 31-32. The Applicant and the Department both mention this site in their post-hearing briefs, but ultimately dismiss it as unacceptable. Applicant's Post-Hearing Brief at 39; Department's Post-Hearing Brief at 93-95. Applicant concludes the Savona site is unsuitable because "brine disposal there is limited." Applicant's Post-Hearing Brief at 39 (quoting Transcript at 483-84). The Department agrees, explaining that "[e]xpansion of the Savona LPG caverns for additional LPG storage is constrained by the rate at which the facility can dispose of its excess brine." Department's Post-Hearing Brief at 94. According to the Department, Savona "would not reduce or avoid adverse environmental impacts." *Id.* at 95.

This discussion proves that at least one Applicant-owned site exists in the immediate area. So far there has been no detailed analysis of how constraining this brine issue is. Even if the Savona site has limits on how much brine it can process, it may have other environmental benefits that make it, on balance, a better option. For example, Savona is not located near an already highly saline lake, which conceivably means less risk of water contamination and human

health impacts. Alternatively, an LPG storage facility at Savona may have different community character impacts, noise impacts, and traffic impacts based on its location. The Village of Savona is also significantly smaller than the communities along Seneca Lake, which could make a facility located there less disruptive. A discussion of these kinds of possible environmental benefits, balanced against the brine limitations, is not unreasonable and is, in fact, what SEQRA requires.

It is also clear that the Applicant's parent company owns several other storage properties in New York, none of which were evaluated as potential alternate sites. Publicly available technical data about these sites is limited, but Crestwood LP owns three facilities in New York that it describes as "storage" with "injection/withdrawal capability." Those are: the Steuben site,[8] the Thomas Corners site,[9] and the Stagecoach site.[10] A lack of publicly available information and technical knowledge makes evaluating these sites difficult for Petitioners. But ultimately the situation here is very different from that in *TransGas* and *Gilles Bouchard*. Petitioners are not speculating that some alternate site must exist somewhere. There is at least one—and apparently four—alternate sites owned by the Applicant that were not considered.

The DSEIS's discussion of alternatives is insufficient. There are very likely other potential locations for this facility, in different environmental settings and with their own advantages and disadvantages. The failure to consider any alternative sites is a failure to comply with SEQRA, and raises a substantive and significant issue for adjudication.

[8] *Available at* http://bit.ly/1PLvBBT.

[9] *Available at* http://bit.ly/1Ew80JJ.

[10] *Available at* http://bit.ly/1esYQsv.

IV. The DSEIS's Failure to Properly Address the Potential Significant Impacts to Water Quality Remains a Substantive and Significant Issue

Notwithstanding Applicant's and the Department's objections, the DSEIS's and the record's evaluation of this project's potential water quality impacts is inadequate and fails to meet SEQRA's requirements. This raises a substantive and significant issue under Section 624.4 warranting adjudication.

Neither the Applicant nor the Department has a compelling explanation for the unusual salinity in Seneca Lake. This is significant because, as discussed previously, the failure to address saline contamination in the lake is a failure to adequately describe the environmental setting of the proposed project. Additionally, current levels of salinity in the lake already violate state and federal health standards, as would any increase.

A. Neither the Applicant nor the Department Have a Compelling Explanation for the Unusual Salinity in Seneca Lake

As discussed in the Communities' initial post-hearing brief, Seneca Lake is significantly and unusually saline. All the known, recorded sources of salinity together are not enough to explain current levels in the lake. Communities' Post-Hearing Brief at 34-35. What's missing is substantial: equivalent to 32,000 metric tons of sodium and 54,000 metric tons of chloride per year into the lake under steady-state conditions. *Id.* at 35. None of the explanations for the salinity offered in the Applicant's reply briefing to the Petitions or by either the Applicant or the Department at the Issues Conference were compelling. *See id*. at 35-39.

That remains the case. In their post-hearing briefs, the Applicant and the Department continue to offer explanations for the salinity in the lake, but those explanations are not convincing. Mine waste is still not, based on the record established so far, a persuasive explanation. The timeline of activity at the site still correlates with the salinity increase in Seneca

Lake. An alleged "time lag" fails to explain today's concentrations. Finally, Dr. Myers' advection theory is not untestable—a test such as the one Dr. Halfman has suggested would be able to provide additional information.

1. Mine Waste is Not, Based on the Record, a Compelling Explanation

Although not mentioned in the DSEIS, the Applicant and the Department both relied heavily on prior industrial activity to explain the lake's unusual salinity at the Issues Conference. *See* Siegel Report at 6; Transcript at 329, 356-358. As discussed in the Communities' post-hearing filing, this explanation was lacking. The only source of discharges pointed to—the Himrod Mine—came online well after chlorides in the lake spiked. Communities' Post-Hearing Brief at 38-39.

