

Liquefied Natural Gas



NYSDEC Proposed Regulation
6 NYCRR Part 570



History of LNG Law

- 1973 – Tragic Staten Island event was a maintenance accident, not an LNG explosion
- 1976 LNG Law passed
 - ECL Article 23 Title 17 Added
- 1978 Statewide Moratorium Enacted
- 1997 Law for Energy Board Evaluation
 - A report was issued in 1998



1998 Report Results

- Safety of LNG Similar to Other Fuels
- 1973 Accident Not Due to LNG Storage
- No Other States Prohibit LNG
- Opportunities for Cleaner Fuel
- Discontinue Moratorium
- Repeal Law



Drafting of Regulation

- Multi-agency workgroup formed
 - Environmental Conservation,
 - Public Service,
 - Transportation,
 - Department of State,
 - Office of Fire Prevention and Control
- Draft substantially complete in 2008
- Impediments to Completing Regulation



Impediments to Regulation

- Routing of Intrastate Transportation of LNG
 - Intrastate vs. Interstate Transportation
 - Practicability of Routing
- Evaluation of Local Fire Response Capabilities
 - Input from Office of Fire Prev. & Control
- Concerns about Safety Issues



2011 NYSERDA Report

- Other States Rely Upon Building/Fire Codes and Standards, Not Permits
 - *NYS Fire Code references NFPA 52 and NFPA 59A (Fire Code 3001.1/3201.1)*
- Texas Licenses Operators
- Project Approximately 21 Facilities in the First Five Years (all associated with transportation)
- Other facility types possible but none expected in first five years



Recent Developments

- Price Divergence of Petroleum and Natural Gas
- Development of More Advanced Engines
- Reduced Emission Profiles
- Economic Demand for Facilities
- About 150 LNG fueling facilities operating or planned nationally



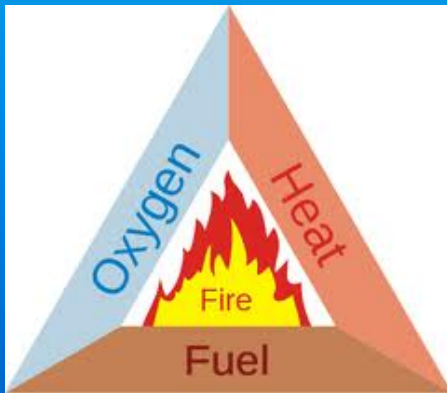
Addressing Impediments

- Routing Requirement
 - Allow intrastate transportation to supply facilities with LNG only if route certified by DOT



Addressing Impediments

- Local Emergency Response Evaluation
 - Permit application to require extensive information on local capabilities
 - DEC to enlist assistance of the Office of Fire Prevention and Control to review capabilities and make recommendations



Key Definitions



- LNG “facility” means any structure/ facility that stores LNG or converts LNG to gas
- “Tank system” means a stationary device designed to store LNG
- On-board LNG fuel tank in an LNG-fueled vehicle/vessel is not an LNG facility



Key Definitions



- LNG Transportation activity means the loading, unloading, or transport of LNG.
- “Interstate transport of LNG” means
 - the transportation of LNG between a point in NYS and a point in another state or foreign country, in either direction; or
 - between points in NYS through another state or foreign country; or
 - between points in other states or foreign countries through NYS.



Re-Cap

- Permit – before preparing property for facility
 - Submit application, EAF and possible EIS
 - Public notice and possible hearings
 - Good for maximum of 5 years
 - Evaluation and, if needed, training of local responders
- Inspection and compliance



Comments in Opposition

- The anti-fracking community believes the program will add to the infrastructure for gas; increase demand and lead to fracking
- Danger from LNG explosions
- Methane emissions too high



Comments in Support

- Implementation of the program will reduce greenhouse gas and other air emissions
- other environmental benefits - groundwater
- Program will put NY on the same footing as 49 other states, with economic benefits



Addressing Concerns

- Part 570 contains does not address production of natural gas; Title 17 dates back many years and does not relate to HVHF – any increase in demand would be *de minimis*
- Only state with a permit program – any issues can be addressed on a case-by-case basis as DEC reviews applications



New York's Proposed New Liquefied Natural Gas Facility Regulations
(6 NYCRR Part 570)

A Dialogue

Presented by: The Environmental Law Section
New York State Bar Association
Annual Meeting, New York, N.Y.
January 31, 2014

Speakers:

David H. Keehn, Esq. N.Y.S. Department of Environmental Conservation
David Vandor, Expansion Energy
Steven C. Russo, Partner, Greenberg Traurig LLP

Moderator:

Michael J. Lesser, Of Counsel, Sive Paget & Riesel, P.C.

LNG Background:

Natural Gas Hits the Road, Bradley Olson, Bloomberg Businessweek May 6 – May 12, 2013, pp. 60-63,

<http://www.businessweek.com/articles/2013-05-02/why-natural-gas-powered-vehicles-are-catching-on>

- Currently, the U.S. natural gas supply can meet U.S. consumption for 100 years.
- 1,000 NG refueling stations are operating in the U.S.
- There are approximately 120,000 NG powered vehicles in the U.S. (15.2 million globally).
- Industry is investing heavily in the manufacture and supply of NG vehicles.
- The concentration of these efforts is on fleet, delivery and long haul vehicles.
- Regarding LNG, efforts are underway to create “America’s Natural Gas Highway” a corridor of LNG refueling stations along major long haul trucking routes.

New York State Department of Environmental Conservation (NYSDEC) Online Resources

NYSDEC Proposed LNG Rule Home Page

<http://www.dec.ny.gov/regulations/93069.html>

NYSDEC Proposed 6 NYCRR Part 570 Regulations (Full Text)

<http://www.dec.ny.gov/regulations/93166.html>

NYSDEC Proposed Part 570 Public Information Page

http://www.dec.ny.gov/docs/remediation_hudson_pdf/lng1030pres.pdf

NYSDEC Proposed Part 570 Press Release

<http://www.dec.ny.gov/press/93559.html>

NYS Part 570 Promulgation Support Study

http://www.dec.ny.gov/docs/remediation_hudson_pdf/lngnyserdareport1.pdf

SEORA Negative Declaration, Proposed Part 570 Regulations
http://www.dec.ny.gov/docs/remediation_hudson_pdf/part570seordocs.pdf

Information about Opposition to Proposed LNG Facility Regulations

New Yorkers Demand DEC Withdraw Proposed Liquefied Natural Gas (LNG) Regulations in 50,000+ Comments Hand Delivered to Agency Headquarters, New Yorkers Against Fracking, 12/4/13
<http://nyagainstfracking.org/new-yorkers-demand-dec-withdraw-proposed-liquefied-natural-gas-lng-regulations-in-50000-comments-hand-delivered-to-agency-headquarters/>

50,000+ Demand DEC Withdraw Flawed LNG Regulations
EcoNews, 12/4/13
<http://www.dec.ny.gov/regulations/93166.html>

Information about Advocates for Proposed LNG Facility Regulations

NYLCV Press Release on LNG Facilities, 10/31/13
<http://www.nylcv.org/newsroom/releases/9843>

LNG for NY, Facts and Links
http://www.lngforny.com/lng_facts.php

Selected 2013 LNG NYS Legislation

S 3846, Sen. Lanza, Enacted 5/7/13, (Extends LNG Facility Moratorium)
<http://public.leginfo.state.ny.us/menugetf.cgi>

S 1119, Sen. Maziarz, Passed Senate but not Assembly (exempts LNG Facilities with 40,000 gallon or less capacity from Moratorium,
<http://public.leginfo.state.ny.us/menugetf.cgi>

Historical Background

40th Anniversary of 1973 LNG Explosion on SI that Killed 40 (Staten Island Advance)
http://www.silive.com/news/index.ssf/2013/02/40_years_ago_today_staten_isla.html

History of US LNG Accidents
<http://www.ch-iv.com/links/history.html>

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Proposed Express Terms (Full Text) - 6 NYCRR Part 570

Liquefied Natural Gas

Sec.

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§ 570.1 Introduction

(a) **Purpose.** The purpose of this Part is to establish criteria for the siting of liquefied natural gas (LNG) facilities and to require such facilities to obtain a permit from the department pursuant to Article 23, Title 17 of the Environmental Conservation Law and to protect the public health and the environment of New York State (the State).

(b) **Applicability.** This Part applies throughout New York State subject to restrictions as identified in section 570.9 of this Part. Unless specifically exempted pursuant to subdivision (d) of this section, owners and operators of liquefied natural gas facilities must comply with this Part. LNG transportation activities do not require a permit issued under this Part. However, intrastate transportation of LNG to supply a permitted facility is prohibited unless the intrastate transportation route has been certified as set forth in subdivision 570.4(a) of this Part. Storage or transportation of natural gas in the vapor state, under pressure or not, is not subject to this Part.

(c) **Definitions.** For the purposes of this Part, the following definitions apply:

(1) "Aboveground storage tank" or "AST" means any tank that is not an underground storage tank.

(2) "Authority having jurisdiction" means the local government, county government, or State agency responsible for the administration and enforcement of applicable regulation or law.

(3) "Department" means the New York State Department of Environmental Conservation.

(4) "Facility capacity" means the sum of the tank design capacities for each tank at the LNG facility.

(5) "Intrastate transport of LNG" means the transportation of LNG other than as is described in the definition of "interstate transport of LNG."

(6) "Interstate transport of LNG" means the transportation of LNG between a point in New York State and a point in another state or a foreign country, in either direction; or between points in New York State through another state or foreign country; or between points in other states or foreign countries through New York State.

(7) "L/CNG," also known as "liquefied to compressed natural gas," means LNG which may be dispensed from its container as either a liquid (LNG) or as compressed natural gas (CNG).

(8) "Liquefied natural gas," or "LNG," means natural gas or synthetic gas composed primarily of methane (CH₄) cooled to its liquid state. For the purposes of this Part, liquefied natural gas shall not mean liquefied petroleum gas.

(9) "Liquefied natural gas facility" or "LNG facility" means any structure or facility used to store liquefied natural gas in a tank system, or other storage device or to convert liquefied natural gas into natural gas.

(10) "Liquefied natural gas transportation activity" or "LNG transportation activity" means the loading, unloading, or transportation, by whatever means, of liquefied natural gas.

(11) "NFPA" means the National Fire Protection Association, or its successor.

(12) "Natural gas" means a fuel consisting of a mixture of mostly methane (CH₄) gas, other hydrocarbon gases, and trace amounts of non-hydrocarbon gases, which is stored and transported in a vapor state and under a wide range of pressures.

(13) "Non-conforming facility" means a liquefied natural gas facility in actual use and operation on September 1, 1976, which is exempt from the requirements of section 23-1707 of the Environmental Conservation Law but is subject to the requirements of the LNG-related Department orders issued on January 19, 1979.

(14) "Operator" means any person who operates, controls, or supervises an LNG facility or

who is responsible for the operation.

(15) "Owner" means any person who owns or has legal or equitable title to an LNG facility.

(16) "Out-of-service," in relation to an LNG facility or portion thereof, means no longer in use.

(17) "Permit" means an "environmental safety permit" issued by the Department pursuant to Article 23, Title 17 of the Environmental Conservation Law.

(18) "Person" means any individual, corporation, partnership, association, cooperative or otherwise, trust or estate, governmental agency, authority, public benefit corporation, municipality or agency thereof, board or commission, or other public or private legal entity.

(19) "SEQRA" means the State Environmental Quality Review Act set forth in Article 8 of the Environmental Conservation Law, and implemented by Part 617 of this Title.

(20) "Spill" or "spillage" means any escape of LNG in liquid form from the containers employed in the normal course of storage, transfer, processing, or use of LNG.

(21) "Statement of compliance" means a two-part document containing the following components. In part one, a State-licensed Professional Engineer authorized to practice in the State consistent with the State Education Law, on behalf of an applicant for a permit, attests by signature and seal that the design of the proposed LNG facility meets the applicable provisions of Federal Pipeline Safety standards, applicable provisions of the Public Service Commission's regulations in Title 16 of the New York Codes, Rules, and Regulations (NYCRR), and the Uniform Fire Prevention and Building Code of the State. In part two, the owner of the facility attests that the facility will be operated in accordance with all applicable regulations, standards, and requirements.

(22) "Tank design capacity" means the nominal amount of liquefied natural gas that a tank is designed to hold as determined by the tank manufacturer. If a certain portion of a tank is unable to store LNG (for example, electrical equipment or other interior components take up space), the design capacity of the container is thereby reduced.

(23) "Tank" means the main storage container of a tank system. Each section of a compartmented tank will be treated as an individual tank.

(24) "Tank system" means a stationary device designed to store LNG that is constructed of non-earthen materials that provide structural support. This term includes all associated piping and ancillary equipment.

(25) "Tank working capacity" means the portion of the design capacity of a tank that may be filled before engaging the overfill prevention device, reduced by an allowance for freeboard and LNG expansion.

(26) "Underground storage tank" or "UST" means a tank for which ten percent or more of the tank design capacity is beneath the surface of the ground. This term does not include a tank situated in an underground vault or other area making the tank fully available for inspection.

(d) **Exemptions.** For the purposes of this Part, the following exemptions apply

(1) An on-board LNG fuel tank in an LNG-fueled vehicle or vessel shall not constitute an LNG facility.

(2) LNG delivery tank trucks, when attached to a natural gas pipeline for the purpose of short-term pipeline-pressure regulation, shall not constitute LNG facilities if such tank trucks remain connected to the pipeline for less than 72 hours per event, and no more frequently than one such event during any thirty (30) day period.

(3) The movement of LNG within the boundaries of a liquefied natural gas facility shall not constitute intrastate transport of LNG.

(4) The movement of an on-board LNG fuel tank in an LNG-fueled vehicle or vessel shall not constitute intrastate transport of LNG.

(5) A non-conforming facility may continue to operate, without the need to obtain a permit, provided that:

i) there is no increase in the on-site LNG facility capacity within the boundaries of the facility,

ii) the facility sends a statement of compliance to the Department within one year of the date of promulgation of these regulations, and every five years thereafter, and

iii) the facility remains in compliance with the terms of the LNG-related Department orders issued January 19, 1979.

(6) The delivery of LNG to alleviate an emergency, as defined in subdivision 621.2(j) of this Title, shall not constitute intrastate transport of LNG, and for the duration of such emergency, the equipment used to convert LNG into natural gas shall not constitute an LNG facility, unless such equipment is already an LNG facility under this Part. In an emergency, the requirements of section 621.12 of this Title must be met.

(e) **Severability.** If any provision of this Part or its application to any person or circumstance is held invalid, the remainder of this Part, and the application of those provisions to other persons or circumstances shall not be affected.

(f) **Enforcement.** Any person, who violates any of the provisions of this Part, or any order issued by the Commissioner, shall be liable for civil, administrative and criminal penalties as are provided for by law.

§ 570.2 **Permit Requirements and Application Procedures**

(a) **Permit Requirements.** A permit issued pursuant to this Part must be obtained prior to the preparation of a site for, construction of, or operation of a liquefied natural gas facility. Facilities with a valid permit must be operated in conformance with the permit and any terms, limitations, and conditions therein. Nothing in this Part exempts a facility from compliance with any other applicable State, federal, or local requirements.

(b) **Permit Application Contents.** A complete application for a permit issued pursuant to this Part must conform to the format provided by the Department and must include, at a minimum:

- (1) the location of the proposed facility;
- (2) a description of reasonable alternative locations for the proposed facility;
- (3) the need for the proposed facility;
- (4) specification of the tank design capacity for each tank and the facility capacity;
- (5) the expected sources of natural gas or liquefied natural gas for the facility;
- (6) a written summary and maps showing the routes to be used to supply the facility with LNG;
- (7) a description of the possible environmental impacts of the proposed facility and the facility features or procedures to mitigate those impacts;
- (8) a statement of compliance;
- (9) a report, prepared by an independent qualified person, that evaluates the capability and preparedness, or lack thereof, of fire departments in the vicinity of the proposed facility who would respond to a release of LNG or fire involving LNG. If this report concludes that any additional training, personnel, or equipment would be needed for local fire departments to effectively respond to a release or fire involving LNG, the report shall detail the deficiencies and provide a detailed cost estimate and schedule for remedying any deficiencies;
- (10) proof of liability insurance carried by the applicant which covers the proposed LNG operations;
- (11) a written listing of the NFPA requirements that would apply to the LNG facility in accordance with paragraph 570.2(d)(1) of this Part and an explanation of how the LNG

facility would be in compliance with those requirements;

(12) for the proposed facility property and for surrounding properties within one-half mile of the facility property boundaries, the current zoning classifications, actual land use, and population (from most recent census); and

(13) such other information as the Department shall determine to be necessary to render a decision about issuing a permit for the facility.

(c) Permit Application Forms.

(1) Facility owners must submit an application for a permit on application forms provided by the Department unless an alternative means of application is approved by the Department. Forms are available at <http://www.dec.ny.gov/>, all Department offices, or by writing the New York State Department of Environmental Conservation, Division of Environmental Remediation, 625 Broadway, Albany, New York, 12233-7020.

(2) A permit application submitted by a corporation must be signed by a principal executive officer of at least the level of vice-president or by a duly authorized representative. A permit application submitted by a partnership or a sole proprietorship must be signed by a general partner or proprietor. An application submitted by a municipal, state, or other public entity must be signed by either a principal executive officer, ranking elected official, or other duly authorized employee, and must be accompanied by a copy of the ordinance, resolution or order authorizing the individual to act on the public entity's behalf.

(3) Applications that do not conform to the requirements of this Part will be determined to be incomplete pursuant to Part 621 of this Title.

(d) Criteria for Siting and Operation of Facilities.

(1) All LNG facilities must comply with all applicable provisions of the August 29, 2012 (2013 edition) of NFPA 59A, "Standard for the Production, Storage, and Handling of Liquefied Natural Gas." In addition, LNG facilities that store and dispense LNG or L/CNG for use by vehicles must comply with all applicable provisions of the December 17, 2012 (2013 edition) of NFPA 52, "Vehicular Fuel Systems Code."

