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

Re: **Comments on the Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas, and Solution Mining Permitting Program**

Dear Sir or Madam:

This comment letter is submitted on behalf of the Natural Resources Defense Council ("NRDC") in connection with the Draft Supplemental Generic Environmental Impact Statement ("DSGEIS") on the Oil, Gas, and Solution Mining Permitting Program -- Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (the "Permitting Program"). These comments identify multiple deficiencies in the DSGEIS specifically related to potential impacts of concern to units of local government, including the following:

(a) The DSGEIS fails to undertake any quantitative or meaningful qualitative analysis of potential significant adverse traffic, visual, noise, community character, and land use impacts from the Permitting Program and to require appropriate mitigation measures. The DSGEIS fails to establish reasonable worst case scenarios, analyze those scenarios, identify any significant adverse impacts, and require appropriate mitigation measures.

(b) The DSGEIS unlawfully segments the environmental review of traffic, visual, noise, community character and land use impacts by failing to undertake any quantitative or meaningful analysis of those potential significant impacts and by deferring such an analysis to the future environmental review of a particular well drilling application.

(c) The DSGEIS and the Permitting Program preclude the New York State Department of Environmental Conservation ("NYSDEC") (or another lead

agency) from issuing a positive declaration to require future preparation of a site specific supplemental environmental impact statement based on the potential of a particular well drilling application to generate significant adverse traffic, visual, noise, community character, and land use impacts. Rather, the DSGEIS and the Permitting Program delineate an artificially circumscribed set of seven criteria which are the exclusive factors for determining which well drilling applications will require a lead agency to make a site specific determination of significance. None of those seven criteria relate to traffic, visual, noise, community character, and land use impacts. Thus, the NYSDEC is precluded from considering potential traffic, visual, noise, community character, and land use impacts when determining whether a particular well drilling application requires a determination of significance. Unless one of the seven criteria is satisfied, there will be no determination of significance for a particular well drilling application even if that application would have the potential to generate significant adverse traffic, visual, noise, community character, or land use impacts and would require preparation of a supplemental environmental impact statement.

(d) The environmental assessment form ("EAF") and the required addendum for high-volume hydraulic fracturing ("EAF Addendum") fail to require submission of necessary information to enable NYSDEC (or another lead agency) to determine whether a well drilling application has the potential to generate significant adverse traffic, visual, noise, community character and land use impacts.

(e) The DSGEIS acknowledges that units of local government are preempted by Article 23 of the Environmental Conservation Law ("ECL") from regulating well drilling except as to matters relating to roads and collection of real property taxes. Yet the DSGEIS assumes that units of local government could require well drilling applicants to comply with local wetland laws and local floodplain development laws. There is no analysis anywhere in the DSGEIS to support the assumption that the Article 23 preemption does not apply to local wetland laws and local floodplain development laws. To the extent that the DSGEIS and the Permitting Program rely on units of local government to apply and enforce local wetland and local floodplain development laws to well drilling, the DSGEIS is defective for failing to analyze and conclude that such laws are not preempted.

(f) The DSGEIS and the Permitting Program require minimum setbacks from wetlands for certain, but not all, facilities associated with high-volume hydraulic fracturing well drilling operations. The "wetlands" referred to in the DSGEIS appear to be only freshwater wetlands protected by New York State under the ECL. The DSGEIS does not require a setback from wetlands protected by local laws and fails to analyze the potential significant adverse impacts from siting well drilling operations proximate to or in wetlands protected by local laws, assuming that such local wetland laws are preempted by the ECL when applied to well drilling operations.

(g) The DSGEIS and the Permitting Program fail to establish any meaningful role for units of local government, even in an advisory capacity, in the NYSDEC's process for issuance of well drilling permits and in the imposition of appropriate

conditions on permit approvals. Units of local government are not required to be notified of any application for high-volume hydraulic fracturing well drilling other than the very first application, thereby requiring the unit of local government to monitor the NYSDEC's website on a daily basis to determine if such an application has been filed. Even if a unit of local government becomes aware of an application, it is not entitled to a copy of application materials nor does it have any inherent opportunity to review or comment on the application. The DSGEIS should have considered an alternative in which: (a) units of local government are required to be informed by the applicant when an application is filed for high-volume hydraulic fracturing and well drilling within their boundaries; (b) such units of local government are provided all application materials; and (c) such units of local government are given a reasonable opportunity to submit comments to NYSDEC on the proposed application, including but not limited to an advisory recommendation in opposition to or in favor of the application, and, if the latter, any reasonable conditions which should be imposed by NYSDEC.