In their post-hearing briefs, both the Applicant and the Department continue to point to mine waste discharges as the likely explanation for the lake's salinity. "It is more likely," the Applicant claims, "that the chloride spike and multi-decade decline in concentration is the result of a change in regulatory oversight that occurred following the implementation of the Clean Water Act in 1972, the Safe Drinking Water Act in 1974 and the State Pollutant Discharge Elimination System ("SPDES") enactment in 1975." Applicant's Post-Hearing Brief at 79. The Department concurs and goes further, arguing that "the amount of mine waste assumed to be discharged to the lake was underestimated by Dr. Halfman, whose work is relied on by Dr. Myers." Department's Post-Hearing Brief at 72. They point to the International Salt facility, which the Department asserts was adding 40,000 pounds a day to the lake in 1981. According to the Department, with these numbers, "a clearer picture emerges as to the more likely source of chlorides." *Id.* (citing Appendix G, James E. Huff, *Technical Review of the Chloride Effluent*

Limits in International Salt's Watkins Glen Facility 21 (1981) [hereinafter "Huff & Huff Report"]).

This additional source—not mentioned in the DSEIS, or in the responses to Petitions, or at the Issues Conference—is still a very long way from explaining Seneca Lake's salinity. First, the Department is seriously overstating International Salt's daily 1981 contribution to the chloride level in the lake. In the very next sentence after the Huff & Huff Report claims 40,000 pounds per day of discharge, it clarifies that "[t]he background chloride level in the incoming water averages . . . 15,500 pounds per day. Thus, ISCO's *actual contribution* to the chloride level is 24,500 pounds per day." Huff & Huff Report at 21-22 (emphasis added).

Second, this is nowhere near the amount of chloride we are missing: 54,000 metric tons of chloride per year. Affidavit of John Halfman, Ph.D., Communities Petition at Attachment I, ¶ 8 [hereinafter "Halfman Aff."]. This becomes clear in an apples to apples comparison. 24,500 pounds per day of chloride sounds large, but it is only approximately 4,056 metric tons per year. Normalized this way, and taking into account what the Huff & Huff Report ultimately concludes, the Department's proffered industrial source is less than $1/13^{th}$ of the missing chloride.

Certainly the regulatory landscape changed in the 1970s, limiting industry's ability to discharge into Seneca Lake. But the record simply does not show that enough mine wastes were discharged to be responsible for the lake's unique salinity. International Salt is the only industrial source that the Department offers in its post-hearing brief; the Applicant points to no particular source and believes this proceeding "may never be able to answer that question." Applicant's Post-Hearing Brief at 82. Neither the Applicant's nor the Department's post-hearing briefs discuss the Himrod Mine, despite the significant role it played at oral argument. *See* Transcript at

357-58. And again, none of these industrial sources were identified or discussed in the DSEIS; there, the only explanation offered is intersection with salt beds. DSEIS at 95.

2. Activity at the Site Correlates with the Increase in Salinity in the Lake

As the Communities have discussed previously, the start of salt mining activity near the lake and previous LPG storage at this site correlate with an increase in salinity (measured in chloride levels) in the lake, culminating in a spike from 1965-1975. *See* Communities' Petition at 14; Communities' Post-Hearing Brief at 42-43. The Applicant and the Department both dispute this correlation. Those objections misapprehend the timeline, however, and are too narrowly focused on the 1965 spike.