(2) Facilities that transfer LNG to trucks or rail cars must also comply with the applicable provisions of the October 1, 2011 edition of the United States Department of Transportation's Pipeline Safety Regulations, 49 CFR Part 193, Subchapter D. The installation, operation and maintenance of facilities that transfer LNG to and from marine vessels shall be designed, built and operated in accordance with 49 CFR Part 193,

Subchapter D and/or the July 1, 2011 edition of the United States Coast Guard's Navigation and Navigable Waters Regulations, 33 CFR Part 127, as applicable.

(3) The Department will determine if the information provided in the facility permit application required by subdivision (b) of this section indicates the need for additional training, personnel, or equipment to enable local fire departments to respond effectively to any release or fire involving LNG at the facility. If the Department concludes that additional training, personnel, or equipment is needed, it shall be provided by the applicant before beginning operation of the facility.

(4) When determining whether to issue a permit under this Part, the Department shall consider the physical, flammability, and explosivity characteristics of LNG and the following factors:

- (i) compliance with the requirements of paragraphs one through three of this subdivision;
- (ii) risks to persons and property in the area neighboring the facility; and
- (iii) risks from transportation accidents.

(e) **Permit Issuance.** The procedures and processes identified in Part 621 of this Title govern the issuance of permits to LNG facilities.

(f) **Duration of Permit.** The date of expiration of any permit issued pursuant to this Part will be five (5) years from the date the permit is issued unless the Department determines that a shorter period is appropriate.

(g) **Renewal of Permit.** A permit issued pursuant to this Part may be renewed by the Department for additional five-year terms, or a shorter period if appropriate, in accordance with Part 621 of this Title, upon a written request on a form approved by the Department, and filed with the Department at least thirty (30) days prior to the permit expiration date. A request for a renewal must also include a statement of compliance.

(h) **Public Participation.** Any hearings, comments, or participation by federal, State or local government bodies or members of the public, relative to any permit proceedings, will be conducted in accordance with procedures established in Parts 621 and 624 of this Title.

(i) **Modifications of Permits and Change of Ownership.** A permit issued pursuant to this Part is issued to the facility owner, and includes the names of the facility owner and facility operator. A permit is valid only for the facility's specified owner and operator, and the specific conditions stated in the application and permit. Changes of ownership require the

new owner to submit an application for permit transfer pursuant to section 621.11 of this Title, and the payment of a fee per subdivision (k) of this section. Changes in facility operator require proper notice to the Department. No payment of a fee is needed for a permit modification to reflect a change in facility operator. Permit modifications, including physical or operational changes to an existing LNG facility are subject to procedures established in Part 621 of this Title. In addition:

(1) any proposed changes at an LNG facility subject to this Part involving any increase in on-site LNG facility capacity, modifications to the site boundaries of the facility, or a material change of any permit terms or conditions will be treated as a new application pursuant to Part 621 of this Title.

(2) the upgrading and maintenance of mechanical systems and other equipment, conducted during the term of a valid permit, that will not increase the on-site facility capacity, and is conducted within the previously approved site boundaries, does not require a permit modification.

(j) **Permit Suspension or Revocation.** Permits issued to liquefied natural gas facilities may be suspended or revoked by the Department. The processes and procedures identified in Part 621 of this Title will be utilized by the Department in suspending or revoking a permit. For matters involving the potential endangerment of public safety, nothing in this section restricts the authority having jurisdiction from taking any action it might otherwise be empowered to take.

(k) **Program Fees.** In addition to any fees or costs associated with the SEQRA process, the owner must submit with each application for a permit, permit renewal, or permit transfer, a five-year fee as follows:

LNG Facility Program Fees	
Facility Capacity	Five-Year Fee
(1) less than 1,100 gallons	\$100.
(2) 1,100 gallons to 10,000 gallons	\$500.
(3) 10,001 gallons to 70,000 gallons	\$1,000.
(4) 70,001 gallons and greater	\$2,500.

§ 570.3 **Site Inspections and Training of Local Fire Department Personnel**

(a) Department staff, or any duly designated representative of the Department, may inspect any LNG facility and site for permit compliance. Nothing herein shall prevent the Department, or any duly designated representative of the Department, from making unannounced inspections when deemed necessary.

(b) Each applicant for a permit shall offer an emergency response training program for local enforcement, fire, and hazardous material response personnel of the authority having jurisdiction. The applicant shall offer, at applicant's cost, relevant training prior to commencing operation of the LNG facility and annually thereafter using an appropriate training program approved by the New York State Fire Administrator within the Division of Homeland Security.

(c) The Department may evaluate facility compliance either with its own personnel or by contract with one or more persons qualified to monitor compliance and certify with respect thereto or by a combination of the foregoing means as deemed necessary by the Department. Costs for any contractual inspection services will be paid by the permittee as a condition of the operating permit.

§ 570.4 **Transportation of LNG**

(a) The intrastate transportation of LNG to LNG facilities permitted under this Part is prohibited unless the route has been certified by the New York State Department of Transportation.

(b) The interstate transportation of LNG within the State shall be conducted in accordance with all applicable State and federal requirements for the transport of hazardous materials, including the requirements as set forth by the State departments of transportation and motor vehicles. The interstate transportation route of LNG within the State does not require certification by the New York State Department of Transportation.

§ 570.5 **Non-Conforming Facilities.** All non-conforming LNG facilities may continue to operate pursuant to LNG-related Department orders issued January 19, 1979. However, any increase in capacity at a non-conforming facility requires a permit issued pursuant to this Part.

§ 570.6 Permanent Closure of Out-of-Service LNG Storage Tanks. The holder of a permit for an LNG storage tank located at an LNG facility where the storage tank or facility is to be permanently closed must submit plans to the Department at least thirty (30) days prior to permanent closure of the tank or facility. In addition, such permanent tank closure shall comply with the container purging procedures of NFPA 59A and the following requirements:

- (a) material removed from tanks must be disposed of in accordance with all applicable State and federal requirements;
- (b) tanks must be protected from flotation in accordance with good engineering practices;
- (c) all gauge openings or connecting lines must be capped, plugged or disconnected to prevent unauthorized use or tampering;
- (d) aboveground storage tanks designated as permanently closed must be vented to the atmosphere and stenciled with the date of such closure;
- (e) underground storage tanks must be filled to capacity with a solid inert material or removed; and
- (f) compliance with the requirements for permit relinquishment in subdivision 621.11(d) of this Title.

§ 570.7 Financial Assurance. Financial assurance, which may take the form of trust funds, surety bonds, letters of credit, insurance, documentation of financial capability, or other acceptable financial assurance, may be required by the Department to ensure proper closure of facilities. The form and amount of such financial assurance, if any, will be established by the Department.

§ 570.8 Reporting of LNG Spills. The reporting requirements of this section apply to spills of LNG at an LNG facility or non-conforming facility that result in, or may reasonably be expected to result in, a fire with potential off-site impacts or that cause, or may reasonably be expected to cause, an explosion.

- (a) Spills of LNG must be reported to the Department within two (2) hours of discovery as described in subdivision (b) of this section. Notification must be made by calling the telephone hotline (518) 457-7362 for calls from out of State or (800) 457-7362 for calls from within the State. Only one report is required for each spill. The owner or operator of an LNG

facility where an LNG spill has occurred must also submit a written report to the Department within 48 hours of the incident or discovery thereof, documenting the cause of the spill, the amount of LNG spilled, and the curative measures to prevent future spills.

(b) The reporting requirements of this section apply to any of the following persons who is aware of a spill:

(1) a facility owner or operator;

(2) any employee, agent, or representative of a facility owner or operator; and

(3) any person in a contractual or agency relationship with an owner or operator of a facility who delivers LNG, inspects, tests or repairs any portion of a facility, or who otherwise has responsibility for the handling or management of the LNG, and/or its spillage.

§ 570.9 **Moratorium.** The provisions of this Part shall not affect any statutory moratorium imposed restricting the issuance of permits under this Part.

§ 570.10 **References.** Citations used in this Part refer to the publications listed below and copies may be purchased directly from the publishers at the addresses shown. These publications are available for inspection at the New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7020, at the New York State Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the New York Legislative Library, Capitol, Room 337, Albany, NY 12224, and at the following law libraries:

Supreme Court Law Library/Civil Branch
851 Grand Concourse
Bronx, NY 10451
(First Judicial Department)

Supreme Court Law Library
72 Clinton Street
Plattsburgh, NY 12901
(Third Judicial Department)

Supreme Court Law Library
360 Adams Street
Brooklyn, NY 11201
(Second Judicial Department)

Supreme Court Law Library
Steuben County Courthouse
Bath, NY 14810
(Fourth Judicial Department)

The provisions of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the booklet entitled: Code of Federal Regulations, title 49, Part 193 and title 33, Part 127, revised as stated in subdivisions (c) and (d) of this section, published by the Office of the Federal Register, National Archives and Records Administration. Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

(a) "NFPA 52" means National Fire Protection Association, "Vehicular Fuel Systems Code," December 17, 2012 (2013 Edition), NFPA, 1 Batterymarch Park, Quincy, MA 02269-9101, and at the following internet address:
<http://www.nfpa.org/categoryList.asp?categoryID=124>.

(b) "NFPA 59A" means National Fire Protection Association, "Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG)," August 29, 2012 (2013 Edition), NFPA, 1 Batterymarch Park, Quincy, MA 02269-9101, and at the following internet address:
<http://www.nfpa.org/categoryList.asp?categoryID=124>.

(c) "49 CFR 193" means Part 193 of Title 49 of the Code of Federal Regulations, United States Department of Transportation Pipeline Safety Regulations, Subchapter D, October 1, 2011, Superintendent of Documents, U.S. Government Printing Office, 732 N. Capitol Street, NW, Washington, D.C. 20401 or <http://www.gpoaccess.gov/>.

(d) "33 CFR 127" means Part 127 of Title 33 of the Code of Federal Regulations, United States Coast Guard's Navigation and Navigable Waters Regulations entitled, "Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas," July 1, 2011, Superintendent of Documents, U.S. Government Printing Office, 732 N. Capitol Street, NW, Washington, D.C. 20401 or <http://www.gpoaccess.gov/>.

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Selected Sections from:

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Promulgation Support Study, September 20, 2011**

By:

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Expansion Energy LLC,
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(The complete text may be accessed via the NYSDEC website at:

http://www.dec.ny.gov/docs/remediation_hudson_pdf/lngnyserdareport1.pdf or via the NYSDEC
Liquefied Natural Gas Part 570 Homepage at: <http://www.dec.ny.gov/regulations/93069.html>)

**NYS Liquefied Natural Gas (LNG) 6 NYCRR Part 570
Promulgation Support Study**

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Contract No. 21361 09/20/2011

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Introduction

Expansion Energy LLC (XE) has been retained by the New York State Energy Research and Development Authority (NYSERDA) to provide supporting information and analysis to NYSEDA and the New York State Department of Environmental Conservation (DEC) in DEC's ongoing efforts to promulgate rules (6 NYCRR Part 570 [Part 570]) to regulate liquefied natural gas (LNG) facilities pursuant to Article 23, Title 17 of the New York State Environmental Conservation Law (ECL). A summary of XE's scope of work can be found in Appendix A. The primary goals of this project are to: 1) document the regulatory approach to regulating the storage of LNG taken by several representative states; 2) project the number of LNG facilities that may be built in New York State (NYS) after promulgation of Part 570; 3) project the number of jobs that would be created to own and operate regulated LNG facilities; and 4) project the costs associated with complying with Part 570. These various projections will be used by DEC to complete the support documents for the rulemaking process as required by the State Administrative Procedures Act.

The purpose of Part 570 is to require owners of LNG facilities to obtain a permit from DEC for the siting, construction, and operations of LNG facilities. Additionally, the rules will provide inspection criteria for such facilities and more generally, requirements to protect the public health, safety and welfare, the lands, waters, air and the environment of New York State. The ECL charges the NYS Department of Transportation with creating certified routes and criteria for the safe transportation of LNG.

According to a representative of the Clean Vehicle Education Foundation, most states in the United States (U.S.), including those bordering NYS, use legislatively empowered "code committees" to select LNG-related codes to be enforced, but in some instances allowing a degree of "flexibility" by local jurisdictions. With only Texas (TX) as the exception, all U.S. jurisdictions use codes developed by the National Fire Protection Association (NFPA). In contrast to the widely used "code committee" format, California (CA) is the only state XE found that has adopted NFPA standards by reference. TX has adopted codes similar to those in NFPA but promulgated within its own legislative framework rather than by reference to NFPA. The TX codes are essentially the same as the NFPA codes and will be mentioned throughout this report but not analyzed in detail. In summary, NFPA 52 and 59A are consistently ("universally") used throughout the U.S.

The promulgation of Part 570 will establish protocols in NYS for the deployment of LNG facilities, based on NFPA codes, following the code enforcement standards found in most jurisdictions nationwide, but specifically following the CA model of "referencing" NFPA codes by a statewide statute. Those NFPA codes represent a detailed, rigorous, and comprehensive set of standards for the construction and operation of LNG facilities.

The first part of this report defines LNG and offers a brief history of LNG facility deployments; defines the "state of the art;" and reviews the history of LNG incidents. The second part uses several methodologies to project the number of LNG facilities that are likely to be deployed in NYS during the first five years after the promulgation of Part 570. Part Two also projects the number of new jobs that will likely be created by the LNG industry during those first five years, and analyzes the costs to prospective LNG facilities for complying with the rules promulgated by Part 570.

Task 1: Defining the “State-of-the-Art”

1A. LNG –Definition and Brief History

LNG is a dense, low-pressure, cryogenic, liquid phase of natural gas, mostly consisting of methane. It is distinct from liquid petroleum gas (LPG, generally called “propane”), which consists mostly of heavier hydrocarbons (rather than methane) and which is stored and transported in pressurized vessels as an ambient temperature liquid. The DEC draft rules do not include LPG.

“LNG facility” is defined in DEC’s draft rules as “any structure or facility used to store liquefied natural gas in a tank, vault or other storage device, to dispense liquefied natural gas, or to convert liquefied natural gas into natural gas.” (Emphasis added by XE.) The definition excludes on-vehicle LNG fuel tanks. Every LNG production plant that will follow the promulgation of Part 570 and every LNG dispensing site will constitute an LNG facility because they will all have some amount of on-site storage capacity.

The phrase “tank, vault or other storage device” in the above quoted DEC draft rules can be construed to be included by the word “container” defined in Section 3.3.9 of NFPA 52, as “a pressure vessel, cylinder, or cylinder(s) permanently manifolded together used to store CNG [Compressed Natural Gas], GH2 [Gaseous Hydrogen], LNG or LH2 [Liquid Hydrogen]” and which includes the following container types:

3.3.9.1 Cargo Transport Container – (A mobile unit designed to transport LNG...)

3.3.9.2 Composite Container

3.3.9.3 Fuel Supply Container – (A container mounted on a vehicle to store LNG, but which is not defined as an “LNG facility” in the DEC draft rules)

3.3.9.4 Fueling Facility Container – (“Primary storage for vehicular fueling,” also known as LNG storage “tanks.”)

Throughout NFPA 52, the terms “tank” and “container” are used interchangeably.

Similarly, NFPA 59A defines Cargo Tank Vehicle as “a tank truck or trailer designed to transport liquid cargo,” and defines Container as “a vessel for storing liquefied natural gas.” Another term used commonly in the industry is “storage vessel.”

Natural Gas in any form (compressed as CNG or liquefied as LNG) is one of the cleanest burning hydrocarbon fuels, producing lower levels of carbon dioxide (CO₂), oxides of nitrogen (NO_x), and particulate matter than heavier hydrocarbon fuels such as diesel. The commercial use of LNG can be traced back to the mid-20th century. LNG’s primary attribute, compared to the natural gas routinely delivered by the nation’s extensive natural gas pipeline system, or compared to the CNG carried on the roof of municipal bus fleets, is LNG’s density. LNG at a pressure of only 65 pounds per square inch, absolute (psia), but chilled to -245° F, has a density of 25.6 pounds per cubic foot. Colder LNG at -260° F will have a density of more than 26 pounds per cubic foot. Those densities are more than twice the 10.65 pounds per cubic foot density of CNG contained in high-pressure (up to 3,600 psia) tanks, at ambient temperatures. Thus, the purpose of liquefying natural gas is to increase its density in comparison to CNG, reducing its volume and the size and weight of the container it is stored in. In other words, a given volume of LNG will contain more than twice the heating value of the same volume of CNG.

The first commercial use of LNG began in the 1950s, mainly for the international shipping of LNG from gas producing regions to gas consuming regions. Within the U.S., LNG was used as a means to “peak-shave” natural gas use. Peak-shaving consists of liquefying and storing natural gas during the off-season

(summer), vaporizing and releasing it back into the pipeline during the peak demand (winter) periods. Also in the 1950s the San Diego Gas and Electric Company began to research the use of LNG for vehicle use.

During the 1960s, the international use of LNG expanded, as did the industry's technical understanding of the safe production, storage, transport and dispensing of LNG. By the 1970s, in response to oil shortages, LNG was seen as a viable alternative to diesel fuel. By the 1980s, heavy-duty vehicle engine technology was advancing, allowing for a wider range of vehicular options that could utilize LNG as a vehicle fuel.

During the 1990s U.S. reserves of natural gas increased, as did the import of oil from non-U.S. sources. As a result, after the 1990s, the historically tandem price fluctuations of oil and gas began to diverge, making natural gas (CNG and LNG) more competitive with standard fuels. That trend of increasing U.S. gas reserves (and increasing rates of production), and a growing gap between the price of natural gas and an equivalent "energy-containing" amount of diesel and gasoline, is likely to continue the growing use of LNG as a heavy-duty vehicle fuel.

On a worldwide scale, the most common reason for producing LNG is to allow it to be shipped in ocean-going tankers from production sources served by LNG export terminals (such as in Qatar) to import terminals in receiving countries (such as Japan), where the LNG is re-vaporized for insertion into local natural gas pipelines. Without liquefaction, such international trade and transport of natural gas, outside of pipelines, would not be possible. Nearby examples of LNG import terminal locations include Everett, Massachusetts; Elba Island, Georgia; and Cove Point, Maryland.