Overview of Relevant Elements of the NYSDEC Well Permitting Process

An applicant seeking a well drilling permit must submit: (1) an application, including various site plans showing the proposed well location, the boundaries of the lease or unit containing the well and information about other nearby wells; and (2) an EAF (set forth in DSGEIS Appendix 5) and the EAF Addendum (set forth in DSGEIS Appendix 6). Neither the EAF nor the EAF Addendum require the applicant to submit any information concerning:

(a) the number of truck trips, the weight and size of the trucks, the duration and frequency of truck trips, the hours during the day and days of the week of trucking operations, or any similar information;

(b) the location of visual impact receptors and the degree to which well drilling rigs, impoundments, and other facilities associated with the proposed well drilling permit would be seen from such receptors;

(c) the location of potential noise receptors and the projected noise levels from well drilling, blasting, trucking, and machinery operation at such noise receptors;

(d) temporary and permanent changes to the land which would have the potential to significantly alter community character; and

(e) uses of land proximate to well drilling and related activities and which are not compatible with such activities, including hospitals, schools, nursing homes, places of worship, etc.

The EAF Addendum requires that a topographic map be attached showing, inter alia, location of the access road, but none of the other information enumerated above. The EAF Addendum also requires certain affirmations by the applicant, including:

(a) that the applicant has consulted applicable FIRM, Flood Boundary and Floodway maps and that any proposed well pad and access road are not within a mapped 100-year flood plain;

(b) any existing comprehensive, open space and/or agricultural plan or similar policy document(s) identified and reviewed by the applicant;

(c) that the access road will be located as far as practical from occupied structures, places of assembly and unleased property, unless otherwise required by the lease;

(d) that the operator will prepare and adhere to the following site plans, which will be available to the NYSDEC on request and available on-site to the NYSDEC inspector while activities addressed in the plan are occurring:

(i) a visual impacts mitigation plan consistent with the SGEIS;

(ii) a noise impacts mitigation plan consistent with the SGEIS;

(iii) a greenhouse gas mitigation plan consistent with the SGEIS; and

(iv) an invasive species mitigation plan.

Note regarding the required EAF Addendum affirmations:

(a) There is no requirement that the applicant take any action to comply with any existing comprehensive, open space and/or agricultural plan or similar policy document(s) other than to affirm which ones, <u>if any</u>, the applicant has identified and reviewed. There is no requirement that the applicant actually identify any of the plans in existence that are applicable to the land on which the well drilling permit is sought, the surrounding areas, or the areas in which trucks will be traveling to and from the well pad or impoundment. Nor is there any requirement that the applicant actually review any or all such plans. Even if a municipality has a series of comprehensive, open space and agricultural plans and similar plans, the applicant would still be in compliance with the EAF Addendum if it represented that it never looked for and, therefore, failed to identify or review any such plans.

(b) There are no definitional or other criteria for determining what is "as far as practical" concerning location of the access road in relation to occupied structures, places of assembly and unleased property. Nor is there any required explanation by the applicant to support its affirmation or submission of a map showing such structures and uses in relation to the access road. Nor is there any required hierarchy in determining which uses of land require greatest distance from the access road in the event that movement of the access road away from one use would bring it closer to another. All that is required of the applicant is a bare affirmation that it has located the access road.

(c) The visual impacts and noise impacts mitigation plans do not have to be prepared prior to issuance of the well drilling permit and are not subject to prior approval by the NYSDEC. The only apparent requirement is that these plans be prepared by the applicant in conformity with the SGEIS and made available to the NYSDEC on request.