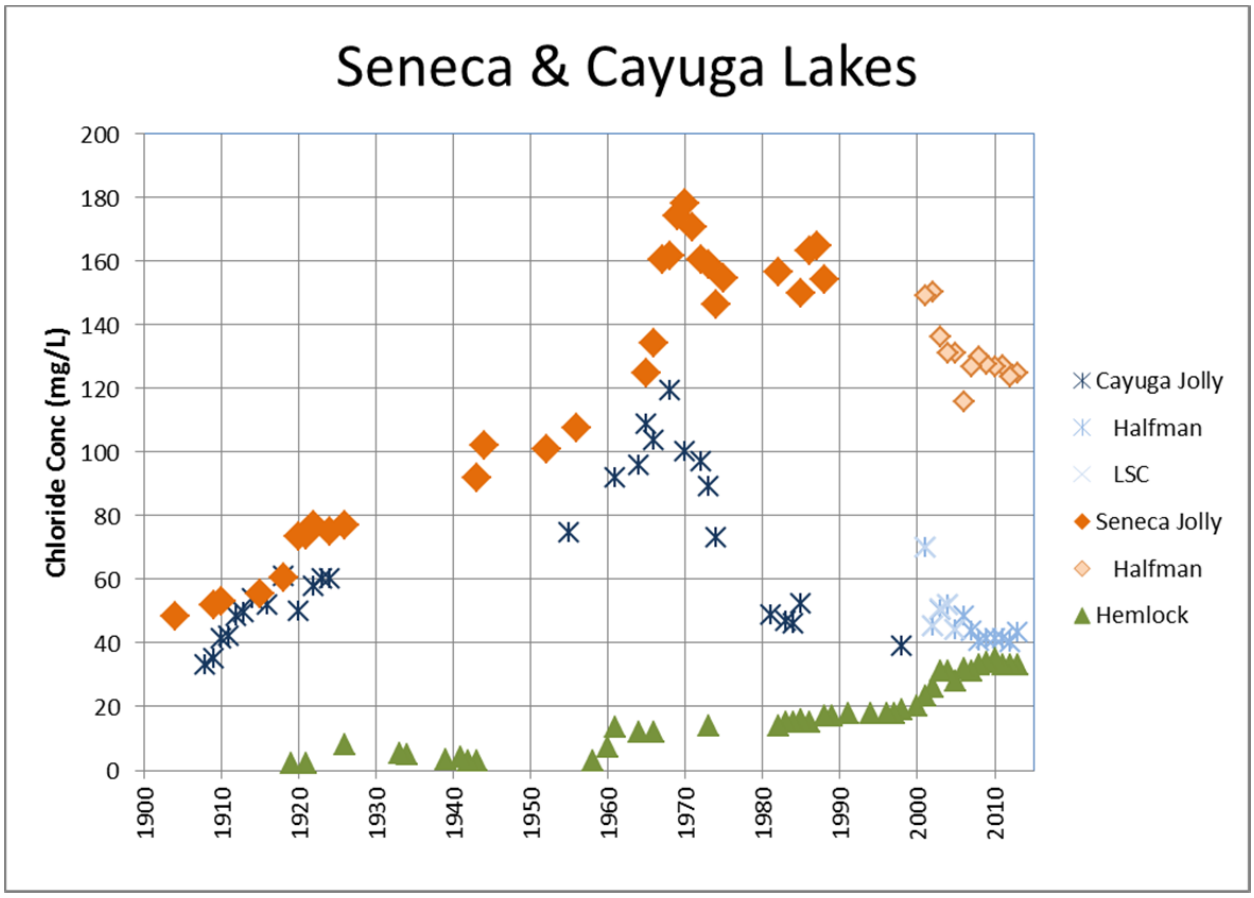
The Department argues that there is no correlation between previous LPG storage at this site and the chloride spike. "[W]hat a review of the data indicates," it claims, "is that LPG storage operations beginning in 1964 did not coincide or correlate with the increase in chloride levels in Seneca Lake; storage operations preceded the chloride increase by almost three years." Department's Post-Hearing Brief at 71. To support this argument, the Department points to one piece of evidence: a 2012 "conference abstract" for a presentation by Glenn Jolly, whose data Dr. Halfman relies on. *Id.* at 71-72.[11] That abstract refers to "the occurrence of the 1967 peak[]," which the Department spins out to conclude that, since TEPPCO began storage in 1964, there is no correlation. *Id.*

This pre-presentation summary of an oral academic discussion from two years before Dr. Halfman's 2014 paper is of minimal scholarly weight, and the Department is reading it excessively narrowly. The year 1967 isn't the year when chlorides in the lake began increasing. Instead 1967 represents, as Dr. Jolly expressed in the abstract, a "peak." The abstract explains that "[f]rom around 1900 to the early 1960s, lake chloride concentrations increased at a fairly

[11] That conference abstract is available at https://gsa.confex.com/gsa/2012AM/webprogram/Paper211940.html.

steady rate." Glenn Jolly, *Did a 'Mid-Century Pulse of Groundwater' Control Cayuga and Seneca Lakes Water Quality?*, 2012 GSA Annual Meeting & Exposition (Nov. 5, 2012). There was a particular increase in 1967—chloride concentrations "rose and fell 30 to 40 mg/L . . . between May and November"—but this was in relation to a "rising background of around 146 mg/L." *Id.* Dr. Jolly is not saying the increase began in 1967.

There was no three-year gap between the start of LPG storage and an increase in chloride. Chloride in the lake has been increasing since the beginning of the century, began rising rapidly starting in 1965, and reached a peak between 1967 and 1972. Looking at Dr. Jolly's data itself, graphed over time, makes this clear:



John Halfman, Ph.D., *A 2014 Update on the Chloride Hydrogeochemistry in Seneca Lake, New York* 20, Fig. 15 (2014), Halfman Aff. at Exhibit B [hereinafter "Halfman Report"]. As Dr.