On the national scale, the U.S. has several LNG import terminals, which receive LNG from various "base load" production facilities throughout the world. The likelihood of new U.S. import terminal proposals has recently been substantially diminished because of increases in domestic natural gas reserves. New import terminals will have difficulty delivering LNG at prices that can compete with an abundance of lower priced north-American natural gas. Some existing import terminals and those that are in the planning stage are considering their options as export terminals. To the extent that exporting LNG from U.S. natural gas reserves is viable, it will likely first occur at existing terminals with amortized equipment rather than at newly built export facilities in NYS or in nearby states. In any event, any future proposal for LNG import or export terminals will require Federal Energy Regulatory Commission (FERC) review. That review will be the primary "permitting" process, rather than Part 570.

NYS has three peak-shaving plants that predate ECL Article 23, Title 17, two in New York City (NYC) and one on Long Island. Those facilities are "non-conforming facilities" and subject to requirements in DEC orders issued on January 19, 1979. Throughout the U.S. there are some 40 peak-shaving plants, including in Baltimore and Philadelphia.

Moving down in scale, and focusing on U.S. LNG facilities, there are several LNG production facilities (for example, in CA, AZ and TX) that produce LNG for use by vehicles based throughout the west and southwest. In terms of the total number of facilities, the most prevalent purpose for U.S. LNG facilities is the production and dispensing of vehicle-grade fuel. Forty-five to 50 U.S. LNG production and dispensing facilities serve that market, mostly in the western U.S. In almost every instance, the production-to-dispensing model relies on centralized LNG plants from which the LNG is distributed in specialized trailers to local storage and dispensing sites. At those dispensing sites, the LNG can be dispensed to heavy-duty vehicles as LNG, or to light-duty vehicles as CNG. XE knows of no example of an LNG production facility serving an individual fleet, "on site," at the home base of the fleet.

Several factors have accelerated the growth of LNG production and use in the U.S., including the following:

- The price of oil and the fuels derived from oil (diesel and gasoline) have begun to diverge from the price of natural gas, with natural gas being less costly, when the fuel costs are compared on an energy equivalent basis.
- The natural gas industry, including the LNG production and distribution portion, and the “alternative fuel vehicle” (AFV) industry have developed advanced engines, transport and storage equipment and cost-effective production systems to respond to a growing demand for AFVs.
- Public policies have been adopted on the federal and state levels to encourage the use of alternative fuels, especially domestic fuels, such as natural gas; and especially those fuels, including natural gas, that have a reduce emission profile.

Those factors will likely continue the growth of LNG production, transport, storage, and dispensing, especially for use as a vehicle fuel. DEC’s proposed adoption of Part 570 coincides with the growth of LNG as a vehicle fuel throughout the U.S. In order for vehicle-grade LNG to continue that market growth into NYS, DEC will need to adopt Part 570, which like all States (except TX) will rely on nationally recognized protocols for the regulation of LNG facilities.

1B. Regulatory Protocols

1B1. Controlling the Location of LNG Storage Facilities

Most U.S. jurisdictions rely on the NFPA codes for the regulation of LNG facilities, as they do for a variety of fire prevention codes, from electrical codes to the codes related to the storage and distribution of oxygen at hospitals. A member of the NFPA Technical Committee on Vehicular Alternative Fuel Systems (which wrote NFPA 52) stated that most states have established, by legislation, expert “code committees,” assigning the review and adoption of fire and building codes to the legislatively empowered code committee, thus avoiding the need for legislative action on each individual code to be adopted. By contrast, CA specifically incorporates NFPA standards, by reference, into its laws. For example, the CA Code of Regulations, Title 8, Section 455 incorporates NFPA 59A by reference.

The DEC draft rules follow the CA example by explicitly referencing NFPA 52 and NFPA 59A as the applicable codes that each LNG facility must comply with. Those codes will not replace, but rather add to local zoning controls, building codes and other codes (including other NFPA codes) related to electrical systems, pressure vessels, and the like. It should be noted that all existing CNG stations in NYS were almost certainly designed, deployed, and approved per NFPA 52, because that document covers all gaseous fuels, not just LNG, and because NFPA 52 is referenced by the International Construction Code.

Appendix B of this report is a summary table of the NFPA, federal, and TX rules and regulations for LNG facilities. That table is organized to mirror Section 1B of this report, with the key topics listed on the left, from 1) Site Planning through 6) Inspection & Enforcement.

NFPA 52, “Vehicular Gaseous Fuel Systems Code,” and NFPA 59A, “Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG),” are the de-facto “national” standards used by local jurisdictions in all states, except TX, for regulating the deployment and operations of all LNG facilities. TX has adopted specific legislation for the siting and operation of LNG facilities. The Texas Railroad Commission (RRC) administers the rules and regulations for the construction and operation of LNG facilities. Those rules and regulations are similar in scope to NFPA 52 and 59A. DEC draft rules

adopt NFPA 52 and NFPA 59A by reference, which is consistent with LNG rules in all other states in the U.S. The most current edition of NFPA 52 was issued in 2010, and the most current edition of NFPA 59A was issued in 2009.

A detailed review of the comprehensive scopes of NFPA 52 and NFPA 59A (see below) will show that the two codes are mutually supportive, often covering similar topics and prescribing the same standards, with NFPA 52 focusing on LNG related to vehicles and NFPA 59A focusing on LNG production, storage and handling. For most LNG facilities, the two NFPA codes will overlap, providing a comprehensive set of standards. Additionally, both NFPA 52 and 59A require compliance with other referenced NFPA codes and with standards by other entities. The following is a list of industry groups, outside of fire prevention, whose standards are referenced by NFPA 52 and 59A:

- American Gas Association (AGA)
- American Petroleum Institute (API)
- American Society of Civil Engineers (ASCE)
- American Society of Mechanical Engineers (ASME)
- American Society for Testing and Materials (ASTM)
- American Welding Society (AWS)
- Canadian General Standards Board (CGSB)
- Canadian Geotechnical Society
- Compressed Gas Association (CGA)
- Gas Research Institute (GRI)
- Gas Technology Institute (GTI)
- International Code Council (ICC)
- International Standards Organization (ISO)
- National Association of Corrosion Engineers (NACE)
- National Board of Boiler and Pressure Vessel Inspectors (NBBI)
- Society of Automotive Engineers (SAE)
- Steel Structures Painting Council (SSPC)
- U.S. Department of Transportation (USDOT)

Part 570, by requiring compliance with both NFPA 52 and 59A, will fully establish a comprehensive set of requirements, no matter what the “function” or scope of service provided at any LNG facility. As such, Part 570 incorporates, by way of NFPA 52 and 59A, the manufacturing, testing, maintenance and operating standards adopted by the expert groups listed above.

Part 570 will require a “statement of compliance,” signed by the owner of a proposed LNG facility and a NYS Professional Engineer, that the proposed facility “meets the provisions of the Federal Pipeline Safety standards, applicable provisions of the Public Commission’s regulations 16 NYCRR, and the Uniform Fire Prevention and Building Code of the State.”

The Federal Energy Regulatory Commission (FERC) has exclusive authority under the Natural Gas Act to authorize the siting of LNG import or export facilities. However, that authorization is conditioned on the applicant’s satisfaction of other statutory requirements. For example, substantial authority exists through current federal statutes for the states in which LNG import or export facilities are to be located to authorize or block (and “veto”) the development of LNG facilities. Examples of such authority held by the states include the Clean Water Act, the Clean Air Act and the National Environmental Policy Act (NEPA), which allows the states to contribute to the environmental review of any LNG proposal brought

to FERC. A more detailed outline of FERC’s LNG review role and how it interacts with the states can be found at FERC’s web site at <http://www.ferc.gov/industries/gas/indus-act/lng/state-rights.asp>.

For LNG facilities located on interstate natural gas pipelines, and which include certain operating characteristics, such as on-site LNG production, storage and re-vaporization of the LNG for re-insertion into the pipeline, the federal pipeline standards found at 49 CFR Part 193 and 33 CFR Part 127 apply. CFR stands for Code of Federal Regulations. 49 CFR Part 193 does not apply to: (1) “ultimate consumers of LNG;” (2) production facilities which do not store LNG; or (3) any LNG facility located in navigable waters. 49 CFR Part 193 incorporates a variety of standards by reference, as tabulated in Table 1 below.

Table 1: 49 CFR Part 193 References

Source and name of referenced material	49 CFR Reference
A. American Gas Association (AGA):	
(1) “Purging Principles and Practices” (3rd edition, 2001)	§§193.2513; 193.2517; 193.2615.
B. American Petroleum Institute (API):	
(1) API Standard 620 “Design and Construction of Large, Welded, Low-Pressure Storage Tanks” (11th edition February 2008, addendum 1, March 2009)	§§193.2101(b); 193.2321(b)(2).
C. American Society of Civil Engineers (ASCE):	
(1) ASCE/SEI 7–05 “Minimum Design Loads for Buildings and Other Structures” (2005 edition, includes supplement No. 1 and Errata)	§193.2067(b)(1).
D. ASME International (ASME):	
(1) 2007 ASME Boiler & Pressure Vessel Code, Section VIII, Division 1, “Rules for Construction of Pressure Vessels” (2007 edition, July 1, 2007)	§193.2321(a).
(2) 2007 ASME Boiler & Pressure Vessel Code, Section VIII, Division 2, “Alternative Rules, Rules for Construction of Pressure Vessels” (2007 edition, July 1, 2007)	§193.2321(a).
E. Gas Technology Institute (GTI) formerly the Gas Research Institute (GRI):	
(1) GTI–04/0032 LNGFIRE3: A Thermal Radiation Model for LNG Fires (March 2004)	§193.2057(a).
(2) GTI–04/0049 (April 2004) “LNG Vapor Dispersion Prediction with the DEGADIS 2.1: Dense Gas Dispersion Model For LNG Vapor Dispersion”	§193.2059.
(3) GRI–96/0396.5 “Evaluation of Mitigation Methods for Accidental LNG Releases, Volume 5: Using FEM3A for LNG Accident Consequence Analyses” (April 1997)	§193.2059.
F. National Fire Protection Association (NFPA):	
(1) NFPA 59A, (2001) “Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG)”	§§193.2019; 193.2051; 193.2057; 193.2059; 193.2101(a); 193.2301; 193.2303; 193.2401; 193.2521; 193.2639; 193.2801.
(2) NFPA 59A, “Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG)” (2006 edition, Approved August 18, 2005)	§§193.2101(b); 193.2321(b).

Note that Section E of the table above deals with Thermal Radiation Modeling, Vapor Dispersion, and the “Evaluation of Mitigation Methods for Accidental LNG Releases, Volume 5: Using FEMA3A for LNG Accident Consequence Analyses.” FEMA stands for Federal Emergency Management Agency. Those referenced models all deal with siting controls.

Also note that NFPA 59A is incorporated by reference in 49 CFR Part 193. In turn, DEC's draft Part 570 regulations incorporate 49 CFR Part 193 for LNG "facilities that produce and transfer LNG to trucks or rail cars or both and store 70,000 gallons or more of LNG in aggregate." 33 CFR Part 127 controls LNG facilities at the waterfront. Chapter I, subchapter D concerns pipeline safety. Section 193 is titled "Liquefied Natural Gas Facilities: Federal Safety Standards." DEC's draft of Part 570 incorporates 33 CFR Part 127 by reference for "the installation, operation and maintenance of facilities that transfer LNG to and from marine vessels."

Thus, all of the codes and standards available to federal and state regulators (including to DEC), are derived from a vast library of continuously updated research by independent entities, and all are cross-referenced in the NFPA and CFR codes that will be promulgated by Part 570.

When it comes to site planning, NFPA 52, NFPA 59A (as well as 49 CFR Part 193, and 33 CFR Part 127) focus on the arrangement of buildings, storage tanks and other equipment on the site of an LNG facility, but not on the site selection process for where an LNG "use" can be located. This "limitation" on the scope of those regulations is accepted by all the U.S. states that rely on the NFPA codes to regulate LNG facilities, because the question of "where" an LNG facility (or any other use) may locate is the purview of local land use controls (zoning regulations) which are the most commonly enforced administrative code in all jurisdictions (with the exception of TX), and stem from the police power of the state.

In the context of zoning controls, LNG facilities fit within a list of defined "uses," (or use categories) which include other fuel processing, storage, and dispensing uses, such as gasoline, diesel, propane storage and dispensing, and the like. Generally, such uses are allowed in "industrial" or "manufacturing" districts or in certain "automotive" commercial districts that permit the storage and sale of fuel and the maintenance of vehicles. Such uses are almost always prohibited from locating in residential zones or in districts that permit community facilities, such as schools and hospitals.

The exceptions are "pre-existing" non-conforming uses that were located in a neighborhood prior to the adoption of the current land use controls. Generally, those non-conforming uses can stay, (and be sold to new owners) but cannot expand or increase their "degree" of non-conformity. For example, if a non-conforming gasoline station in or next to a residential district proposed to add LNG dispensing to its services, it would likely be deemed an increase in its degree of non-conformity because more liquid fuel would be proposed for storage, and/or more liquid fuel would be proposed for aboveground storage. As a practical matter, such an addition of LNG storage and dispensing to any existing fuel dispensing site, (even one that conforms with the zoning ordinance), would need to be on a site large enough to allow compliance with the buffer standards in NFPA 52 and 59A, which are reviewed below.

The "edges" between industrial/manufacturing districts and residential and community facility districts most often include "buffers." Buffering techniques might include specific yard and setback requirements in the industrial/manufacturing district, when adjacent to less intensive uses. Buffering can also be achieved by placing light manufacturing and commercial uses between heavier manufacturing and residential districts. In other words, statewide and nationally, the most common and most effective tool for separating fuel processing, storage and dispensing facilities (including LNG facilities) from incompatible land uses is the local zoning ordinance.

Zoning ordinances are routinely amended by localities to respond to evolving land use patterns. Such amendments are undertaken within a predictable and transparent review process (including

environmental assessments of the proposed “land use action”), and are subject to judicial review. The adoption of Part 570 may trigger such amendments.

Based on the research conducted, it is believed that the adoption of Part 570 will not “open the floodgates” to new LNG facilities, especially in locations that are incompatible with existing land uses. First, the role of LNG within the overall energy production, storage and transport industry will continue to be limited to special applications and markets where the extra costs associated with the production, storage, and transport of LNG can be recovered by the “value added” aspects of its increased density. In other words, there are market driven limits to the commercialization of LNG that will, for example, yield much fewer LNG dispensing sites than gasoline stations. Subsequent sections of this report address the projected number of LNG facilities likely to be deployed in NYS during the first five years after the promulgation of Part 570.

As for compatibility with adjoining land uses, any proposed LNG facility will need to comply with existing land use controls, which also control all other fuel processing, storage and dispensing facilities. DEC’s permitting process, per Part 570, including the environmental review of each application, will confirm that the proposed location of an LNG facility complies with local land use controls. Some communities may, as an extra measure of “protection,” seek to amend their local zoning regulations to “zone out” LNG facilities, or to more rigorously restrict the location options available to proposed LNG facilities, compared to the land use restrictions placed on other similar uses. Such “exclusionary” zoning controls are subject to challenge in the courts and are not likely to prevail in jurisdictions that permit other (competing) fuel production, storage and dispensing facilities, but limit or exclude LNG facilities.

1B2. Controlling the Site Plan of LNG Storage Facilities

Instead of controlling where an LNG facility can be located, the NFPA and federal pipeline safety standards regulate the site plan of such facilities, especially with regard to the “buffer zone” between LNG storage tanks and property lines and/or nearby buildings. For example, site planning controls, including the regulations for the required distance between LNG storage tanks and property lines, can be found in Section 16.5.1 of NFPA 52, in Chapter 5 of NFPA 59A, and in Sections 193.2057 and 193.2059 of the federal pipeline safety standards. Similarly, Subchapters B and D of the LNG regulations of the Texas RRC contain site-planning controls as well as regulations related to the design and operation of equipment.

Section 16.5.1 of NFPA 52

Section 16.5.1 of NFPA 52 regulates the distance between LNG storage containers, between storage containers and buildings and between storage containers and a property lines, relative to the capacity of the storage container as measured in gallons. For example, LNG containers with capacities of up to **2,000 gallons** must be placed at least 5 feet apart, with a minimum of **15 feet** from any property line. For facilities with very small storage tanks, the minimum “buffer” zone between a tank and a property line is 10 feet.

Facilities with tanks up to **15,000 gallons** of capacity require a minimum of 5 feet between tanks, and a distance of at least **25 feet** to the property line. Storage tanks up to a capacity of **30,000 gallons** need to be placed at least **50 feet** from a property line, and tanks up to **70,000 gallons** in capacity need to be placed **75 feet** from a property line. Storage containers with capacities larger than 40 gallons are not permitted in buildings.

Thus, the smallest practical “lot area” for an LNG storage facility with straight property lines (a rectangular site, rather than a circular one), and assuming a 5 foot diameter vertical storage tank, is 35

feet by 35 feet. However, the addition of other equipment, such as dispensers, and the NFPA requirements for distancing certain safety equipment from the equipment they serve, will require larger sites. Also, most zoning ordinances include front, rear, and side yard controls, which do not permit (or strictly limit) the deployment of permanent structures / equipment in those yards.

A “typical” LNG fuel dispensing site, with a single 10,000-gallon storage tank, requiring 25 feet between the tank and any property line, and again assuming a vertical tank, will likely need a site that is significantly larger than 100 feet by 100 feet. This is to accommodate (1) the buffer zone between the storage tank and the property lines and any other equipment (or buildings) required for that fuel dispensing function; (2) distances required between safety equipment and the equipment they support; (3) required standards for the safe arrival and departure of vehicles; and (4) yard requirements inherent in the zoning ordinance.