The principal purpose of the EAF and EAF Addendum is to provide facts to enable NYSDEC (or another lead agency) to determine whether any one of the following seven criteria has been "tripped," thereby requiring a site specific determination of significance by the lead agency:[1]

(a) Any proposed high-volume hydraulic fracturing where the top of the target fracture zone is shallower than 2,000 feet along the entire proposed length of the wellbore;

(b) Any proposed high-volume hydraulic fracturing where the top of the target fracture zone at any point along the entire proposed length of the wellbore is less than 1,000 feet below the base of a known fresh water supply;

(c) Any proposed centralized flowback water surface impoundment. Emphasis of the initial review will be on proposed additive chemistry relative to potential emissions of Hazardous Air Pollutants. Additional review of site topography, geology and hydrogeology will be required for any proposed centralized flowback water surface impoundment at the following locations:

(i) within 1,000 feet of a reservoir;

(ii) within 500 feet of a perennial or intermittent stream, wetland, storm drain, lake or pond, or within 300 feet of a public or private water well or domestic supply spring;

(d) Any proposed well pad within 300 feet of a reservoir, reservoir stem or controlled lake;

(e) Any proposed well pad within 150 feet of a private water well, domestic-use spring, watercourse, perennial or intermittent stream, storm drain, lake or pond;

(f) A proposed surface water withdrawal that is found not to be consistent with the Department's preferred passby flow methodology as described in Chapter 7; and

(g) Any proposed well location determined by NYCDEP to be within 1,000 feet of subsurface water supply infrastructure.

If a well drilling application falls within one of the foregoing seven criteria, then the lead agency (presumably NYSDEC in most if not all instances) must determine whether the application may have the potential to generate any significant adverse environmental

[1] See DSGEIS at 3-12 to 3-13.

impacts. If so, a supplemental environmental impact statement would be required. Conversely, if a well drilling application does not fall within any of the foregoing seven criteria, there will be no determination of significance, the application will be treated as a Type II action under the New York State Environmental Quality Review Act ("SEQRA"), and there would be no identification of any potential significant adverse environmental impacts arising from the proposed well drilling, nor imposition of any mitigation measures.

None of the seven enumerated criteria relates in any way to potential significant adverse traffic, visual, noise, community character or land use impacts. Thus, the DSGEIS and the Permitting Program do not provide for submission of facts relevant to such potential significant adverse environmental impacts in the EAF or EAF Addendum and preclude a lead agency from issuing a positive declaration for a particular well drilling application based on the presence of such potential significant adverse environmental impacts. This violates one of the most fundamental requirements of SEQRA -- that the lead agency take a "hard look" at all of the potential significant adverse environmental impacts when making a determination of significance. By establishing, a priori, that only certain enumerated and circumscribed criteria could potentially trigger a determination of significance, the DSGEIS and the Permitting Program preclude the "hard look" mandated by SEQRA.

Regardless of whether a well drilling application requires an individualized determination of significance, the NYSDEC will notify a town only of the first application for high-volume hydraulic fracturing in any town. (DSGEIS at 8-3.) As stated at DSGEIS 8-4 to 8-5, the notification will include:

(a) a brief description of permitting process;

(b) an explanation that the letter is a notification for purposes of local coordination of jurisdictional issues (e.g., road use), not a SEQRA notice;

(c) pertinent website links, including SGEIS, mapping applications and various lookup tables; and

(d) instructions for using the website to track well status and future applications.

Once a town is notified of the first well drilling application for high-volume hydraulic fracturing, there is no requirement that the town ever be notified by the NYSDEC of any subsequent application by that applicant or any other applicant. The DSGEIS is silent as to whether the NYSDEC will notify units of local government other than towns (cities and villages) if an application for high-volume hydraulic fracturing is filed within their boundaries. After a well drilling permit has been issued, the permittee must notify any affected local government and surface owner prior to commencing operations. (DSGEIS 8-3.) There is no requirement that neighbors ever be notified of any application for high-volume hydraulic fracturing. Although the DSGEIS states that NYSDEC staff welcome

input from the surface owner and neighbors during the application review and may impose specific permit conditions to address environmental concerns, if appropriate, there is no such statement made regarding input from units of local government, nor is there any process by which NYSDEC solicits such input or is required to consider such input in any way if it is informally proffered.