Jolly's data (the solid diamond data points) shows, levels in the lake increased steadily until 1965, when they began to sharply increase. Chloride levels peaked between 1967 and 1972.

This data also shows that Applicant's and the Department's arguments about pre-1960s activity at this site are off-base. Both the Applicant and the Department claim that petitioners' concerns ignore the industrial history of the area around Seneca Lake. The Department argues that petitioners' theory "ignores the fact that solution mining and hydraulic fracturing had been taking place for years in the Watkins Glen Brine Field," including a major "hydraulic fracturing event" in 1955. Department's Post-Hearing Brief at 71. The Applicant, meanwhile, notes that "there has been solution mining activity occurring at this site for 70 years prior to the spike in the mid-1960s" and claims "[i]f there was going to be an impact from this activity on the lake, it would not have only been seen in the mid or late 1960s." Applicant's Post-Hearing Brief at 83.

The Communities have previously explained that this correlation is not limited to the 1960s but instead dates back to the beginning of solution mining near the lake. *See, e.g.*, Communities' Petition at 14; Communities' Post-Hearing Brief at 34, 43. Dr. Halfman's research clearly demonstrates that this is the case, showing a steady increase since 1900. *See* Halfman Report at 20; Halfman Aff. at ¶ 11. In fact, as noted above, even the conference abstract the Department uses to challenge Dr. Halfman explains that rising chloride levels date back to the beginning of the 20th century. *See supra* pp. 33. The historic impacts the Communities are concerned about are not limited to the 1960s.

3. A "Time Lag" Does Not Explain the Salinization of the Lake

The Department also downplays the correlation by claiming that Dr. Halfman attributes "elevated concentrations observed today" to a "time lag between the pre-1970s inputs and the point where the lake reaches equilibrium" in his 2014 paper. Department's Post-Hearing Brief at

70. The Department makes note of this in an aside immediately after saying that "Dr. Halfman didn't come right out and conclude that it was LPG storage operations by TEPPCO that caused the 1960's 'spike,'" implying that the two are related. *Id.* They are not.

In discussing a time lag, Dr. Halfman was discussing why concentrations are still elevated today, *not* why they became elevated originally or spiked in the 1960s. *See* Halfman Report at 24. As the Communities explained in their petition, Seneca Lake has a particularly long residence time. It takes about 100 years to flush out contaminants. Communities' Petition at 13. This residence time helps explain why levels remain so high today, but it does not explain where the salinity came from originally.

4. Dr. Halfman Has Proposed a Test to Help Evaluate Dr. Myers' Advection Theory

Both the Applicant and the Department argue against Dr. Myers' advection theory by claiming it is fundamentally untestable, making it unscientific. "In other words," the Applicant contends, "this theory cannot be replicated mathematically within known geologic parameters, and it cannot be tested. In other words, according to Dr. Gowan, 'this is not science.'" Applicant's Post-Hearing Brief at 80. The Department apparently agrees, describing Dr. Myers as "[not actually believing] it is even possible for someone else to model and prove his theory because . . . the data doesn't exist." Department's Post-Hearing Brief at 76.

There is a difference between a theory that is difficult to test and a theory that is fundamentally unscientific. As the Communities argued in their initial post-hearing brief, the lack of compelling explanations for the salinity of the lake is evidence that Dr. Myers' advection theory is worth exploring. Communities' Post-Hearing Brief at 42-44. Additionally, Dr. Halfman has proposed a test to help evaluate Dr. Myers' theory. Dr. Halfman recommends the Applicant

perform a year-long pressure test on the proposed caverns while a third party monitors the lake for variations in chloride and sodium. Halfman Aff. at ¶ 13; Halfman Report at 24.

B. Failing to Address the Saline Contamination in Seneca Lake is a Failure to Describe the Relevant Environmental Setting of this Project Under SEQRA

Applicant and the Department continue to object that Seneca Lake's salinity has no relevance here. The Department believes that "[t]he actual cause of the increase [in chlorine levels], assuming there was one, would be the subject of academic debate since the data already precludes previous LPG storage as the cause." Department's Post-Hearing Brief at 73. The Applicant, too, argues that "Petitioners ask the Department to adjudicate an academic debate . . . that cannot be the purpose of an adjudicatory hearing." Applicant's Post-Hearing Brief at 84. The Communities strenuously disagree. Failing to address the salinity of the lake is a failure to describe the project's environmental setting under SEQRA, and is a defect in the DSEIS.