Chapter 5 of NFPA 59A

Chapter 5 of NFPA 59A includes spill and leak control provisions, requiring one of three possible “impoundment” techniques for controlling spills, and preventing spills from reaching buildings, equipment, adjoining properties or waterways. Those impoundment methods can include natural barriers, dikes, walls, excavated “bowls,” or any combination of such techniques.

The volumetric capacity of those impoundment areas must be 100 to 110 percent of the capacity of the storage tanks being impounded, depending on the strength of the impoundment and its height. Chapter 5 specifies the construction standards for various impoundment designs; drainage standards to keep the impoundments free of water and to keep spilled LNG within the impoundment area until it vaporizes; and the distance of the impoundment perimeter from the edge of the tank(s) within the impoundment area.

Chapter 5 also regulates the “Radiant Heat Flux Limits to Property Lines” and to off-site “occupancies,” requiring that the applicant calculate the potential for fire damage to off-site areas in the event of a spill and fire. Mitigation measures, such as water curtains can be included in the site plan. The calculation of a “design spill rate and volume” of a potential LNG release is based on type of LNG container proposed for the site specific deployment and on the location of “container penetrations” (for valves, pipes, and the like), relative to the liquid level within the container.

The minimum distance from the edge of an impoundment area to a property line is **15 feet** for facilities with storage capacities of up to **2,000 gallons**, which is the same requirement as in NFPA 52. For facilities with capacities up to **18,000 gallons**, the required distance from the impoundment area to the property line is **25 feet**. (That standard allows 3,000 more gallons within that 25 feet buffer than the NFPA 52 standard.) For impoundment area capacities of up to **30,000 gallons**, the minimum distance to a property line is **50 feet**, which is consistent with NFPA 52. For capacities up to **70,000 gallons**, the minimum distance to property lines is **75 feet**, which is also consistent with NFPA 52. Facilities with more than 70,000 gallons of storage capacity are required to provide a distance to all property lines that is 0.7 times the diameter of the storage container, but not less than 100 feet.

Section 5.9 of Chapter 5 deals with “portable LNG facilities,” also known as “portable pipelines.” In addition to requiring that vehicles complying with USDOT standards be used as the “supply container,” and requiring trained staff at the site, this section also requires that “provisions shall be made to minimize the possibility of accidental discharge of LNG at containers.” The section allows the use of portable and temporary spill containment methods.

Sections 193.2057 and 193.2059 of federal pipeline safety standards (49 CFR Part 193)

As discussed above, the required thermal exclusion zone and the vapor dispersion zone is to be calculated per NFPA 59, and the modeling for thermal radiation and “vapor-gas dispersion distance” is to be done per the referenced Gas Technology Institute (GTI) standards.

1B3. Design and Operation of LNG Production, Storage and Dispensing Facilities

In addition to each jurisdiction’s zoning ordinance, specific controls relating to the buildings and the equipment that constitute the permitted land use are generally found in local, national, or international building codes that each jurisdiction has adopted. It is those building codes, enforced by local “code enforcement” officials, which contain (explicitly or by reference) standards related to fire safety, explosion prevention, and the general protection of life and property. The purview of local code enforcement officials may cover all applicable building and safety codes, or certain fire and explosion related matters might be delegated to the local fire department. NFPA codes supplement those more general building codes.

Draft Part 570 requires compliance by all proposed LNG facilities with NFPA 52 and NFPA 59A, as well as with 49 CFR Part 193 and 33 CFR Part 127 for certain larger LNG facilities. The design and operation of equipment, including for buildings, storage tanks, vaporization equipment, piping, valves, pumps and electric instruments, are covered in each of those referenced codes. Those design and operation controls are covered in Chapters 11, 12 and 16 in NFPA 52, and Chapters 6-11 and 13 of NFPA 59A, with each chapter’s main topics outlined below.

NFPA 52, Chapters 11, 12, and 16

Chapter 11 of NFPA 52 covers **LNG engine fuel systems** on ground-transport vehicles (with Chapter 17 covering marine vehicles). All safety aspects are addressed, as follows:

- Materials used in LNG equipment;
- The design of vehicular fuel containers;
- Controlling the filling of fuel containers;
- Structural integrity of containers;
- Standards for shut-off valves;
- Various other fuel container standards;
- Standards for pressure relief devices, pressure gauges and pressure regulators;
- Piping tubing and fittings standards;
- Valves; pumps and compressors;
- Vaporizers that convert LNG back to a gas;
- The integration and installation of LNG fuel tanks, piping and other equipment on a vehicle, with the vehicle’s engine and other vehicle components;
- On-vehicle pipes, tubing, fittings, valves, pressure regulators, gauges, electric wiring, labeling;
- On-vehicle fueling receptacle; and
- The testing of on-board LNG systems.

Chapter 12 of NFPA 52 covers **LNG fueling facilities**, where stored LNG is transferred to vehicles.

- General facility design standards, related to safety, security, and operating methods. Facilities that are to be unattended “shall be designed to secure all equipment from tampering,” including storage equipment and transfer equipment;

- Siting standards relative to such topics as overhead electric lines, other-than-LNG hazardous liquids, and the “points of transfer” where, for example, an LNG transfer point must be at least 25 feet from the nearest building not associated with the LNG facility;
- Spill containment;
- The construction of on-site buildings;
- Cargo transport unloading;
- Isolation valves associated with transfer piping;
- Methane detection systems;
- Depressurization of LNG hoses and loading arms for transfer piping and for the vehicle fuel dispensing systems;
- Vehicle fuel dispensing systems;
- Safety valves and relief valves;
- Corrosion control;
- Pumps, compressors and vaporizers;
- LNG-to-CNG (L/CNG) systems;
- Instrumentation and gauges;
- Emergency shutdown devices
- Electrical equipment; and
- Maintenance of equipment.

Chapter 16 of NFPA 52 covers stationary **LNG tanks** with a capacity of 70,000 gallons or less, covering the following topics at LNG fueling facilities. “Tanks” and “containers” are used interchangeably in Chapter 16. For example, the title of the chapter is “Installation Requirements for ASME Tanks for LNG,” but with section 16.1 using the phrase “LNG containers of 70,000 [gallons]”, section 16.3.1 using the phrase “inner and outer containers,” and section 16.3.3 using the phrase “inner tank and outer tank.”

- Securing containers against tampering;
- General standards for tank and container design, with reference to ASME standards, including the requirement that all containers be double walled;
- Standards for the vacuum insulation between the tanks;
- Pressure relief devices;
- Container seismic design standards;
- Container identification standards,
- Container foundation and support standards;
- The installation of containers;
- Automatic, failsafe product retention valves;
- Inspection, testing and purging of containers prior to start up;
- Piping within and to containers;
- Instrumentation, including in the event of power failure; and
- Gauges and pressure control devices.

Section 16.5.1 includes a table that codifies the minimum required distance between storage tanks and the minimum distance between any LNG storage tank and the facility’s property line. That topic was discussed above in Section 1B2.

NFPA 59A Chapters 6, 7, 8, 9, 10, 11 and 13

Chapter 6 of NFPA 59A covers **LNG process equipment** and includes the following topics:

- The installation of process equipment;

- Pumps and compressors;
- Flammable refrigerant and other flammable liquid storage; and
- General standards for the fabrication, pressure limits and other mechanical features of process equipment.

Chapter 7 of NFPA 59A covers **stationary LNG containers** including the following:

- Inspection prior to the operation of a facility;
- General standards related to pressure and cryogenic conditions, piping, gauges and foundations;
- Seismic design for field-erected and shop-fabricated containers;
- Wind, flood, and snow loads on containers;
- Foundations;
- Metal and concrete container standards;
- Construction, inspection and testing standards;
- Pressure relief devices; and
- Exposure to fire.

Chapter 8 of NFPA 59A covers **vaporization equipment and facilities**, which also covers topics related to “portable pipelines.”

- Classification of vaporizers and general design and materials standards;
- Piping and valves; and
- Relief devices.

Chapter 9 of NFPA 59A covers **piping systems and related components**.

- General piping standards;
- Seismic design;
- Materials and methods of construction assembly, including joints, fittings, bends and valves;
- Installation and welding;
- Pipe supports;
- Inspection, testing and record keeping;
- Corrosion control; and
- Operational standards.

Chapter 10 of NFPA 59A covers **instrumentation and electrical systems**.

- Gauges for LNG tanks and for refrigerant tanks, pressure and vacuum gauges;
- Temperature indicators;
- Emergency shutdown instruments;
- Electrical equipment, with reference to NFPA 70; and
- Electrical grounding and bonding.

Chapter 11 of NFPA 59A covers the **transfer of LNG and of refrigerants** used in the production of LNG.

- General standards;
- Piping systems, pumps and compressors;
- Marine shipping and receiving;
- Tank vehicle and tank car loading and unloading;
- Pipeline shipping and receiving;
- Hoses and transfer “arms;” and

- Communication equipment and lighting.

Chapter 13 of NFPA 59A covers **stationary LNG containers**. As mentioned above, the terms “tank” and “container” are used interchangeably.

- General standards;
- Container standards;
- Foundations and supports;
- Installation standards, including minimum standards for the distance between a container and a property line, as codified in Chapter 5;
- Spill containment;
- Inspection and testing of containers;
- Piping integral to containers;
- Instrumentation and gauges;
- Operation requirements and procedures manual;
- Emergency procedures;
- Maintenance and records; and
- Training of personnel.

The federal regulations for the design and operation of LNG equipment can be found in Subparts E and F of 49 CFR Part 193, and in Section 127.101 of 33 CFR Part 127. Those standards reference NFPA 59A, which has been covered above in this report. In the Texas RRC rules, design and operation controls, beyond those in Subchapters B and D, can be found in Subchapters E, F and G. The Texas RRC rules will not be analyzed in this report because TX represents a “special case” of a state adopting its own LNG regulations rather than referencing NFPA standards. CA enforces NFPA 52 and 59A and adds Cal/OSHA Titles 8 and 13, which deal with the safety of workers. Cal/OSHA means the California Occupational Safety and Health Administration.

1B4. Transportation of LNG in Bulk

The transport of Non-Radioactive Hazardous Materials (NRHM) is regulated by Federal Regulations, CFR 49 Part 397, which can be accessed at the following web site: <http://ecfr.gpoaccess.gov/>. The following is the definition of Hazardous Materials per section 397.65:

"A substance or material, including a hazardous substance, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, or property when transported in commerce, and which has been so designated. "

The term NRHM is defined in 397.65 as follows:

"A non-radioactive hazardous material transported by motor vehicle in types and quantities which require placarding, pursuant to Table 1 or 2 of 49 CFR 172.504. "

The term "Hazardous Materials" includes all of the following: (1) Hazardous Substances, (2) Hazardous Wastes, (3) Marine Pollutants, (4) Elevated Temperature Material, (5) Materials identified in 172.101, and (6) Materials meeting the definitions contained in Part 173. Class 1 covers explosives, Class 2 covers gases (including flammable, non-flammable and toxic), and Class 3 covers flammable liquids. LNG, like all other liquid fuels, fits Class 3, and is covered by the federal codes.

Section 397.3 allows for local jurisdictions to impose stricter rules, but requires that federal standards apply when the federal standards are stricter than local standards. The states establish, maintain and enforce specific NRHM routing designations, but which must comply with federal standards related to the following:

Information on TSA's "HAZMAT Endorsement Threat Assessment Program" can be found at http://www.tsa.gov/what_we_do/layers/hazmat/index.shtm. "The program was implemented to meet the requirements of the USA PATRIOT Act, which prohibits states from issuing a license to transport hazardous materials in commerce unless a determination has been made that the driver does not pose a security risk. The Act further requires that the risk assessment include checks of criminal history records, legal status, and relevant international databases." Other features of the program can be found at the web site cited above.

1B7. Emergency Response Procedures

Emergency response and shutdown procedures are regulated in section 12.11.3 of NFPA 52, which requires an ESD, which will, "in the event of a power or instrumentation failure" cause the system to "go into a fail-safe condition that can be maintained until the operators can take appropriate action to either reactivate or secure the system." Additionally, emergency response procedures are covered in the following sections of NFPA 59A: 10.6, 11.5.4, 12.2.2, 12.3, 13.18.3, 14.4.8 and 14.5.9, each of which is summarized as follows:

- **Section 10.6** replicates the standards of NFPA 52, section 12.11.3, which is quoted above;
- **Section 11.5.4** requires manual ESD systems at marine terminals;
- **Section 12.2.2** outlines a comprehensive set of fire protection standards, including ESD systems, and with a reference to NFPA 600, "Standard on Industrial Fire Brigades;"
- **Section 12.3** outlines standards for automatic ESD systems as well as requiring "manual actuators" to be located at least 50' from the equipment they serve;
- **Section 13.18.3** requires a set of emergency procedures, including the prompt notification of an emergency to local officials;
- **Section 14.4.8** outlines the emergency procedures required as part of the overall operation, maintenance and personnel-training program; and
- **Section 14.5.9** deals with emergency power systems, including their monthly testing.

The federal pipeline safety regulations address emergency response in 49 CFR section 193.2509 and in 33 CFR section 127.205. (The Texas RRC regulations deal with this topic in sections 14.2046, 14.2049 and 14.2510, which are not reviewed here in detail.) The following summarizes the emergency procedure topic covered by 49 CFR and 33 CFR.

49 CFR Section 193.2509

- Identification of potential types and places of future emergencies;
- Establish written manuals for emergency procedures;
- Establish protocols for controllable emergencies;
- Establish protocols for uncontrollable emergencies;
- Coordinating with local officials;
- Cooperating with local officials regarding evacuations; and
- Informing local officials as to the location and types of fire control equipment, potential hazards at the plant, communication and control capabilities, and the status of each emergency.

33 CFR Section 127.205

- Each transfer system must have a manually operated Emergency Shutdown System; and
- The system must operate automatically when LNG concentrations exceed "40% of the lower flammable limit."

In NYS, outside of NYC and to some extent outside of Nassau and Suffolk Counties, the training of firefighters and emergency responders is the responsibility of NYS OFPC, which was recently combined with several other State agencies to form the Division of Homeland Security and Emergency Services. The NYC Fire Department has its own training system, which is fully independent of OFPC. With regard to Nassau and Suffolk Counties, OFPC provides specialized training that supplements each county's local training system.

OFPC provides training courses to first responders in NYS. The courses cover all types of containers at all scales, for all types of flammable, explosive and hazardous liquids and gases. The Flammable Gas workshops, covering propane and natural gas, familiarize students with transport vehicles, and distribution systems. Students at the fire academy are also taught (and practice) proper procedures for dealing with leaks of flammable fluids and fires caused by such fluids. The Flammable Liquids course covers procedures at bulk fuel storage facilities. Spill control and firefighting is covered in the Operations and Technician courses. Cryogenic fluids are also covered, with an emphasis on containers and the hazards associated with super cold fluids. Issues related to rail transport are covered in many of the OFPC courses. The agency is currently developing a Rail Tank Car Specialist course consistent with NFPA 472, Chapter 12.

Firefighters are encouraged to work with local industry specialists to prepare appropriate emergency response plans. The training includes identifying hazardous products, evaluating potential emergencies, and developing tactics to deal with those emergencies that are consistent with safe work practices. In the past, when a local fire department requested help for the planning of a specific facility, OFPC conducted a site visit and worked with the local entities to create the emergency response plan.

NYS's career firefighters must complete 229 hours of basic training, including 16 hours of Hazardous Materials training. After basic training, career firefighters are required to complete 100 hours of "in service" training annually. Details of the minimum training requirements are available at: <http://www.dos.state.ny.us/fire/pdfs/standards/Part426LawBook.pdf>.

Some career departments add training to the "Hazmat Technician" level to the basic program. Others offer it only to individuals who will be assigned hazardous material response duties. Advanced training is usually taken voluntarily, but some departments require it for promotion or assignment to specific duties. Both career and volunteer fire departments must comply with OSHA 1910.120 paragraph q, which requires training to the Operations level, complete refresher training, and annual competency demonstration. OSHA means the federal Occupational Safety and Health Administration.

An entity that has deployed several LNG facilities in TX has informed XE that for "large-scale" LNG projects, applicants for permits have been know to fund the training of first responders. Section 570.3 (c) of the draft Part 570 regulations requires that "each applicant for a permit shall offer an emergency response training program for local enforcement, fire, and hazardous material response personnel of the authority having jurisdiction."

1B8. Inspection of LNG Facilities and Enforcement of Applicable Rules and Regulations

NFPA 52 covers inspection of LNG facilities and the enforcement of applicable rules and regulations in sections 9.9.1.4, 16.7 and 16.8.

Section 9.9.1.4 covers **pipng systems**.

- ASME and other standards are referenced; and
- Standards for manifolds, joints, threading, bends, and fittings are stated.

It should be noted that the Building Code of New York State, which contains fire prevention standards, does not contain LNG-specific standards. However, the quote above suggests that all LNG facilities, by their special nature, would undergo “Special Inspection” by third party inspection entities.

According to senior staff at Chart Industries, most U.S. jurisdictions with LNG facilities inspect those sites on an annual basis. Those inspections mostly focus on pressure vessels. The codes in place during the time that the facility was deployed are generally used as the standard for the inspection, rather than newer version of the applicable codes.

Section 570.3(a) of the draft Part 570 allows for the unannounced inspection of any LNG facility for permit compliance, at any time, and as often as deemed appropriate by DEC or its designated representative.

1C. Regulatory Relief

The Texas RRC LNG regulations offer exceptions related to LNG safety rules in Section 14.2052. Subsection (h) states the following:

“After [a public] hearing, the Commission may grant exceptions to this chapter if the Commission finds that granting the exception will not adversely affect the safety of the public.”

XE is not aware of any other national or local codes that offer regulatory relief to LNG facilities. As such, no jurisdiction makes a distinction between LNG facilities operated by small businesses, government agencies, or “minor facilities” that might store less than a specified threshold quantity of LNG.