Overview of Regulatory Authority

The NYSDEC has exclusive authority to regulate oil, gas, and solution mining industries. (See DSGEIS 1-2;) ECL § 23-0303(2). As set forth in the DSGEIS, "ECL §23-0303(2) provides that NYSDEC's Oil, Gas and Solution Mining Law supersedes all local laws relating to the regulation of oil and gas development except for local government jurisdiction over local roads and the right to collect real property taxes. Likewise, ECL §23-1901(2) provides for supercedure of all other laws enacted by local governments or agencies concerning the imposition of a fee on activities regulated by Article 23." (DSGEIS 1-2.)

The DSGEIS omits any discussion of NYSDEC's understanding and interpretation of the breadth and scope of the local government regulatory preemption contained in the ECL. Without explanation, the DSGEIS assumes that local governments have the power to require those seeking to engage in well drilling for high-volume hydraulic fracturing to comply with local wetland laws and local laws governing construction and other activities in floodplains. For example, the DSGEIS notes that "if the proposed action falls under the jurisdiction of more than one agency, based, for example, on the need for a local floodplain development permit, the lead agency must be determined by agreement among involved agencies." (DSGEIS 3-7.) See also Question 18 in the EAF in which the NYSDEC requires an applicant to state whether the proposed well drilling would require a local wetland permit or a local floodplain permit. Nowhere in the DSGEIS is there any explanation as to how units of local government would possess such regulatory authority given the preemptive language contained in ECL Article 23.

Nevertheless, the DSGEIS assumes that local governments could apply local wetland and floodplain development laws to well drilling applications. Presumably that is why the DSGEIS and the Permitting Program only require setbacks from those wetlands protected by the ECL. However, the mere assumption that local wetland laws are not preempted is insufficient to establish that such local regulatory authority does actually exist. Without such an analysis and supporting conclusion, the DSGEIS cannot rationally conclude that wetlands outside NYSDEC's jurisdiction will be protected by local wetland laws.

The DSGEIS Fails To Identify Or Analyze Potential Traffic Impacts

The DSGEIS fails to identify or analyze potential significant adverse traffic impacts that would arise from the construction and operation of hydraulic fracturing, horizontal wells, multiple well pads, and other related well drilling infrastructure and activities. The DSGEIS acknowledges that "the water requirement of high volume hydraulic fracturing could lead to significantly more truck traffic than was discussed in the GEIS." (DSGEIS

6-138.) And although the DSGEIS estimates that more than one thousand (1,000) truck loads would likely be required for each well per fracture job,[2] there is no attempt to analyze the potential adverse impacts of such a substantial increase in truck traffic, as required by SEQRA. (See id. 6-138 to 6-139.)

To the extent that the DGSEIS implicitly defers the analysis of potential adverse traffic impacts to the future environmental review of a particular application for a well drilling permit, such a wholesale deferral of environmental review of potential significant adverse traffic impacts violates SEQRA. A generic environmental impact statement cannot simply defer all environmental review of potential adverse traffic impacts to the filing of a site specific application.[3]

Moreover, even to the extent that analysis of site specific traffic impacts could be legitimately deferred, in part, to the review of a specific well drilling application, the process created by NYSDEC is defective. None of the seven criteria that would trigger a determination of significance has anything to do with truck traffic. Thus, even if a proposed well drilling application would contemplate massive truck traffic that would overwhelm local streets, those facts would not be germane to triggering a determination by NYSDEC (or any other lead agency) that a site specific determination of significance is required. Thus, the very process created by the NYSDEC to establish when a future well drilling application would require a determination of significance precludes potential traffic impacts from being considered. Even if the NYSDEC (or other lead agency) issues a positive declaration on the basis of one of the seven criteria cited above, there is still no guarantee that potential adverse traffic impacts would be analyzed. The EAF and EAF Addendum require no truck traffic data or trip generation information. Thus, it is difficult to imagine on what basis the NYSDEC (or another lead agency) would require preparation of a supplemental EIS to address potential adverse truck traffic impacts.

The foregoing confirms that potential significant adverse truck traffic impacts are neither analyzed in the DSGEIS nor is there any reasonable likelihood that such potential impacts would ever be analyzed in connection with any future well drilling application. Put simply, this violates SEQRA.