The Department's regulations state that an EIS must include a description of the environmental setting of the areas to be affected. That description must be "sufficient to understand the impacts of the proposed action and alternatives." 6 N.Y.C.R.R. § 617.9(b)(5)(ii). The SEQR Handbook explains that "a summary of the background or history of a site with respect to previous activities there . . . may have a bearing on what is presently proposed." N.Y. State Dep't of Envtl. Conservation, *SEQR Handbook* 121-22 (3d ed. 2010) [hereinafter "SEQR Handbook"]. When describing the environmental setting, "[t]he components . . . that relate to potential relevant impacts should receive [the] most attention." *Id.* at 123. "In particular," it continues, "omission of facts about earlier environmental problems or issues at a site could be a fatal defect with respect to the adequacy of an EIS." *Id.* at 122.

As the Communities argued in their previous filing, the DSEIS and the record fail to meaningfully address Seneca Lake's high and unusual salinity. Communities' Post-Hearing Brief

at 40-41. Understanding the lake's salinity matters for balancing risks, analyzing potential environmental impacts, and evaluating alternatives regardless of whether Dr. Myers' advection theory is correct. *See id*. at 41-42. Yet despite the SEQR Handbook's instructions, the DSEIS devotes very little attention to salinity and lacks a substantive discussion of Seneca Lake's earlier environmental problems. The record, as discussed above and in the Communities' previous filings, does not cure this failure. The discussion of the baseline environmental setting here is incomplete—and that is not an irrelevant issue.

C. Current Levels of Salinity in the Lake Already Violate State and Federal Health Standards, As Would Any Increase

Finally, the Applicant claims that "at no time historically have chloride concentrations in Seneca Lake approached DEC or any other drinking water standards." This is something, the Applicant confidently asserts, that Petitioners have "conveniently ignored." Applicant's Post-Hearing Brief at 82.

This misses the point. Chloride is the ion used to measure Seneca Lake's salinization in Dr. Halfman's research, Dr. Jolly's data, and in Petitioners' filings. The reason for this is because the historical data available for Seneca Lake is measured in chloride. *See* Halfman Report at 5 ("Century-scale chloride data were also discovered for Seneca, Cayuga, Hemlock & Canadice, and Skaneateles Lakes."). Chloride is being used to measure sodium chloride. It is salinity—specifically, sodium—that raises serious health concerns for the Seneca Lake Communities who rely on the lake.

Levels of salinity in the lake already violate state and federal health standards. Currently, Seneca Lake has sodium levels of 75 mg/L. Halfman Aff. at ¶ 3. This is already above the 20 mg/L Department limit for sodium, which is a health-based standard. *See* 6 N.Y.C.R.R. § 703.5(f), Table 1. EPA also recommends a 20 mg/L limit for sodium designed for individuals on

a restricted sodium diet, and generally suggests reducing sodium in drinking water to between 30 and 60 mg/L for potability. EPA, *Drinking Water Advisory: Consumer Acceptability Advice and Health Effects Analysis on Sodium* 1 (Feb. 2003), *available at* http://1.usa.gov/1IIHNfM. As the Communities have discussed previously, ensuring compliance with such standards is one of the primary objectives of SEQRA. Communities' Post-Hearing Brief at 44. Further salinization, whether through advection, through accidents, or through a brine pond spill, would further violate those standards and endanger human health. *Id.* Despite this, the DSEIS is silent on human health. This is a serious omission and raises a substantive and significant issue for adjudication.

V. The DSEIS's Inadequate Discussion of Emergency Preparedness Remains a Substantive and Significant Issue for Adjudication

As a threshold matter, there is some confusion about what the Communities propose as an adjudicable issue on emergency preparedness. The Applicant says that the Communities "assert that the DSEIS does not properly evaluate potential significant adverse impacts that spill, accident or catastrophic events would have on emergency resources." Applicant's Post-Hearing Brief at 86. This is true. *See* Communities' Petition at 18-20; Communities' Post-Hearing Brief at 45-46. But the Applicant also claims that the Communities raise issues related to Watkins Glen State Park and to their QRA's evaluation of rail transport. Applicant's Post-Hearing Brief at 86, 98. This is not the case. Although other petitioners and proposed amici do raise those issues, the Communities' argument on emergency preparedness is narrower.