1D. LNG-Related Incidents /Accidents

The LNG industry has an excellent safety record, due to several factors. First, all LNG containers, large and small, stationary or transportable, are required by technical standards related to the vessel’s ability to resist heat gain and by NFPA standards to be double walled. The space between the inner and outer container is insulated to keep the LNG in its liquid state. That universal double-wall design is substantially stronger and more resistant to spills than the standard single-walled design used for all other fuels such as propane, diesel and gasoline. Secondly, the LNG industry, and the codes that regulate it, have continued to evolve technical solutions and protocols for the safe production, storage, transport, and dispensing of LNG. Also, the risks associated with LNG (as distinct from the risks associated with other flammable and explosive fuels and various toxic fluids) are well understood and have been incorporated into the applicable codes that regulate LNG facilities.

There have been many studies undertaken to assess the potential hazards of LNG, some by entities opposed to the deployment of LNG facilities, some by the LNG industry, and others by more “neutral” entities at the behest of public agencies, regulatory authorities, and policy makers, seeking to understand the risks posed by LNG facilities. Sandia National Laboratories prepared two such reports, one in 2004 and a second one in 2008, titled “Breach and Safety Analysis of Spills Over Water from Large Liquefied Natural Gas Carriers,” which can be found at the following site:

http://fossil.energy.gov/programs/oilgas/storage/lng/SANDIA_2008_Report_-_Large_LNG_Vessel_Sa.pdf.

The earlier study looked at LNG tankers that transport from 125,000 to 145,000 cubic meters of LNG in multiple (separated) cargo tanks on a single ship. The 2008 report looked at LNG tankers that can carry

up to 265,000 cubic meters of LNG, also in multiple compartments. The following is one of the noteworthy conclusions of the 2008 Sandia study, which focused on ships carrying up to 265,000 cubic meters of LNG:

“Even with the increase in thermal hazard distances from pool fires for the larger ships, the most significant impacts to public safety and property are still within approximately 500 m of a spill, with lower public health and safety impacts at distances beyond approximately 1600 m.”

A concise (but not comprehensive) history of LNG can be found at the following web site:

<http://www.centreforenergy.com/AboutEnergy/ONG/LiquifiedNaturalGas/History.asp>

A web-based search of LNG incidents and/or accidents yields several sites that compile such information. A fairly comprehensive and neutral compilation of such incidents can be found on the web site of the California Energy Commission (CEC) at <http://www.energy.ca.gov/lng/safety.html>

A review of those incidents indicates that most were related to the operations of export/import terminals and the ships serving those facilities rather than to smaller, more widely deployed LNG facilities. For example, none of the approximately 40 LNG facilities servicing LNG fleets in CA have experienced any explosions, fires, spills or leaks. Also largely absent from the compilation by the CA Energy Commission are incidents related to the transport and transfer of LNG (from transport truck to stationary storage tank). Admittedly, the “volume” of LNG transport, as measured in total gallons or vehicle miles, is very low when compared to the transport of other hydrocarbon fuels, such as gasoline, diesel and propane. Still, the lack of transport-related LNG incidents indicates that the applicable NFPA standards are working and that double-walled tanks are inherently safer than the single-walled tanks that are used to carry other fuels.

The CA compilation is organized under two categories: 1) **Explosions and Fires**; and 2) **Spills and Leaks**. Rather than reproduce here that compilation’s nineteen events with the narrative that describes each event, the following is the date and place/name of the eleven “Explosions/Fires” and the 8 “Spills/Leaks” that have occurred worldwide since 1944, which are described more fully on the above-referenced CEC web site. Note that LNG spills and leaks can happen without causing an explosion or fire, and that explosions and fires can occur at LNG facilities even in the absence of LNG, as they can at any natural gas facility; fuel production, storage and transfer facility; and industrial site or large-scale construction site.

1D1. Explosions and Fires

- October 1944, Cleveland, Ohio: failure of a low-nickel (3.5%) storage tank at a peak-shaving plant
- 1964 and 1965 Methane Progress, Arzew, Algeria: on-board an LNG ship, via lightning strike
- 1969, Portland, Oregon: during the construction of an LNG tank, not yet containing LNG
- January 1972, Montreal East, Quebec, Canada: valve failure at a peak-shaving plant
- February 1973, Staten Island, New York: explosion in empty tank during tank repairs
- October 1979, Cove Point, Maryland: due to natural gas leak
- April 1983, Bontang, Indonesia: at base-load plant due to excess pressurization of heat exchanger
- August 1987, Nevada Test Site, Mercury, Nevada: by accidental ignition during vapor cloud testing
- June 2004, Trinidad, Tobago: due to gas turbine failure
- July 2004, Ghislenghien, Belgium: due to gas pipeline failure, likely caused by contractor
- March 2005, District Heights, Maryland: explosion in house due to difference in chemical composition of NG derived from imported LNG, compared to domestic NG.

The 1973 Staten Island explosion in NYS occurred in tank empty of LNG that was undergoing maintenance. The tank was warmed, purged of the remaining combustible gases with inert nitrogen, and then filled with fresh recirculation air. A construction crew entered the tank to begin repair work in April of 1972. In February 1973, an unknown cause ignited the tank's Mylar liner and polyurethane foam insulation. The rapid rise in temperature caused a rise in pressure, lifting the tank's concrete dome, which then collapsed killing 37 construction workers inside. NYC Fire Department investigation concluded that the accident was a construction accident, not an LNG accident.

1D2. Spills and Leaks

- Early 1965, Methane Princess Spill: during ship-to-shore transfer
- May 1965, Jules Verne Spill, Arzew, Algeria: due to overflow from cargo tank
- 1971, La Spezia, Italy: due to vapor cloud escape
- July 1974, Massachusetts Barge Spill: 40 gallons leaked during a transfer operation
- September 1977, Aquarius Spill: overflow from tank, likely because of gauge failure
- March 1978, Das Island, United Arab Emirates: due to pipe connection failure
- April 1979, Mostafa Ben Bouliad Spill, Cove Point, Maryland: valve failure during transfer resulted in a minor spill
- April 1979, Pollenger Spill, Everett, Massachusetts: due to a valve fracture

Missing from the above CEC list was a 2004 incident at the Skikda, Algeria LNG Export Facility. A description of that incident can be found at <http://www.ch-iv.com/links/history.html>, where several other incidents (on the CEC list) are also described. (The date of the Cleveland incident on the CH-IV web page is shown as 1994, but should be 1944.)

Also missing from the CEC list are several incidents found on a PDF produced by CEC that is available at the following web page:
http://www.slc.ca.gov/division_pages/DEPM/DEPM_Programs_and_Reports/BHP_Deep_Water_Port/RevisedDraftEIR/1aCabTransport/Appendices/C3_Public%20Safety.pdf

It should be noted that the NFPA rules and regulations are regularly updated by expert panels, in response to new technologies, new deployment and operating models, and especially in response to adverse incidents, including those listed above. For example, the 1944 Cleveland incident substantially advanced the industry's (and the regulators') understanding of the need for 9% nickel steel (and other such standards) to combat brittleness in cryogenic storage tanks. Each of the incidents listed above likely generated the next round of code improvements.

For example, the Clean Vehicle Education Foundation (CVEF), which is a member of the NFPA Technical Committee on Vehicular Alternative Fuel Systems, investigates all LNG related incidents and provides information to all of the NFPA 52 committees. A new NFPA 52 is normally issued on a 3 to 4 year cycle, reflecting input by the various committees including from CVEF. However, if a change to NFPA 52 is needed prior to the normal cycle, a Tentative Interim Amendment (TIA) can be issued to address a specific issue. A similar process exists for updating NFPA 59A.

As mentioned above, LNG trailers are double-walled steel containers, which, unlike single-walled vessels used to store or transport other fuels, tend to better withstand collisions and other adverse effects. Over the last 20 years or so, there have been several LNG trailer accidents (collisions), none of which has resulted in loss of life or major property damage. Chart Industries recalls an incident some year ago where an LNG trailer in the U.S. developed a leak in its on-board "plumbing" (valves and pipes), which

caused a fire when a temporary solution to stop the leak was attempted. The fire burnt out safely with no loss of life and no property damage beyond the trailer.

Some entities that have lobbied against the deployment of LNG facilities have suggested that a catastrophic release of LNG will create a “boiling liquid expanding vapor explosion,” or BLEVE. In independent laboratory tests and in open-ocean combustion tests, there have been no documented cases of LNG BLEVEs.

Any catastrophic failure of an LNG containment vessel can result in a “rapid phase transition” (RPT) or the rapid conversion from liquid to vapor, but which will not cause ignition. Instead the RPT will further damage the containment vessel. Any ignition that might occur would need to be initiated by a heat source. Opponents of LNG suggest that LNG tankers (ships and trailers) are potentially explosive “bombs.” The history of LNG transport includes events that have resulted in the loss of containment (spillage) as well as fires, but not the explosion of a containment vessel.

After 9/11/2001, local and state public safety officials commissioned studies to evaluate the fire and explosion risks associated with a potential terrorist attack on LNG ships destined for the Distrigas import terminal at Everett, Massachusetts (near Boston). Those studies concluded that a 5-meter hole in a ship would spill 25,000 cubic meters of LNG, which if ignited, would burn off in 37 minutes, with no explosion.

Regulations

New York's Proposed New Liquefied Natural Gas Facility
(6 NYCRR Part 570)

A Dialogue

Presented by: The Environmental Law Section

New York State Bar Association

Annual Meeting, New York, N.Y.

January 31, 2014

New York Proposes To Green Light LNG Fueling Stations

By [Steven C. Russo](#) on September 18th, 2013 Posted in [Energy, Oil & Gas](#)
<http://www.environmentalenergylawblog.com/2013/09/articles/energy/new-york-proposes-to-green-light-lng-fueling-stations/>

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New York State has not exactly been a haven for the natural gas industry these past few years, serving as the epicenter of the anti-fracking movement. It is also one of the few states that does not permit Liquefied Natural Gas (LNG) fueling stations, due to the application of an out-of-date 1970s statute. That may soon change, however, as the New York State Department of Environmental Conservation (DEC) recently issued proposed regulations that would finally authorize the siting and construction of LNG fueling stations. See [6 NYCRR Part 570 \(proposed\)](#). The proposed regulations tout the environmental benefits of LNG as an alternative to diesel as fuel in heavy-duty trucks. DEC is also responding to new interest expressed by the long-haul trucking industry in employing LNG engines as an alternative to diesel engines. While LNG engines are expected to cost more than diesel engines, the existing price differential between LNG and diesel can save as much as \$30,000 per year in fuel based on the number of miles driven by the typical 18-wheeler. This price differential would more than pay for the increased cost of LNG engines.

As brief background, New York has the most stringent LNG-related requirements in the nation. In response to an explosion at an liquefied natural gas (LNG) facility in Staten Island in 1973, the State enacted into law [ECL §§ 23-1701 et seq.](#), which strictly regulates the siting of LNG storage facilities, the intrastate transportation of LNG, and treats the transportation of LNG differently than other hazardous and/or volatile substances. The siting and storage of LNG and intrastate LNG transportation routes have been prohibited in NYC since 1999. See L. 1999, ch. 25. These prohibited activities have been extended every two years since 1999. The siting of storage facilities in other areas of the state is prohibited until DEC issues regulations. ECL § 23-1719(1). Moreover, the ground transportation of LNG must be along "intrastate routes" certified to meet certain safety criteria by the NYS Department of Transportation, including that all local fire departments along such routes are properly trained to address LNG-based discharges. See ECL §§ 23-1713(3); 23-1715; 23-1717. To date, given the stringency of these requirements, DEC has never issued regulations under this statute.

The proposed regulations would specifically prohibit the "intrastate transportation" of LNG until the establishment of approved routes. 6 NYCRR § 570.4(1). "Interstate transportation" of LNG, by contrast, would be authorized so long as it was conducted "in accordance with all applicable State and federal

requirements for the transport of hazardous materials, including the requirements as set forth by the state departments of transportation and motor vehicles." *Id.* § 570.4(b). In this context, the proposed regulations define the term "interstate transportation" to mean "the transportation of LNG between a point in New York State and a point in another state or a foreign country . . ." *Id.* § 570.1(c)(6). In other words, so long as the transportation of LNG is initiated outside of New York, it essentially would not be regulated by New York. This appears to be DEC's way of avoiding having to promulgate "intrastate transportation" requirements contained in the law and points to the focus of the proposed regulations to "interstate" facilities such as LNG fueling stations.

The proposed regulations otherwise specify the criteria that must be included in an application for siting and constructing an LNG storage facility. In this respect, the application must include, among other things, an explanation of (i) the need for the proposed facility; (ii) specification of the tank design capacity for each tank and the facility capacity; (iii) the expected sources of natural gas or liquefied natural gas for the facility; (iv) a description of the possible environmental impacts of the proposed facility and the facility features or procedures to mitigate those impacts; and (v) a report, prepared by an independent qualified person, that evaluates the capability and preparedness, or lack thereof, of fire departments in the vicinity of the proposed facility who would respond to a release of LNG or fire involving LNG; and (vi) a written listing of the NFPA requirements that would apply to the LNG facility. *See* 6 NYCRR § 570.2(b). At first glance, the regulatory criteria appear to closely follow the statutory criteria specified at ECL § 23-1709(2), (3) and do not appear difficult to meet.

It remains to be seen if the definition of "intrastate transportation" employed by DEC in the proposed regulation would be challenged by environmental groups given the link some have made between horizontal hydraulic fracturing for the purpose of extracting natural gas and all other matters that promote the use of natural gas. Indeed, in the past legislative session, the New York State Assembly refused to introduce a bill passed by the New York State Senate that would have exempted LNG filling stations from the requirements of ECL §§ 23-1701 *et seq.*, strongly suggesting that all measures related to natural gas in New York will remain controversial.

[DEC's website announces](#) that a public hearing will be held with respect to the proposed regulations on October 30, 2013 at DEC's Albany office, and written comments will be accepted until November 4, 2013.

<http://www.environmentalandenergylawblog.com/2013/09/articles/energy/new-york-proposes-to-green-light-lng-fueling-stations/>



K N A U F

S H A W

L L P

ETHICAL AND PRACTICE ISSUES FOR ENVIRONMENTAL LAWYERS

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This outline will discuss selected issues that environmental lawyers may be presented with in the course of environmental matters, particularly those involving contaminated properties.

1. Spill Reporting

Federal and state environmental laws and regulations are filled with requirements to report unpermitted spills or releases, making violators subject to criminal penalties. Some of the more important requirements under federal and New York law will be discussed. The reporting requirements are cumulative, so each requirement that applies must be satisfied. While most petroleum spills must be reported, there is no general requirement to report spills of less than a “reportable quantity” of hazardous substances that are not stored in a tank of at least 1,100 gallons.

a. CERCLA Release Reporting.

- i. **Reportable Quantities.** Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §9603(a), requires the immediate reporting of releases of hazardous substances, pursuant to regulations set forth at 40 C.F.R. Part 302. Reporting is required by “any person in charge of a vessel or an offshore or onshore facility... as soon as he or she has knowledge,” to the National Response Center at (800) 424-8802, of any release, of a “reportable quantity” within a 24-hour period of a CERCLA hazardous substance, 40 C.F.R. §302.6(a), except for certain continuous releases that are reported. 40 C.F.R. §302.8. The reportable quantities of hazardous substances are listed at 40 C.F.R. §302.4. Generally, the reportable quantity for an unlisted hazardous substance is 100 pounds in a 24-hour period. 40 C.F.R. §302.5(b).
- ii. **Hazardous Substance TSD Sites.** CERCLA §103(c), 42 U.S.C. §9603(c) required a report to the U.S. Environmental Protection Agency (“EPA”), by June 9, 1981, by “any person who owns or operates or who at the time of

disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances... are or have been stored, treated, or disposed of,” and which did not have a Resource Conservation and Recovery Act (“RCRA”) hazardous waste facility permit. The deadline for this report has long since passed, and in spite of EPA interpretations to the contrary, has been held by district courts to be a one-time reporting requirement not applying to releases that were subsequently identified. *City of Toledo v. Beazer Materials and Services, Inc.*, 833 F.Supp. 646 (N.D. Ohio 1993); *Lutz v. Chromatex, Inc.*, 718 F.Supp. 413 (M.D. Pa.1989). Failure to give this notice not only was a crime, but resulted in loss of CERCLA liability defenses.

- b. **SARA Title III Reporting.** Pursuant to SARA (Superfund Amendments and Reauthorization Act of 1986) Title III, at 42 U.S.C. §11004, the “owner or operator of a facility “must” immediately” report a release or spill of a reportable quantity of a CERCLA hazardous substance or an “extremely hazardous substance” designated by 40 C.F.R. §355.40(a) to “the community emergency coordinator for the local emergency planning committee of any area likely to be affected by the release and the State emergency response commission of any State likely to be affected by the release.” 40 C.F.R. §355.42. In New York State, this is accomplished by calling the New York State Department of Environmental Conservation (“NYSDEC”) spill hotline at (800) 457-7362. For transportation-related releases, the report may be made by calling 911. 40 C.F.R. §355.42. Exemptions are provided for any release that “results in exposure to persons solely within the boundaries of the facility,” federally-permitted releases, and continuous releases meeting the requirements of 40 C.F.R. §302.8(b). 40 C.F.R. §§355.31, 355.32. The extremely hazardous substances, along with their reportable quantities, are set forth at Appendix A to Part 355. The report must include the information set forth at 40 C.F.R. §355.40(b), and a written follow-up report is also required “as soon as practicable.” 40 C.F.R. §355.40(b).
- c. **RCRA Facility Reporting.** If a hazardous waste treatment, storage or disposal facility has “a release, fire or explosion” by which a hazardous waste “could threaten human health or the environment outside the facility,” federal and state RCRA regulations require that its “emergency coordinator” must immediately notify local authorities, and call the National Response Center at (800) 424-8802 or the federal “on-scene coordinator” designated under the National Contingency Plan, and in New York the state spill hotline, (800) 457-7362, to report information specified at 6 N.Y.C.R.R. §373-2.4(g)(4)(ii). *See also* 40 C.F.R. §264.56(d). Further, the hazardous waste must be cleaned up as soon as practicable. 6 N.Y.C.R.R. §373-2.4(g)(6). *See also* 40 C.F.R. §264.56(e). Similar requirements also apply to “accumulators” of hazardous wastes. 6 N.Y.C.R.R. §372.2(a)(8)(ii), 373-1.1(d)(iii)(c)(5), 373-3.4(g)(4)(iii). 40 C.F.R. §262.34(d)(5)(iv)(C).
- d. **Federal UST Regulations.** Federal regulations at 40 C.F.R. Part 280, promulgated under RCRA, generally cover underground storage tanks (“USTs”) of at least 110 gallons that store petroleum or any substance defined as hazardous under CERCLA. *See* 40 C.F.R. §§280.10, 280.12. Hazardous waste tanks are excluded, since they are regulated as hazardous waste storage facilities under RCRA. 40 C.F.R. §280.10(b)(1). *See, e.g.*, 6 N.Y.C.R.R. Part 373. Under these regulations, if there is a spill or overfill of petroleum of either more than 25 gallons or that causes a sheen

on nearby surface waters, or a CERCLA reportable quantity of a hazardous substance,” owners and operators of the UST system” must report the spill within 24 hours to EPA, or the state if designated by EPA. 40 C.F.R. §280.53(a)(1). In New York, EPA has designated NYSDEC to receive these reports, and the report is made to the NYSDEC spill hotline. The spill must be immediately cleaned up or contained. 40 C.F.R. §280.53(a). If spills of less than 25 gallons or less than a reportable quantity cannot be cleaned up within 24 hours, they must also be reported. 40 C.F.R. §280.53(b).