The DSGEIS also fails to comply with SEQRA's requirement to include mitigation measures to avoid or minimize adverse environmental impacts. The DSGEIS states that the "applicant should attempt to obtain a road use agreement with the municipality or document the reasons for not obtaining one. When there is no agreement, operators should develop a trucking plan that includes estimated amount of trucking, hours of operations, appropriate off road parking/staging areas, and routes for informational

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[2] The DSGEIS fails to analyze the potential traffic associated with multiple fracture jobs that would likely be completed at each well.

[3] A Generic EIS must establish thresholds and conditions that would trigger the need for supplemental determinations of significance or site specific EISs and must analyze the secondary, or indirect impacts of a project, including traffic. See NYSDEC, THE SEQR HANDBOOK at 79; cf. Horn v. Int'l Bus. Machines Corp., 110 A.D.2d 87, 96, 493 N.Y.S.2d 184, 191 (2d Dept. 1985) (GEIS "replete with lengthy studies, analyses and discussions of the potential impact of the proposed project . . . on the surrounding areas" reflect that agency took a "hard look" at the proposed project pursuant to SEQRA's requirements).

purposes." (DSGEIS 7-109.) Both the road use agreement and the trucking plan are "for informational purposes only." (Id. 7-110.) "The Department strongly encourages operators to attain road use agreements with governing local authorities . . . [but] does not have the authority to require, review or approve road use agreements or trucking plans." (Id. 8-4.) Merely requesting information does nothing to mitigate any adverse environmental impacts. Documents submitted pursuant to these information requests will not state what mitigation measures must be taken or who is responsible for mitigating the adverse traffic impacts. As such, they fall far short of what is required by SEQRA.

As an alternative, or in addition to, developing a reasonable worst case scenario upon which to perform a full traffic assessment in the DSGEIS,[4] NYSDEC should require that applicants include in their permit applications and EAF Addendum a site-specific traffic study identifying temporary traffic control measures that ensure safe operations. This study must include a full traffic analysis showing what potentially significant adverse traffic impacts would arise and how those impacts will be mitigated. Such study should be implemented at applicant's own expense.

As a condition of receiving a NYSDEC well permit, the applicant should also be required to obtain certification from the Chief Executive Officer of the local municipality in which the well will be located (e.g., the Supervisor of the Town) stating that all required local road use permits have been obtained and/or the applicant has entered into all applicable local road use agreements. The certification should certify that the applicant has posted all necessary road security bonds prior to any land disturbance.

The DSGEIS Fails to Identify or Analyze Potential Wetland Impacts

The DSGEIS states that "[a]ctions located within 100 feet of wetlands regulated by Article 24 of the ECL [freshwater wetlands] generally require a permit from DEC." (DSGEIS 7-6.) It appears that only NYSDEC-regulated freshwater wetlands within the ECL Article 24 definition are within the scope of the DSGEIS. See ECL §24-0107(1). This definition excludes wetlands under the jurisdictions of the U.S. Army Corps of Engineers ("ACOE") and local governments. Such a scope for the DSGEIS is far too narrow because it does not include wetlands that fall outside of the ECL Article 24 freshwater wetlands definition. Therefore, the Final SGEIS must include an analysis of potentially significant adverse impacts of drilling operations on wetlands within the jurisdiction of the ACOE and local governments. Particularly, with respect to the latter, the Final SGEIS must address potential impacts on wetlands under local government jurisdiction if local wetland laws are preempted.

In addition, if the Final SGEIS concludes that local wetland laws are not preempted, then the Final SGEIS should recommend that the Permitting Program require a certification by the municipality's Chief Executive Officer, similar to the traffic certification described above. The certification would confirm that the application complies with all local wetland laws, if any exist, and that the applicant has applied for and obtained the requisite wetland permit or variance to commence drilling in the proposed location.

[4] See accompanying report by AKRF, Inc.

The DSGEIS Fails to Identify or Analyze Potential Visual, Noise, Community Character and Land Use Impacts

The same defects noted above regarding potential traffic impacts apply equally to the handling of potential visual, noise, community character, and land use impacts. The EAF and EAF Addendum do not require submission of facts and data based upon which an evaluation of potential visual, noise, community character, or land use impacts could be undertaken by the NYSDEC (or other lead agency). The seven enumerated criteria cited above do not authorize the NYSDEC (or other lead agency) to require a determination of significance based on the potential significant adverse visual, noise, community character, or land use impacts. Even if one of the seven criteria is triggered and a positive declaration is made, there is no requirement that the scope of the resulting supplemental EIS would include analysis of potential visual, noise, community character, or land use impacts. Indeed, it is hard to imagine how such a supplemental EIS could include such analyses given that the EAF and EAF Addendum fail to require submission of facts that would be germane to identifying such potential significant adverse environmental impacts.