In their Petition, the Communities explain that "while the DSEIS does address local emergency response, it does so only in a limited and inadequate fashion." Communities' Petition at 19. This is concerning because, as the Communities offer to prove through the testimony of Mr. Richard Kuprewicz and Mr. Mark Venuti, an accident involving either the storage or the

transport of LPG would severely tax the limited emergency response capability of nearby local governments. *Id.*; Communities' Post-Hearing Brief at 45-46. The DSEIS's discussion of local emergency response is very general and does not engage in a frank assessment of responders' capabilities. *See* Communities' Petition at 19-20; Communities' Post-Hearing Brief at 51.

The Communities have made a competent offer of proof of Mr. Kuprewicz's testimony. His testimony, combined with the proffered testimony of Mr. Venuti, establishes a factual foundation for the Communities' argument. The DSEIS's inadequate discussion of local emergency preparedness remains a substantive and significant issue for adjudication.

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

As they did at the Issues Conference, the Applicant and the Department argue that the Communities' offer of Mr. Kuprewicz's testimony is inadequate. *See* Applicant's Post-Hearing Brief at 95-96, 99; Department's Post-Hearing Brief at 81, 84. Applicant criticizes Mr. Kuprewicz's affidavit as "generic . . . conclusory and unpersuasive." Applicant's Post-Hearing Brief at 95, 99. They claim that "statements made by counsel . . . as to what Mr. Kuprewicz may or may not testify about are simply beyond the record . . . [and] should be disregarded." *Id.* at 96. The Department concurs, arguing that Mr. Kuprewicz makes "conclusory statements," and the offer of proof "did not identify the nature of the evidence they [the Communities] intend to submit at hearing." Department's Post-Hearing Brief at 81, 84. According to the Department, the nature of his testimony would be "to offer a comparison of LPG storage in underground caverns to either aboveground LPG storage or the storage of natural gas." *Id.* at 84.

The Communities have made a competent offer of proof of Mr. Kuprewicz's testimony. As discussed in their initial post-hearing brief, Mr. Kuprewicz's affidavit and counsel for the Seneca Lake Communities' proffers at oral argument are competent offers of proof and should

not be rejected. Communities' Post-Hearing Brief at 46-51. ALJs in other contexts have accepted offers of proof that are similar to the one at issue here. *See id.* at 48-49 (citing *Scott Paper Co. and Finch, Pruyn & Co.*, Rulings of the ALJ, 1994 WL 1735340 (DEC 1994); *Mirant Bowline, LLC*, Ruling on Proposed Adjudicable Issues and Petitions for Party Status, 2001 WL 429863 (DEC 2001)).

Mr. Kuprewicz's proposed testimony is not merely conclusory. The Communities' proffer also explained the basis of those opinions. Communities' Post-Hearing Brief at 49-50. Consistent with Section 624.5(b)(2)(ii), the Communities' offer of proof specifies the witness (Mr. Kuprewicz), the nature of the evidence (expert testimony on risk assessment and the cost of an accident), and the grounds it is based on (a review of the record and substantive disagreements with the Applicant and the Department's assessment of this project's risk versus previous activity, especially their reliance on the region's prior experience with natural gas and hydrocarbon transportation). *Id.* at 50. This offer of proof meets the standards of Part 624.

B. The Communities' Argument that a Spill or Accident Would Severely Tax the Limited Emergency Response Capability of Nearby Local Governments Has a Strong Factual Foundation

The Applicant also asserts that the petitioners provide no "statements by knowledgeable, qualified emergency personnel familiar with LPG, potential risks, or the ability of local emergency service providers," and so "lack the requisite factual foundation." Applicant's Post-Hearing Brief at 98. The Department makes similar claims, arguing that Mr. Kuprewicz's testimony rests "on the flawed assumptions that either the proposed project will increase the salinity of Seneca Lake or that an accident at the facility would overwhelm emergency response resources." Department's Post-Hearing Brief at 81. "Therefore," they continue, "SLC's proposal

to layer unsupported non-expert opinion on the theoretical outcome of an unproven hypotheses [sic] should be rejected." *Id.*

This is incorrect. The Communities have proffered two witnesses to testify to the impacts a spill or accident would have on local emergency response capacity: Mr. Kuprewicz and Mr. Venuti. Communities' Post-Hearing Brief at 46. Mr. Kuprewicz proposes to testify that, based on his review of the proposed project, state and local emergency response plans and first responders are not likely to be able to handle a catastrophic event. Such an event would also be exceptionally costly. Affidavit of Richard Kuprewicz, Communities Petition at Attachment F, ¶ 15, 16 [hereinafter "Kuprewicz Aff."].