- e. **Surface Water Spills.** Clean Water Act §311(b)(5), 33 U.S.C. §1321(b)(5) requires that “[a]ny person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility” of a “harmful quantity” must “immediately notify the appropriate agency of the United States Government of such discharge.” “Hazardous substances” and their reportable quantities are designated by 40 C.F.R. Part 116. 40 C.F.R. §117.21. For oil, a quantity which violates an applicable water quality standard, or which causes a sheen on the water, 40 C.F.R. §110.3, must be reported to the National Response Center at (800) 424-8802. 40 C.F.R. §110.6.
- f. **New York Petroleum Bulk Storage Regulations.** The New York State petroleum bulk storage regulations contain an important spill reporting requirement, which is contained in regulations applicable “to all aboveground and underground petroleum storage facilities with a combined storage capacity of over eleven-hundred (1,100) gallons, including all facilities registered under Part 612 of this Title.” 6 N.Y.C.R.R. §613.1(b). Under these regulations:

Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two (2) hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the department within two (2) hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362.

6 N.Y.C.R.R. §613.8. Note that the NYSDEC hotline can also be reached with an “800” prefix (800-457-7362). The bulk storage regulations were promulgated in 1985, so they may not apply to spills from facilities removed before that date. Furthermore, by policy, NYSDEC has created the following exception for *de minimis* spills:

3. What petroleum spills need to be reported?

All petroleum spills that occur within New York State (NYS) must be reported to the NYS Spill Hotline (1-800-457-7362) within 2 hours of discovery, except spills which meet all of the following criteria:

- 1. The quantity is known to be less than 5 gallons; and
- 2. The spill is contained and under the control of the spiller; and

3. The spill has not and will not reach the State's water or any land; and
4. The spill is cleaned up within 2 hours of discovery.

A spill is considered to have not impacted land if it occurs on a paved surface such as asphalt or concrete. A spill in a dirt or gravel parking lot is considered to have impacted land and is reportable.

<http://www.dec.ny.gov/chemical/8692.html>. Currently NYSDEC is considering amendments to the bulk storage regulations, including the spill reporting requirement.

- g. **New York Oil Spill Act.** Navigation Law §175 provides that “[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge.” Regulations at 17 N.Y.C.R.R. §§32.3 and 32.4 implement that statute. Under section 32.3, the notification requirement under Navigation Law §175 extends to “[a]ny person responsible for causing a discharge,” “the owner or operator of any facility from which petroleum has been discharged,” and “any person who has actual or constructive control of such petroleum immediately prior to such discharge.” Notification is required by a telephone call to the NYSDEC spill hotline, and a list of detailed information that must be provided with the notification is set forth at 17 N.Y.C.R.R. §32.4(b). While the reporting requirement under 6 N.Y.C.R.R. §613.8 appears limited to regulated bulk tanks (although it may be interpreted more broadly by NYSDEC), the reporting requirement under Navigation Law §175 is not limited to bulk tanks, and covers any unpermitted “discharges,” as defined by the New York Oil Spill Law. *See* Navigation Law §172(8).
- h. **Bulk Storage Spills in New York.** Environmental Conservation Law (“ECL”) §17-1743 sets forth the following reporting requirement to make an immediate call to the NYSDEC spill hotline for a spill from a facility that stored more than 1,100 gallons of petroleum or any other liquid that might pollute ground or surface waters:

Any person who is the owner of or in actual or constructive possession or control of more than 1,100 gallons, in bulk, of any liquid, including petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.
- i. **Releases of Hazardous Substances in New York.** NYSDEC regulations also require reporting of releases of designated quantities of hazardous substances listed at 6 N.Y.C.R.R. Part 597. While the designated substances and reportable quantities may be similar to those specified under CERCLA, they are not identical, and the measurement of reportable quantities is not limited to 24 hours. 6 N.Y.C.R.R. §595.1(c)(13). “[R]eleases of petroleum or hazardous wastes” are exempt. 6

N.Y.C.R.R. §595.1(b). The reporting requirement applies to (1) “an owner or operator” of a “storage facility,” (2) “any person in a contractual relationship with an owner or operator who inspects, tests, or repairs any portion of a storage facility which is or was used for the storage of hazardous substances,” (3) “any person in actual or constructive control or possession of a hazardous substance prior to its release,” and (4) “any employee, agent or representative” of such persons. 6 N.Y.C.R.R. §595.3(a)(1). Further, releases of lesser quantities which cause or “may reasonably be expected to cause” an explosion, “vapors, dust and/or gases,” which may cause illnesses (not including illnesses to persons in the same building), or contravention of air or water quality standards, must also be reported. 6 N.Y.C.R.R. §595.3(a)(2). All such releases must be reported to the NYSDEC spill hotline within two hours. Nonetheless, a spill to a secondary containment system that is completely contained and accounted for within 24 hours need not be reported. 6 N.Y.C.R.R. §595.3(a)(4). Furthermore, within 24 hours of discovery, “[t]he owner or operator of a storage facility shall notify [NYSDEC] of a suspected or probable release of a hazardous substance unless an investigation shows that a release has not occurred or does not need to be reported” 6 N.Y.C.R.R. §595.3(b)(1). Reporting is not required for a continuous release satisfying the requirements of 40 C.F.R. §302.8. 6 N.Y.C.R.R. §595.3(a)(5). NYSDEC is currently considering revisions to this reporting requirement.

- j. **Requirements for Attorneys.** Most of the spill reporting requirements apply to the “owner or operator,” and not their lawyer. While persons in “actual or constructive possession or control” or a contractor “who inspects, tests or repairs” that must report under ECL §17-1743 and 6 N.Y.C.R.R. §595.3(a)(2) may include an environmental consultant or tank tester, it would not normally include an attorney. However, an attorney may fall within the category of “any person” with knowledge of a spill who is required to report a release of petroleum from a bulk storage facility under 6 N.Y.C.R.R. §613.8. Likewise, an attorney would likely be an “agent or representative” of an “owner or operator” required to report a release of hazardous substances under 6 N.Y.C.R.R. §595.3(a)(1).

What should a lawyer do if his client refuses to report? There is no clear answer. In a decision of the NYSDEC Commissioner, *In the Matter of Middleton, Kontokosta Associates, Ltd.* (Dec. 31, 1998), Commissioner Cahill found that a consultant who learned about a petroleum spill from a tank, but failed to report, violated 6 N.Y.C.R.R. §613.8, even though he was neither an owner nor an operator. In this case, Donald Middleton, acting on behalf of a bank that held a mortgage on the property, smelled petroleum in dirt from soil borings excavated near a UST. The Commissioner ruled that:

The term “any person” in §613.8 should be given a broad, not limited or restrictive, interpretation. The term “any person” is intended to apply, not only to persons who are “owners” and “operators”, but also to all other persons with knowledge of a spill, leak or discharge in order to implement the remedial and preventive purposes of the Petroleum Bulk Storage Code, of which §613.8 is a part. The rationale for requiring “any person” to report a spill or discharge to the Department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill. For example, in the case of an ongoing gush of oil from an

overturned tanker truck on the highway, an immediate report will enable a quick response in order to minimize environmental damage. The reporting duty is on everyone with knowledge of the spill.

The Commissioner skirted the issue of whether ethics codes may supercede this reporting requirement, stating:

Middleton is not a professional engineer, and therefore cannot claim that he is under a professional obligation not to disclose under the Code of Ethics for Engineers, assuming that the code was otherwise applicable under the circumstances. Nor is Mr. Middleton an attorney, and therefore the attorney-client privilege could not be asserted as a basis for his non-disclosure.

In the Matter of Middleton, Kontokosta Associates, Ltd. (Dec. 31, 1998).

How does this ruling apply to lawyers? Rule 1.6 of the Rules of Professional Conduct (formerly DR 4-101) generally prohibits attorneys from revealing “confidential information” of a client, which is defined as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential,” Rule 1.6(a) (generally encompassing “confidences” and “secrets” under the old rule). However, Rule 1.6(b) contains a number of exceptions, pursuant to which a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary,” including “(2) to prevent the client from committing a crime,” and “(6) when permitted or required under these Rules or to comply with other law or court order.” Arguably, the spill reporting requirements falls under each. Since the Rule uses the word “may,” it is not mandatory, there is no affirmative burden... to disclose.” Nassau Co. 2001-07. Nonetheless, this does not relieve an attorney from an independent obligation to comply with the law. *See* N.Y. State 681; *Matter of Balter v. Regan*, 63 N.Y.2d 630, 479 N.Y.S.2d 506 (1984), *cert. den’d* 469 U.S. 934, 105 S. Ct. 332 (1984) (duty to comply with court order).

Under *Middleton*, the spill reporting by a lawyer may be “required by law,” so he or she may fall under the exception of Rule 1.6(b)(6). N.Y. State 649 considered the obligation of a lawyer to reveal a breach of fiduciary duty by an executor to the beneficiaries of an estate, and concluded that “the attorney’s obligation or ability to disclose the information to the beneficiaries depends, with respect to information that qualifies as a client secret, upon whether the applicable law requires disclosure.”

Social Services Law §413 requires social service professionals to report suspected child abuse. In N.Y. City 1997-2, the City Bar Committee on Professional and Judicial Ethics considered whether a lawyer employed by a social services organization, who provided legal services to minor clients, had a duty to report abuse without authorization by the client. It concluded:

If the lawyer concludes that the law requires the lawyer to report suspected child abuse or mistreatment in certain classes of cases, the lawyer may make such a report when the law so requires. DR 4-101(C)(2). If the lawyer is not certain that he

has a legal obligation to disclose otherwise confidential information, however, the lawyer should take available legal steps to seek clarification of the law before making disclosure.

Similar logic may apply to spill reporting. In addition, if the client refuses to report a spill, he commits a continuing violation of the law, and therefore the attorney knows his or her client intends to continue to commit a crime. This could fall under the exception of Rule 1.6(b)(2). “[A] client’s intent to commit a crime is not a protected confidence or secret.” *People v. Andrades*, 4 N.Y.3d 355, 361-2, 795 N.Y.S.2d 497 (2005). Under this exception, an attorney acted properly in revealing the intent of his client to commit perjury after counseling his client not to perjure himself. *People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001). Similarly, a lawyer may take appropriate action to prevent suicide, including disclosure of his client’s intentions. N.Y. State 486; N.Y. City 1997-2. However, in N.Y. City 2002-1, the City Bar Committee on Professional and Judicial Ethics ruled that the exception does not permit disclosure of client confidences and secrets based on client’s “continuing crime” of continued knowing possession of stolen property, but might have reached “a different balance, and outcome... for emergencies which involve the prevention of imminent serious bodily injury or death.”

While a spill rarely creates a risk of “imminent serious bodily injury or death” (unless explosion or fire is imminent), some spills may lead to immediate serious environmental harm, so the exception might apply. If the threat is not so serious, then N.Y. City 2002-1 suggests that the duty to report a future crime does not apply.

Another concern is Rule 1.2(d), which states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent.” This rule has been found to require a lawyer to call upon a client to correct a misrepresentation, but not to report the misrepresentation. Nassau Co. 2003-1.

Ethics opinions advise a lawyer posed with uncertainty about disclosure to “commence a declaratory judgment action or some other appropriate procedure designed to obtain a court determination on the disclosure law.” N.Y. State 645. This advice is of little benefit to an environmental lawyer faced with a two-hour reporting requirement. Certainly, the lawyer is bound to try to convince the client to report within the time limit for reporting. N.Y. State 649 (duty to try to convince executor not to breach fiduciary duty). If the client refuses, the lawyer is left with a Hobson’s choice.

One option might be to call NYSDEC, and indicate there was an issue at a property, without explicitly revealing the spill (much like the lawyer did due to the planned perjury in *People v. Andrades*, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005)), and also withdraw as attorney. However, if the lawyer learns about either a petroleum spill covered by 6 N.Y.C.R.R. §613.8, or a release of hazardous substances at their client’s facility covered by 6 N.Y.C.R.R. §595.3(a)(1), the lawyer falls under the class of persons (“any person” or an “agent,” respectively) required to report, and may not be able to keep confidential information. An excellent discussion of this issue is contained in Randall C. Young, *Attorney-Client Privilege and Spills at Petroleum Bulk Storage Facilities*, 30 N.Y. Environmental Lawyer 1 (Spring 2010),

in which Mr. Young also suggests that the client's Fifth Amendment privilege against self-incrimination might prevent an attorney from making a report.

- k. **Misprision.** The general rule under New York law is that "criminalizing a citizen's mere failure to report a crime to the police is incongruous with our nation's system of justice." *People v. Williams*, 20 A.D.3d 72, 79, 795 N.Y.S.2d 561, 567 (1st Dep't 2005), *app. dis'd* 5 N.Y.3d 811, 803 N.Y.S.2d 40 (2005). "New York has never recognized the common-law crime of misprision, the failure to report a crime." *People v Meyers*, 72 Misc. 2d 1003, 1006, 340 N.Y.S.2d 505 (Crim. Ct. Kings Co. 1973). Therefore, there is no general duty to report someone else's failure to report a spill under New York law. However, "misprision of a felony" is a federal crime:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. §4. According to the Second Circuit, "Misprision of Felony has its roots in the common law which recognized a duty to raise a 'hue and cry' and report a felony to the authorities." *U.S. v. Cefalu*, 85 F.3d 964 (2d Cir. 1996). According to the Second Circuit:

The elements of Misprision of Felony are 1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime.

U.S. v. Cefalu, 85 F.3d 964 (2d Cir. 1996). The courts universally agree that a necessary element of misprision of felony is that the defendant affirmatively concealed the felony committed by another. "Mere silence, without some affirmative act, is insufficient evidence" of the crime. *Lancey v. United States*, 356 F.2d 407, 410 (9th Cir. 1966), *cert. den'd*, 385 U.S. 922, 87 S.Ct. 234 (1966). "Concealment – indeed an affirmative step to conceal – is a required element; mere failure to make known does not suffice." *U.S. v. Warters*, 885 F.2d 1266, 1275 (5th Cir. 1999). "Thus, a person who witnesses a crime does not violate 18 U.S.C. §4 if he simply remains silent." *U.S. v. Ciambrone*, 750 F.2d 1416, 1418 (9th Cir. 1984). A felony is a crime punishable by more than one year in jail. U.S.S.G. §2L1.2, n.2. The failure to comply with federal spill reporting requirements may be a felony, since they are punishable by more than a year in jail. *See* 42 U.S.C. §§6928(d), 9603(b,c), 11045(b)(4). While "mere silence" would not make a lawyer liable for this crime, any affirmative act of concealment of the spill would. If a lawyer offered advice to help his or her client conceal a spill, this might be considered concealment. Such conduct may put a lawyer at risk of committing misprision of a felony.

2. Materials Subject to Discovery.

- a. **Privileges.** Counsel must be cautious to shield, to the extent possible, communications and other materials developed in the course of investigation by the

work product or attorney/client privilege. The attorney/client privilege under CPLR §4503 protects “those communications made in confidence to an attorney for the purpose of seeking professional advice.” *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 887 (1979). CPLR §3101(c) exempts the work product of an attorney from disclosure, which “includes memoranda, correspondence, mental impressions and personal beliefs conducted, prepared or held by the attorney.” *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 396, 522 N.Y.S.2d 999, 1002 (4th Dep’t 1987). But if the material could have been prepared by a lay person, it is not covered by this exception. Connors, *McKinney’s Practice Commentary* C3101:28. Further, routing material through a lawyer does not make it privileged. *Id.* C3101:35. While under the Federal Rule of Evidence 501, federal common law governs these privileges (except that where a state claim or defense is involved, the state rule applies), the rules are generally the same in federal court. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

- b. **Material Prepared for Litigation.** CPLR §3101(d)(2) protects from disclosure “materials prepared in anticipation of litigation” unless “undue hardship” and “substantial need” are shown. This includes non-party witness statements. *Yasnogordsky v. City of New York*, 281 A.D.2d 541, 722 N.Y.S.2d 248 (2d Dep’t 2001). However, CPLR §3101(g) allows discovery of accident reports. While an investigation or accident report prepared in the ordinary course of business is normally discoverable, reports prepared exclusively for purposes of anticipated litigation are presumptively shielded. *Landmark Insurance Co. v. Beau Rivage Restaurant, Inc.*, 121 A.D.2d 98, 509 N.Y.S.2d 819 (2d Dep’t 1986); Connors, *McKinney’s Practice Commentary* C3101:33. FRCP Rule 26(b)(3) provides similar protection in federal court. Therefore, data and reports that are prepared in the normal course of business or submitted to government agencies are discoverable, such as test results, Phase I and II reports, and remedial investigations. This would include such things as interviews with past owners, operators and occupants conducted for a Phase I study, pursuant to 40 C.F.R. §312.23. The more difficult issue is whether data and reports produced for purposes of litigation are discoverable.
- c. **Expert Disclosure.** While CPLR §3101(d) requires disclosure, for a testifying expert, of “the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion,” it does not require production of an expert report. Connors, *McKinney’s Practice Commentary* C3101:29A(H). In federal court, non-testifying experts are generally shielded from discovery absent “exceptional circumstances,” FRCP Rule 26(b)(4)(D)(ii), but testifying experts must produce reports, including “(I) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them.” FRCP Rule 26(a)(2)(B). While there had been a split of authority interpreting former FRCP Rule 26(a)(2)(B)(ii), requiring disclosure of “the data or other information considered by the witness in forming them,” the Federal Rules were amended in 2010 so it is now clear under Rule 26(b)(4)(B) that draft expert reports are not discoverable. Also, FRCP Rule 26(b)(4)(C) now provides that communications between a lawyer and expert are privileged, except for facts, data or assumptions given by the lawyer, or matters related to compensation of the expert.