In addition, regarding potential community character and land use impacts, the EAF Addendum merely requires that the applicant attest to any existing comprehensive, open space and/or agricultural plan or similar policy document(s) it has reviewed. (DSGEIS, App. 6.) This attestation is meaningless. There are no consequences for not identifying or reviewing any of a municipality's plans and there is no requirement that an applicant take such plans into account when siting its facilities. Even if the failure to comply with such plans would have the potential to generate a significant adverse community character or land use impact, there is no requirement that such a potential impact be disclosed in the EAF or EAF Addendum, nor that such a potential significant adverse impact be mitigated.

In order to comply with SEQRA, NYSDEC must require that the applicant identify all land uses within 2,500 feet of a proposed well. These land uses should include, but not be limited to hospitals, senior citizen residences, schools, places of worship, and residential uses. If a specified land use is located within 2,500 feet of a proposed well, the applicant must include a mitigation plan detailing how it plans to mitigate potential adverse noise, traffic, visual, and light impacts to the maximum extent practicable. This plan should be subject to review and comment by local government officials of the municipality in which the proposed well will be located and must be approved prior to issuance of a well drilling permit by NYSDEC.

The DSGEIS Should Analyze an Alternative Enabling Units of Local Government to Provide Advisory Input to the NYSDEC as an Integral Part of the Well Permitting Process

The DSGEIS does not analyze, and the Permitting Program does not provide for, meaningful input by units of local government in the well permitting approval process.

Mere notification of the first application for a high-volume hydraulic fracturing well drilling operation is woefully inadequate. While the NYSDEC is correct that no statute or extant regulation requires additional notification or greater involvement by units of local government in the permitting process, it is also true that NYSDEC is not precluded from providing for additional local government involvement by regulation. It should analyze as an alternative a proposed regulation in which units of local government would be given notice of all applications for high-volume hydraulic fracturing well drilling and an opportunity to comment on such applications.

By definition, the DSGEIS does not and cannot address the specific impacts associated with an individual high-volume hydraulic fracturing well drilling application in any particular unit of local government. Given the far more intensive nature of such well drilling activities compared to traditional well drilling (especially concerning potential traffic, visual, noise, community character and land use impacts), NYSDEC is well within its rights and would be acting responsibly to protect the environment by providing a meaningful opportunity for units of local government to provide advisory input to NYSDEC as part of the permitting process. Obviously, the potential impacts of high-volume hydraulic fracturing well drilling projects will vary depending upon their specific locations. Local government involvement is essential to provide input to NYSDEC about local conditions and concerns -- especially given the very limited instances in which a determination of significance and supplemental EIS would be required in connection with future applications.

When an applicant submits an application and EAF and EAF Addendum for high-volume hydraulic fracturing well drilling, a copy of these materials should be provided to the affected unit of local government, even if the local government is not an involved agency. An applicant should be required to demonstrate that constructing and operating the proposed well will comply with the municipality's road use requirements and/or trucking plan and comply with local wetland permits and floodplain requirements.

Prior to issuing a well permit, NYSDEC should give the affected local government the opportunity to submit comments on the proposed application. In particular, the affected local government should be given the opportunity to recommend denial of the permit, or if approval is recommended, to identify conditions on which approval should be imposed by NYSDEC. In order to make such local government input meaningful, NYSDEC should adopt regulations which require it to make a reasoned elaboration in the record if it chooses to act contrary to a unit of local government's recommendation.

The foregoing is not contrary to the ECL preemption of local government regulation of well permitting, but does provide an opportunity for meaningful input by the local government within which the high-volume hydraulic fracturing well drilling will occur.

Conclusion

For the foregoing reasons, it is respectfully submitted that the DSGEIS is defective as presently written and violates the requirements of SEQRA.

Respectfully submitted,

Steven Barshov