Similarly, Mr. Venuti will testify that, as the Geneva Town Supervisor, he is familiar with his community's emergency response capabilities. Affidavit of Mark Venuti, Communities' Petition at Attachment E. ¶ 9-12 [hereinafter "Venuti Aff."]. The Geneva Fire Department would need to call for assistance from other departments in the event of a truck or rail car accident in their jurisdiction, and the Geneva Fire Department could in turn be called on as backup if there were a serious accident in the Town of Reading. *Id.* ¶ 10. Despite this, the Geneva Fire Department has no training specific to LPG hazards and would have to "consult the Hazardous Material Response Guide" if an accident were to occur. *Id.*

Through these witnesses, the Communities offer to prove that both a catastrophic event and a more routine accident would impose significant burdens on local emergency responders who lack vital expertise in managing such disasters. Combined with evidence proposed by the Communities and others about the risks to water quality and cavern integrity here, they provide a factual foundation for the Communities' argument that a spill or accident would severely tax limited local emergency response capability.

The DSEIS's incomplete discussion of emergency preparedness and the William Kennedy Affidavit are not enough to address this issue. The DSEIS's section on the capabilities of first responders is very general, describing the Watkins Glen Fire Department and identifying emergency services in the vicinity of the facility. *See* DSEIS at 166-169; Communities' Post-Hearing Brief at 51. What it does not do is look beyond Watkins Glen or the Schuyler County government, or put this information in a meaningful context. It does not analyze the potential impacts of an accident on these local resources or discuss how prepared they actually are.

Mr. Kennedy's affidavit, which concludes that the "Schuyler County government has adequately anticipated and addressed the risks of various activities throughout Schuyler County, including risks associated with the storage and transportation of LPG," only addresses one of the many local jurisdictions implicated by the project. Applicant's Post-Hearing Brief at 100-01. As the Communities offer to prove, many other municipalities in the area face risks from accidents and spills, or face the potential of needing to respond to a major accident at the Watkins Glen location. Whether these other communities are prepared was not addressed in the DSEIS and remains unknown, raising a substantive and significant issue for adjudication.

VI. The Draft Permit Conditions' Failure to Provide Adequate Assurance Against Immediate Environmental Harms that Would Result from a Catastrophic Failure Should Be Adjudicated

The Applicant and the Department object to the adjudication of the Draft Permit Conditions' failure to provide adequate assurance to mitigate the Project's potential catastrophic harms based upon: (1) the alleged lack of applicable statutory or regulatory criteria that this failure violates; (2) their underestimation of the likelihood of such harms occurring; and (3) the supposed purely "economic" nature of these harms, which they argue renders it uncognizable under SEQRA. Applicant's Post-Hearing Brief at 48-54; Department's Post-Hearing Brief at

100-101. While the Communities have already addressed all three of these contentions, *see* Communities' Post-Hearing Brief at 52-57, they briefly reiterate their arguments here.

Initially, the relevant applicable criterion is SEQRA's mandate that all significant adverse impacts associated with a project "be avoided or minimized to the maximum extent practicable *by incorporating as conditions . . . those mitigative measures that were identified as practicable*." 6 N.Y.C.R.R. § 617.11(d)(5) (emphasis added); *see also* E.C.L. § 8-0109(1), (8). This need to mitigate the effects of adverse impacts, particularly the types of potential catastrophic impacts associated with LPG storage, is bolstered by the design and purpose of Article 23 of the E.C.L.—including Title 13—to "protect landowners' rights and the general public" against such harms. *See* Communities' Post-Hearing Brief at 53-55 (quoting *Bath Petroleum Storage, Inc. v. Sovas*, 309 F.Supp.2d 357, 375 (N.D.N.Y. 2004) (finding that the Department acted within its discretion to require sonar testing of proposed LPG storage salt cavern facility, even though it was not explicitly authorized to do so by Title 13)).

Here, in imposing Condition 9 of the Draft Permit Conditions, the Department identified indemnification as a practicable mitigation measure necessary to protect the State of New York against impacts "reasonably related" to integrity loss or explosion at the Project site. 6 N.Y.C.R.R. § 617.3(b) ("conditions imposed must be practicable and reasonably related to impacts identified in the EIS"). Although the Department has authority to afford similar protection to the region's municipalities—a group of communities more directly vulnerable than the State itself—it nonetheless fails to justify why it is not likewise practicable or necessary to provide similar assurance to those municipalities. Communities' Post-Hearing Brief at 55-56 (citing to *Town of Henrietta v. Dep't of Envtl. Conservation of N.Y.*, 76 A.D.2d 215, 223-24 (4th

Dep't 1980) (finding SEQRA provides authority to attach permit conditions "necessary to minimize or avoid all adverse environmental impacts revealed in the EIS")).