- d. **Data.** While there is no clear rule on whether data developed for purposes of litigation must be disclosed, the better course is to assume it is discoverable. Further, if a federal court expert relies upon it, it is clearly discoverable under FRCP Rule 26(a)(2)(B)(ii).
- i. In *Dunning v. Shell Oil Co.*, 57 A.D.2d 16, 393 N.Y.S.2d 129 (3d Dep't 1977), the plaintiffs' geologist undertook testing, and created a report. While the plaintiffs were required to produce "test borings and related soil data," they did not have to produce the expert's opinions, since they were created for purposes of litigation.
- ii. In *Occidental Chemical Corp. v. Ohm Remediation Services Corp.*, 45 ERC 1821 (W.D.N.Y. 1997), the defendant was allowed discovery of documents produced by the plaintiff's consultant Rust, who was originally hired by the plaintiff's former law firm to handle site remediation. The materials were not work product, since there was no proof "that Rust was hired for the project to assist its counsel in providing legal advice, or that any of the documents were generated for that purpose." 45 ERC at 1824. Further, "[e]ven if these documents were prepared with an eye toward litigation, it is indisputable that the documents also contain information which plaintiff would be expected to obtain or compile in the ordinary course of its business of overseeing the performance of environmental remediation work under its contract with defendant." *Id.* In addition, "when a party takes a position in a case that places at issue the very information sought to be protected from disclosure by the work product doctrine, the protection may be waived." *Id.* Finally, "the assistance rendered by Rust was based on factual and scientific evidence obtained through studies and observation of the physical condition of the Durez site, and not through client confidences," and "[s]uch underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations." 45 ERC at 1826.

3. Spoliation

Spoliation is the destruction of evidence that "will fatally compromise the defense or leave the defendants without the means to defend the action." *Ifraimov v. Phoenix Industrial Gas, LLC*, 4 A.D.3d 332, 333, 772 N.Y.S.2d 78, 79 (2d Dep't 2004). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation." *Standard Fire Insurance Company v. Federal Pacific Electric Co.*, 14 A.D.3d 213, 218, 786 N.Y.S.2d 41, 45 (1st Dep't 2004). A pleading may be struck "even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation." *DiDomenico v C & S Aeromatik Supplies*, 252 A.D.2d 41, 53, 682 N.Y.S.2d 452, 459 (2d Dep't 1998). Alternately, the less severe sanction of a negative inference may be imposed. *Ifraimov v. Phoenix Industrial Gas, LLC*, 4 A.D.3d 332, 334, 772 N.Y.S.2d 78, 79 (2d Dep't 2004). The federal courts follow a similar analysis:

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). Once a court has concluded that a party was under an obligation to preserve

the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed, and the likely contents of that evidence. *See id.* at 127. The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, *see West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999), and is assessed on a case-by-case basis. *See United States v. Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980).

Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001).

In *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334 (D. Conn. 2009), PCB-laden soil samples taken from a golf club's property and electronic records of the analyses were not preserved. No "litigation hold" was placed on laboratory data or the samples. Counsel did, however, advise the purported owner of the source site that samples had been taken and remediation was going to begin in two weeks. Defendant Pitney-Bowes, the tenant of the alleged source property, sought to undertake testing and radioisotope dating, but could not do so. The district judge imposed as a sanction precluding admission of the data or other evidence plaintiff gained from the soil samples, holding that the duty to preserve the evidence arose by the time counsel was actively involved in the investigation and preparation for a cost recovery action:

Unlike other cases involving difficulties of evidence preservation--for example, the scene of a fire in a house, *Howell*, 168 F.R.D. at 506 -- there is no reason offered why it was not feasible, either logistically or economically, for OBG to store the soil samples in its laboratory. Contrary to Innis Arden's contention, federal regulations permit rather than prohibit such storage. *See* 40 C.F.R. § 261.4(d)(vi) (authorizing temporary storage of a hazardous sample in a laboratory for "a specific purpose," including "until conclusion of a court case or enforcement action where further testing of the sample may be necessary"). Moreover, such retention is consistent with the procedures for sample storage that OBG developed. Innis Arden's culpability is based on OBG's continuous and on-going sample "deactivation," and on its counsel's failure to issue any evidence-preservation directive despite contemporaneously recognizing the potential negative consequences of evidence destruction. Under these circumstances, Innis Arden's failure to preserve evidence warrants sanctions.

Pitney Bowes also claims that it is significantly prejudiced by the loss of the sample evidence because it now cannot analyze the soil samples for dating analysis and cannot assess the precise types of PCBs, as well as other compounds, in the sampling from Innis Arden's property. This prejudice is consistent with Innis Arden's recognition of the relevance of such additional testing--which never performed--in its correspondence with OBG. In his July 2005 e-mail, McCormack [counsel for Innis Arden] suggested doing the same types of further testing as a way of making the link between Pitney Bowes and Innis Arden more conclusive. Because the sediment samples and data no longer exist and cannot be re-tested, date-tested, or subjected to more refined testing, Pitney Bowes cannot conduct the analysis on which it might have developed evidence that the

PCBs on Innis Arden's property were not caused by a post-1967 release from Pitney Bowes.

257 F.R.D. 334, 342. In a later decision, 629 F. Supp. 2d 175 (D. Conn. 2009), the plaintiff's expert opinions were struck due to insufficient data, attorneys' fees awarded by the magistrate were approved, and the case was dismissed.

Thus, if plaintiff does not give potentially responsible parties or insurers the opportunity to sample a site or examine tanks or other equipment prior to disposal, a spoliation claim may be raised. All potential parties should be invited to sample and examine the site, and observe tank removals or other major operations. The need to address an imminent threat to the environment, or respond to agency orders, may compromise this ability. A cautious plaintiff may seek a court order or stipulation to govern the defendants' rights in this regard. Where possible, split samples and tanks or piping at issue should be preserved, as well as chain of custody, lab results and other related data.

4. Access for Testing.

It is critical to generate evidence to support future cost recovery and protect subrogation rights prior to remediation. Generally, an expert should observe and test the site as soon as feasible, and forensic testing should be undertaken at an early juncture.

a. **Access Agreements.** Normally an access agreement should be executed prior to entry onto a third party's property. Typical provisions include:

- Advance notice.
- Limited duration/termination.
- Only a temporary license not a tenancy or easement.
- Split samples.
- Sharing of data and reports.
- Immediate notification regarding release reporting.
- Insurance coverage.
- Defense and indemnification for work.
- Reservation of rights and defenses.
- Restoration of site.
- Confidentiality.
- No representations regarding utilities or subsurface conditions.

While "all appropriate inquiry" for a Phase I study only requires "[a] visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (e.g., aerial photography)," 40 C.F.R. §312.27(a)(2), the standard Brownfield Cleanup Agreement requires access:

IV. Entry upon Site

A. Applicant hereby agrees to provide access to the Site and to all relevant information regarding activities at the Site in accordance with the provisions of ECL 27-1431. Applicant agrees to provide the Department upon request with proof of access if it is not the owner of the site.

B. The Department shall have the right to periodically inspect the Site to ensure that the use of the property complies with the terms and conditions of this Agreement. The Department will generally conduct such inspections during business hours, but retains the right to inspect at anytime.

C. Failure to provide access as provided for under this Paragraph may result in termination of this Agreement pursuant to Paragraph XII.

b. **Discovery Devices.** Access can be gained for testing by discovery devices.

i. FRCP Rule 34(a)(2) allows a party to serve notice “to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.” FRCP Rule 34(c) provides that if a subpoena is served, “a nonparty may be compelled... to permit an inspection.”

ii. CPLR §3120(1) provides that “[a]fter commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum....”

(ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

iii. Pre-action discovery may be allowed by court prefer “to aid in bringing an action,” or “to preserve information.” CPLR §3102(c).

c. **Warrantless Entry.**

i. **Environmental Statutes.** CERCLA §104(e)(4)(A), 42 U.S.C. §9604(e)(4)(A), authorizes the government to enter property “if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant” in order “to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants.” However, “before leaving the premises,” the owner, operator or tenant must be given “a receipt describing the sample obtained and, if requested, a portion of each such sample.” CERCLA §104(e)(4)(B), 42 U.S.C. §9604(e)(4)(B). NYSDEC has similar authority under ECL §27-1309(3) to “enter any inactive hazardous waste disposal site and areas near such site and inspect and take samples of wastes, soils, air, surface water, and groundwater.” It should give advance notice, and give receipts and offer split samples. ECL §27-1309(4). Towns engineers are authorized to enter property “for the purpose of making

surveys, examinations or investigations, including the making of test pits and test borings.” Town Law §32-a.

ii. **Constitutional Protections.** The Fourth Amendment and Article 1, §12 of the New York Constitution prohibit warrantless searches, and require “probable cause” prior to the issuance of a warrant for a search to determine code compliance. Agencies generally cannot enter without a subpoena. *Marshall v Barlow’s, Inc.*, 436 U.S. 307 (1978). An “administrative” search warrant may be issued, provided “reasonable legislative or administrative standards for conducting an... inspection are satisfied.” *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S. Ct. 1727, 1735 (1967). The authority for such devices under New York law is unclear. *Cf.* Criminal Procedure Law Part 190 (criminal subpoenas); ECL §27-1309(2) (authorizing subpoenas for records and testimony). But in an emergency, a reasonable warrantless entry may be justified. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, (1978). Further, warrantless inspections may be allowed for closely regulated industries where there is a reduced expectation of privacy. *Colonade Corp. v United States*, 397 U.S. 72, 90 S. Ct. 774 (1970); *United States v Biswell*, 406 U.S. 311, 92 S. Ct. 1593 (1972).

d. **Unauthorized Entry.** Unauthorized entry for testing is a trespass. *Benderson v. Ulrich/34 Chestnut Street, LLC*, 57 A.D.3d 1417, 871 N.Y.S.2d 547 (4th Dep’t 2008). In *Benderson*, a contractor entered the property to do testing after a purchase and sale contract and access agreement had expired, and contamination was found that required remediation. This was actionable, because discovery of previously unknown contamination on its property can result in liability for the remedial costs:

Plaintiffs allege in the complaint that, by reason of defendant’s conduct, they have “incurred environmental remediation costs in an amount to be determined at trial and the value of the Property has been impaired to the plaintiff[s]’ damage in the amount to be determined at trial.” We conclude that defendant failed to meet its initial burden of establishing that plaintiffs did not sustain any damages. Indeed, the attorney for plaintiffs who was responsible for negotiations stated in an opposing affidavit that “plaintiffs[s] would not have incurred [the costs of environmental remediation] but for the Defendants[‘] trespass.” [citation omitted]

57 A.D.3d at 1419, 871 N.Y.S.2d at 548-9.

5. Notice to Insurers.

Upon identifying an occurrence that may result in a potential claim, it is prudent to give immediate notice to all carriers that may provide coverage. This includes not only policies held by the injured party, but also, to the extent they can be identified, insurers of third parties who may be liable for environmental contamination.

a. **Late Notice.** In New York, the rule has long been that late notice of an occurrence that may result in a claim precludes coverage, even if there is no prejudice to the

insurer. *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972); *Olin Corp. v. Insurance Co. of North America*, 743 F. Supp. 1044, 1053 (S.D.N.Y. 1990), *aff'd* 929 F.2d 62 (2d Cir. 1991). In most other states, prejudice must be shown. *See, e.g., Solvents Recovery Service of New England, Inc. v. Hartford Ins. Co.*, 218 N.J. Super. 49 (N.J. App. Div. 1987); *West American Insurance Company v. Hardin, Exrx.*, 59 Ohio App.3d 71, 571 N.E.2d 449 (Ohio Ct. App. 1989). However, by Laws of 2008, Ch 388, Insurance Law §3420(a)(5) was added, applicable to policies issued on or after January 17, 2009, to eliminate the “no prejudice” rule. This new rule does not apply to older policies, *Briggs Ave. LLC v. Insurance Corp. of Hannover*, 11 N.Y.3d 377, 870 N.Y.S.2d 841 (2008), which often are the source of coverage for environmental liabilities.

- b. **Evidence of Coverage.** An insured must prove, by a preponderance of the evidence, the existence and terms of a lost insurance policy. *Gold Fields American Corporation v. Aetna Casualty and Surety Co.*, 173 Misc.2d 901, 661 N.Y.S.2d 948 (Sup. Ct. N.Y. Co. 1997), *Employers Insurance of Wausau v. The Duplan Corp.*, 1999 U.S. Dist. LEXIS 15368 (S.D.N.Y. 1999). “Of necessity, policyholders tender secondary evidence to establish the existence and terms of missing policies.” West, *General Practice in New York*, Insurance §31.20. *See also Gold Fields American Corporation v. Aetna Casualty and Surety Co.*, 173 Misc.2d 901, 661 N.Y.S.2d 948 (Sup. Ct. N.Y. Co. 1997). Such secondary evidence often comes in the form of witnesses, “including individuals involved in the placement of the missing or incomplete policy or claims personnel who adjusted claim thereunder,” who “may be able to testify as to the content of the original document.” *Id.* Further, specimen policies can be used to establish the terms of the policies at issue. *Id.*; *Maryland Cas. Co. v. W.R. Grace & Co.*, 1995 WL 562179 (S.D.N.Y. 1995). Historic records, including minutes and prior litigation records, should be searched, previous insurance brokers, outside counsel and former employees should be consulted, and it may even be prudent to hire insurance archeologists to try to locate evidence of coverage or provide standard policy terms.
- c. **Claims Against the Responsible Party’s Insurer.** Two New York statutes give a right to make a direct claim against a responsible party’s insurance company. Consequently, reasonable diligence must be used to be sure these insurers are put on notice as soon as contamination is discovered. If their identity is not known, requests should be made to the responsible party to identify the insurers and put them on notice.
- i. **Navigation Law §190.** The New York Oil Spill Law provides as follows:

Claims against insurers. Any claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

Navigation Law §190. In *Snyder v. Newcomb*, 194 A.D.2d 53, 60, 603 N.Y.S.2d 1010, 1015 (4th Dep’t 1993), the Fourth Department held that “section 190 is explicit in providing that ‘any claim for damages by any injured person... may be brought directly against... the insurer,’” and ruled

that “the statute creates a direct cause of action.” *See also Henner v Everdry Mktg. & Mgt., Inc.*, 74 A.D.3d 1776, 902 N.Y.S.2d 765 (4th Dep’t 2010).

- ii. **Insurance Law §3420(a)(2).** This statute provides that if a judgment “shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.”
- iii. **Notice.** While an insurer must be placed on notice of a claim by an injured party, Insurance Law §3420(a)(3) allows the notice to be given by the injured party. This provision is applicable to the claims by a third party under Navigation Law §190. *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep’t 1993). Thus, “[w]here the insured fails to give proper notice, the injured party can give notice herself, thereby preserving her right to proceed directly against the insurer,” and “is not to be charged vicariously with the insured’s delay.” *Appel v. Allstate Insurance Co.*, 20 A.D.3d 367, 799 N.Y.S.2d 467 (1st Dep’t 2005); *Lauritano v. American Fidelity Fire Insurance Co.*, 3 A.D.2d 564, 568-9, 162 N.Y.S.2d 553, 557 (1st Dep’t 1957), *aff’d* N.Y.2d 1028, 177 N.Y.S.2d 530 (1958). The “reasonable notice required of an injured party is of necessity measured by standards different than those applied to the insured.” *Price v. Allstate Insurance Co.*, 12 A.D.2d 911, 210 N.Y.S.2d 945, 946 (1st Dep’t 1961); *Lauritano v. American Fidelity Fire Insurance Co.*, 3 A.D.2d 564, 568-9, 162 N.Y.S.2d 553, 557 (1st Dep’t 1957), *aff’d* N.Y.2d 1028, 177 N.Y.S.2d 530 (1958). “[T]he sufficiency of notice by an injured party is governed not by mere passage of time but by the means available for such notice.” *National Grange Mut. Ins. Co. v. Diaz*, 111 A.D.2d 700, 701, 490 N.Y.S.2d 516, 518 (1st Dep’t 1985). It is acceptable to give notice to an insurer within a reasonable time of discovering that the existence of a policy and the identity of the insurer after using reasonable diligence to discover them. *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep’t 1993); *State of New York v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep’t 1995). In *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep’t 1993), the court held that notice given approximately five years after discovery of a spill was timely, but in *State of New York v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep’t 1995), a two-year delay after learning of the identity of the insurer was too long. A three-year delay was excused in
- iv. **Disclaimer.** Where an insurer’s disclaimer merely states that the insured did not give timely notice, but does not mention late notice by the injured third party, the disclaimer is not effective as to the injured party, and the late notice defense is waived or barred by estoppel. *General Accident Insurance Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979). Thus, in *Henner v. Everdry*, 74 A.D.3d 1776, 902 N.Y.S.2d 765 (4th Dep’t 2010), plaintiffs who sued under Navigation Law §190 could proceed against the

discharger's insurer in spite of a four-year delay between the discharge and the notice, since the insurers only disclaimed on the basis of the discharger's late notice, and a reservation of rights letter was not a disclaimer.