Perhaps this is because, as demonstrated by the Communities and other petitioners, both Applicant and Department woefully underestimate the risk of such a catastrophic failure occurring at the Project site. *See, e.g.*, Communities' Post-Hearing Brief at 33-45 (discussing potential risk of significant water quality impacts); 45-52 (risk of significant impacts to local emergency resources); Gas Free Seneca's Post-Hearing Brief at 19 to 36 (cavern integrity risks); 36-47 (public safety risks); Seneca Lake Pure Waters Association's Post-Hearing Brief at 5-46 (cavern integrity risks). The real and substantial risk of the salinization of Seneca Lake, a catastrophic explosive incident, or both, is by no means speculative, and the Communities will prove as much at an adjudicatory hearing through the offers of proof identified in their Petition and Post-Hearing Brief. *See* Communities' Petition at 22-24; Communities' Post-Hearing Brief at 52-53, 56-57.

Lastly, Communities emphasize that while "purely economic" harms are not cognizable environmental impacts under SEQRA, *see, e.g.*, *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 50 (4th Dep't 1995) (dismissing petitioner's claims that related only to "purely competitive economic factors"); *Concetta T. Cerame Irrevocable Family Trust v. Town of Perinton Zoning Bd. of Appeals*, 27 A.D.3d 1191 (4th Dep't 2006) (letter of credit to cover damage to town roads not related to mitigating an environmental impact), economic factors must be considered when they are bound up with other environmental impacts. *St. Lawrence Cement*, 2001 WL 1587361 at *109 ("Under SEQRA, economics are relevant to a determination of significance. The statute requires an inquiry into 'whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be

considered in determining the significance of an environmental effect.'" (quoting E.C.L. § 8-0113(2)(b))).

Here, the impacts of a catastrophic incident at the Project site may cause widespread environmental harms, such as the salinization of Seneca Lake, with immediate impacts on local residents and their basic everyday needs. These injuries are not remediable without sufficient economic resources. For example, as demonstrated in the Affidavit of Matthew Horn cited by Applicant, Applicant's Post-Hearing Brief at 53-54, were a salinization incident to occur, tremendous economic resources would be required in the immediate-term to provide for the 15,500 people who depend entirely on the City of Geneva water system. *See* Communities' Petition at Attachment G, ¶¶ 3, 9-10 ("Depending upon the intensity of the salinization," water users "could be left without a viable drinking water solution for over a year" during which costs of temporary water would be substantial). Without immediate economic assurances available—such as those that could be provided by a bond or other insurance mechanism—these very real and very significant environmental harms will go unaddressed. Although Applicant may feel that the people of the Seneca Lake Region have sufficient recourse "under tort law," Applicant's Post-Hearing Brief at 54, this would entail significant time, expense, and uncertainty. Accordingly, the Draft Permit Conditions' failure to provide adequate assurance against these real and immediate environmental harms that would result from a catastrophic incident at the Project site should be addressed in an adjudicatory hearing.

VII. Conclusion

As the Communities have shown at the Issues Conference, in their previous briefs, and above, the proposed project poses risks to the health, safety, and community identity of the Seneca Lake Communities and the Finger Lakes Region. Many of these risks have not been

adequately considered or mitigated in the DSEIS and the Draft Permit Conditions. This failure to comply with SEQRA is a substantive and significant issue requiring adjudication. Therefore, the Seneca Lake Communities respectfully request the opportunity to present evidence at an adjudicatory hearing.

Respectfully Submitted,

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New York State Department of Environmental Conservation

In the Matter of the Applications of

Application Number
8-4432-00085

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

AFFIRMATION OF SERVICE

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

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

That on May 29, 2015, the foregoing Post Issues Conference Reply Brief of the proposed parties the Seneca Lake Communities—Seneca County, Yates County, the City of Geneva, the Town of Fayette, the Town of Geneva, the Town of Ithaca, the Town of Romulus, the Town of Starkey, the Town of Ulysses, the Town of Waterloo, the Village of Waterloo, and the Village of Watkins Glen—was served on the following by email, with a hardcopy of the foregoing petition being mailed to the same (except for those parties for who email-only service was authorized by the April 15, 2015 email order of Chief Administrative Law Judge James T. McClymonds, as indicated below):

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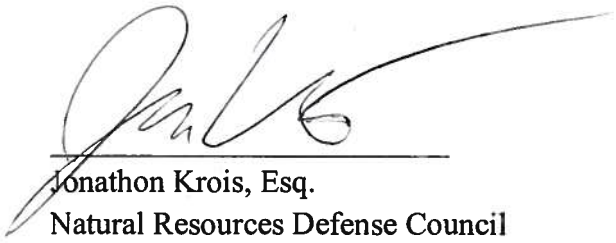

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