6. **Environmental Audit Incentive Policy.**

In keeping with its responsibility to ensure compliance with environmental laws, NYSDEC recently issued NYSDEC Commissioner Policy 59 ("CP-59" or the "Policy"). CP-59 offers regulated entities the opportunity to reduce or waive penalties for violations that are discovered and disclosed voluntarily, or discovered during pollution prevention or compliance assistance. Additionally, the Policy creates and implements incentives to encourage regulated entities to go beyond mere compliance by agreeing to evaluate and incorporate Environmental Management Systems ("EMS") and Pollution Prevention ("PP") into their own existing systems. The Policy's goal is to encourage self-auditing and the adoption of effective approaches to prevent violations, including the Environmental Management Systems and Pollution Prevention. Note that EPA also has an Audit Policy, available at www.epa.gov/compliance/incentives/auditing/auditpolicy.html.

- a. **Environmental Management Systems.** CP-34 defines EMS as "management processes, procedures, and auditable performance objectives that allow a facility to continuously analyze, control, and reduce the environmental impact of its activities, products, and services by utilizing pollution prevention measures, performing beyond minimum compliance levels, or integrating sustainable business practices."
- b. **Pollution Prevention.** ECL §28-0105(3) defines PP as "changes in production methods, work practices, raw materials or the provision of services that reduce energy or resource consumption, or that reduce, avoid or eliminate the use of hazardous substances or the generation of such substances, pollutants or waste per unit of product or service provided, so as to reduce risks to public health or the environment, without shifting risks between individuals or environmental media."
- c. **Prosecutorial Discretion.** Although the Policy is a formalization of the exercise of NYSDEC's prosecutorial discretion conferred by ECL Article 71, its utilization is stated to be entirely at the discretion of NYSDEC. The Department reserves the right to select eligible entities for the Policy. The Policy states that it does not create any rights enforceable by any party, restrict or alter the authority or enforcement discretion of the Department, apply to criminal violations, or limit the ability of NYSDEC to collect natural resource damages, regulatory fees, or remedial costs.
- d. **Incentives.** CP-59 instructs NYSDEC to work with several groups to create incentives for voluntary compliance, including Empire State Development (ESD), Environmental Facilities Corporation (EFC), New York State Energy Research & Development Authority (NYSERDA), and the Pollution Prevention Institute (P2I). Some, but not all of the incentives are financial in nature. While the list of available incentives may expand, the Policy states that they include:
 - i. **Penalty Reduction or Waiver.** If the requirements set out in the Policy are met, the "gravity component" of a penalty will be waived. Additionally, the entity may qualify for a waiver of the "economic benefit component" of a penalty. If the entity is engaged in environmental audits and EMS, then this portion may be waived as well, up to \$5,000. To the extent that it exceeds \$5,000 it may also be waived, equal to an amount that the entity commits to

invest in PP not otherwise required by law. To receive penalty mitigation, entities must identify measures to ensure future compliance and state in writing that those measures will be implemented and maintained. The Policy applies only to civil penalties, and does nothing to mitigate criminal penalties.

ii. **Environmental Audit Agreement.** The policy encourages entities to subject themselves to Environmental Audit Agreements by offering several incentives. These incentives include, but are not limited to:

- Public recognition for measures that go beyond compliance.
- Eligibility for a cost share of up to half of audit activities related to energy reduction.
- Priority for assistance from the Small Business Environmental Assistance Program.
- A finding that the entity meets the compliance requirements for ESD's Environmental Investment Program, as long as environmental compliance issues are fully resolved prior to the date application decisions are made.
- Qualification for entry into the "entry tier" of the NY Environmental Leaders Program.
- An understanding that the entity will be a low priority for inspection during the audit period, unless a complaint is received.

iii. **Pollution Prevention.** In addition to the incentives already offered for the enactment of an Environmental Audit Agreement, the policy suggests the following additional incentives for entities that engage in PP:

- Waiver of any payable economic benefit component for the amount the entity commits to invest in PP to the extent not required by law.
- Qualification for entry into the "leadership tier" of the NY Environmental Leaders Program.

e. **Eligibility.** CP-59 applies to any entity, private or public, including a Federal, State, or municipal agency, regulated under New York State environmental laws and regulations. The Policy applies to violations of New York State laws and regulations that are discovered by an eligible entity during an environmental audit, or by the NYSDEC or other agencies during pollution prevention or compliance assistance. Qualifying environmental audit activities include, but are not limited to a formal audit by a third party, informal compliance review by a facility employee, and compliance assessment conducted pursuant to a facility's EMS.

i. **Entities Excluded.** The Policy specifically excludes entities that, within the past five years, received a notice of Violation, Environmental Conservation Appearance Ticket, Notice of Hearing and Complaint, or an administrative or judicial order, or were subject to a penalty demand and were uncooperative in remedying past violations. "Uncooperative" includes, but is not limited to, failing to respond to NYSDEC correspondence and failing to take good faith steps to remedy violations within time frames prescribed by law. If a regulated entity with multiple facilities is eligible for penalty mitigation at one facility, it may remain eligible even if another facility is the

subject of an investigation, inspection, information request, or third-party complaint or ticket.

ii. **Violations Excluded.** The Policy excludes several types of violations. These violations generally are ones that are not properly reported or remedied or are considered too egregious, and include violations:

- (1) Of the same requirement for which the entity has received a Notice of Violation, Environmental Conservation Appearance Ticket, or Notice of Hearing and Complaint, or administrative or judicial order, or was subject to a penalty demand, within the past five years.
- (2) Of the same requirements for which the entity has already received a penalty waiver under the Policy within the past five years.
- (3) Of Administrative or judicial orders.
- (4) Of the terms of any response, removal, or remedial action covered by a written agreement.
- (5) That are alleged criminal conduct, regardless of whether there was referral for criminal prosecution.
- (6) Discovered through NYSDEC inspection activities.
- (7) Reported by a member of the public or a “whistle blower” employee.
- (8) Required to be self-reported, except for state agencies pursuant to ECL § 3-0311 and those disclosed by new owners.
- (9) Resulting in a natural resources damage claim, serious actual harm or one that may have presented an imminent and substantial endangerment to human health or the environment.
- (10) Categorized as Significant Non-Compliance by the NPDES program or RCRA hazardous waste program, or a High Priority Violation under the Clean Air Act, which may be excluded from eligibility in conjunction with consideration of the above factors, and with new owners given some leeway.

f. **Procedure.**

i. **Disclosure.** In order to qualify, entities must disclose their violations to NYSDEC in accordance with several requirements. The disclosure must be made to the NYSDEC Regional Office for the Region where the violation occurred or where the entity is located, and must be (1) voluntary, (2) in writing, (3) expeditious, (4) consistent with any applicable time frame prescribed by law or regulation. If no time frame is specified, disclosure to NYSDEC must occur within 30 days of the discovery of the violation, although the time frame may be extended at the discretion of NYSDEC. Violations must be disclosed prior to the announcement or commencement

- (2) State Superfund Law has a similar defense at ECL §27-1323(4).
 - (3) Navigation Law §181(4)(a) includes a similar third party defense under the New York Oil Spill Act, but must report spill, and provide “all reasonable cooperation and assistance in cleanup and removal activities” by NYSDEC.
- ii. **Innocent Purchaser Defense.** CERCLA §101(35)(A,D), 42 U.S.C. §9601(35)(A,D), with a similar defense at ECL §27-1323(4) but not under the Oil Spill Act.
- (1) No “contractual relationship, “so eligible for third party defense, if purchaser (I) “did not know and had no reason to know” about hazardous substances at the site, (ii) is a government entity which acquired property by involuntary transfer or condemnation, or (iii) acquired facility “by inheritance or bequest.”
 - (2) Must not cause or contribute to the release or threatened release, cooperate with response actions at the facility, comply with land use restrictions related to response action, and not impede any institutional controls.
 - (3) To establish “did not know and had no reason to know,” must carry out “all appropriate inquiries... into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices,” which requires a Phase I environmental site assessment (“ESA”) for non-residential properties in compliance with ASTM International Standard E1527-05 or, as of December 30, 2013, E1527-13, or else requirements detailed in the statute and 40 C.F.R. §§312.20-312.31.
 - (4) For residential properties “purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation.”
- iii. **Bona Fide Prospective Purchaser.** CERCLA §§101(40), 107(r), 42 U.S.C. §§9601(40), 9607(r). A purchaser can qualify for the Bona Fide Prospective Purchaser (“BFPP”) defense to CERCLA liability if: (A) all disposal of hazardous substances occurred prior to acquisition; (B) conduct “all appropriate inquiries prior to acquisition like under the innocent purchaser defense, or in the case of residential property “a facility inspection and title search that reveal no basis for further investigation,” (C) make all required spill or release reports or notices; (D) “take reasonable steps” to respond to the release, including stopping any “continuing release” or “threatened future release” and limit “human, environmental or natural resource” exposure; (E) fully cooperate with response efforts; (F) comply with land use and institutional controls; (G) comply with any EPA request for information or administrative subpoena”; and (H) are not related to or affiliated with a potentially responsible party (“PRP”). In *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013), *cert. den’d* 134 S.Ct. 514 (2013), Ashley was unable to use the BFPP defense because it failed to

“exercise appropriate care with respect to hazardous substances found at the facility by taking reasonable steps “ required, including its failures to clean out and fill sumps when related aboveground structures were demolished, or to monitor and adequately address conditions related to a debris pile and limestone run of crusher cover on the site. Based upon *Ashley II*, it may not be easy to qualify for this defense.

iv. **Contiguous Property Defense.** CERCLA §107(q), 42 U.S.C. §9607(q).

- (1) Under this exemption, a landowner is not liable if its land is contaminated by another property that is “contiguous to or otherwise similarly situated with respect to” the property, and they (1) “did not cause, contribute, or consent to the release or threatened release,” (2) are not related to or affiliated with the owner of the source property; (3) “take reasonable steps” to respond to the release, including stopping any ‘continuing release” or ‘threatened future release” and limit “human, environmental or natural resource” exposure, which for properties above contaminated aquifers need not include ‘ground water investigations” or installation of “ground water remediation systems”; (4) fully cooperate with response efforts; (5) comply with land use and institutional controls; (6) make all required spill or release reports or notices; (7) qualified as an “innocent purchaser” to the extent it conducted “all appropriate inquiry,” and did not know the property was contaminated from an off-site source.
- (2) While the defense applies to owners, EPA guidance extends it to tenants. *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision* (Dec. 5, 2012).
- (3) Unnecessary for “two facility” cases. *Niagara Mohawk Power Corp. v. Jones Chemical Inc.*, 315 F.3d 171 (2d Cir. 2003).

v. **Municipal Exemption.** CERCLA §101(20)(D), 42 U.S.C. §9601(20)(D). This defense provides relief for state and local governments that acquire title involuntarily by “bankruptcy, tax delinquency, abandonment, or other circumstances,” provided they did not cause or contribute to the contamination. There is a similar defense at ECL §27-1323(2) for public corporations that do not participate in site development, but not under the Oil Spill Act.

vi. **Lender Liability Defenses.** An exception from liability is provided under §101(20)(A), 42 U.S.C. §9601(20)(A), for persons who hold “indicia of ownership principally to protect his security interest.” Furthermore, a lender who does not “participate in management” of the facility is not even considered an owner. CERCLA §101(20)(E)(I), 42 U.S.C. §9601(20)(E)(I). Moreover, lenders who take title after foreclosure may also be protected if they seek to sell “at the earliest practicable, commercially reasonable time.” CERCLA §101(20)(E)(ii), 42 U.S.C. §9601(20)(E)(ii). Similar defenses are at ECL §27-1323(1) but not under Oil Spill Act.

- b. **Common Law Liability.** A purchaser of contaminated property may be liable for cleanup of environmental contamination under common law theories such as public nuisance, even if they did not cause the situation, if “upon learning of the nuisance and having a reasonable opportunity to abate it” the purchaser fails to do so. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985); *see also N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep’t 1984); *Restatement (Second) of Torts* §839, comment d (1979) (“liability is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it....”). Conversely, a seller’s liability may shift to the buyer if, after a reasonable time after the transfer of title, the new owner fails to take steps necessary to remediate the continuing environmental problem. *N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep’t 1984). Thus, a purchaser of contaminated property must take necessary steps to remediate contamination or they may face common law liability.
- c. **Agency Determinations.** Various determinations by NYSDEC (or EPA) may sanction a cleanup, but do not necessarily result in a full release of liability, and may have no impact on liability to third parties such as neighbors or other governmental entities.
- i. **Brownfield Cleanup Program.** The Brownfield Cleanup Program (“BCP”) provides a process for voluntary cleanup of sites contaminated with hazardous waste or petroleum under the supervision of NYSDEC. The applicant rewarded with a liability release and tax incentives (10-24% of project costs). A “brownfield site” includes “real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant. ECL §27-1405(2). “Contaminant” is defined as “hazardous waste and/or petroleum.” ECL §27-1405(7-a). Upon completion of investigation and remediation of a “brownfield site” admitted to the, and receiving a Certificate of Completion (“COC”) from NYSDEC, a landowner “shall not be liable to the state upon any statutory or common law cause of action, arising out of the presence of any contamination in, on or emanating from the brownfield site that was the subject of such certificate.” ECL §27-1421(1). However, there are “reopeners” where the site or cleanup standards utilized are found to be “no longer protective of public health or the environment,” noncompliance with the Brownfield Cleanup Agreement, fraud, a change to a use requiring a higher cleanup standard, or failure to make substantial progress toward development within five years.
- (1) NYSDEC had been difficult allowing entry into the program. *See Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, 14 N.Y.3d 161, 897 N.Y.S.2d 693 (2010). Still it looks closely at exceptions to eligibility, or strives to classify applicants as “participants” liable for off-site contamination.
 - (2) The tax credit program sunsets if a COC is not received by December 31, 2013. Legislative proposals are on the table, and new legislation is likely in 2013.

- ii. **Petroleum Spills.** Normally a Stipulation Agreement is made with NYSDEC, and then a corrective action plan implemented. When remediation is complete, NYSDEC issues a closure or “no further action” letter issued, which normally includes “reopeners.” Reopeners have been used by NYSDEC to address vapor intrusion issues, which have only been recognized in the last decade. An example from a “no further action” letter:

Please be advised that this determination does not preclude reactivation of this case should new information become available, impact upon receptors be discovered in the future or changes in site usage adversely affect human exposure.

- iii. **Consent Order.** NYSDEC (and EPA) may enter into a consent order to resolve liability for a site, which may require a monetary payment.
- iv. **EPA Status/Comfort Letters.** EPA may issue a letter addressing the potential for CERCLA liability and need for remediation. “EPA intends to limit the use of such comfort to where it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address the party's concerns.” EPA, *Policy on the Issuance of Status/Comfort Letters* (Nov. 8, 1996).

d. **Contractual Provisions.**

- i. **Contingencies.** Normally, a contract is made contingent upon undertaking a Phase I ESA, and possibly a Phase II study, and the purchaser's satisfaction (perhaps in its “sole discretion”) with the results. The contingency may allow access to the site, or a separate access agreement may be required (discussed below). A seller may want to limit the right to conduct studies, particularly testing, and keep information regarding contamination confidential. However, discovery of contamination may trigger mandatory spill reporting duties. The seller wants to be sure work meets “all appropriate inquiry” standards so they can re-use it if necessary, and that they receive a copy of all data and other work product. Here is a sample form:

Purchaser shall have six (6) months from the date of this Agreement (the “Inspection Period”) to complete due diligence, and to be satisfied, in its sole and absolute discretion, with the condition and suitability of the Property, including the results of environmental, geological, subsurface, and engineering investigations and studies, including but not limited to preparation of a Phase I environmental investigation report and any Phase II environmental investigation deemed appropriate by Purchaser. Within the Inspection Period, Purchaser may cancel for any or for no reason, and upon cancellation shall be refunded the Deposit in full. Seller shall allow reasonable access to the Property for any such investigations and studies.

- ii. **Merger.** Where a landowner is suing the prior owner for selling contaminated property, the doctrine of merger is generally a bar to claims arising out of the purchase and sale contract. *White v. Long*, 204 A.D.2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *rev. on other grounds*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995). Thus, it is in the buyer's interest to be sure that the purchase contract includes provisions such as representations and indemnifications that survive closing. *See, e.g. Avalon Realty, Inc. v. Baumrind*, 203 A.D.2d 185, 610 N.Y.S.2d 269 (1st Dep't 1994), *app. dis'd* 84 N.Y.2d 864, 618 N.Y.S.2d 8 (1994) (buyer justified in canceling contract based upon false representation regarding lack of tidal wetlands). However, the merger doctrine neither bars a claim of fraud, *Lawlor v. Engley*, 166 A.D.2d 799, 563 N.Y.S.2d 160 (3d Dep't 1990), nor mutual mistake, *Larsen v. Potter*, 174 A.D.2d 801, 571 N.Y.S.2d 121 (3d Dep't 1991); *Copland v. Nathaniel*, 164 Misc.2d 507, 624 N.Y.S. 514 (Sup. Ct. Westchester Co. 1995). Nor is it a bar to a claim based upon an indemnification, representation or other provision intended to survive closing or outside the contract. *See, e.g., Irmer v. Autohaus*, Civ. No. 92-CV-6553L (W.D.N.Y. 6/11/93), Daily Record July 1-2, 1993 (indemnification agreement in separation agreement).
- iii. **"As Is."** An "as is" clause is probably only a bar to warranty claims, and is not a defense to a statutory claim for environmental contamination, "leaving the burden of environmental hazards with the seller." 51 U. Pitts. L. Rev. 995, 1019, *An 'As Is' Provision in a Commercial Property Contract: Should It Be Left As Is When Assessing Liability For Environmental Torts?* (1990); *International Paper Co. v. GAF Corp.*, 1995 WL 760641 (N.D.N.Y. 1995). Thus, the "as is" clause does not bar a claim under the Oil Spill Act. *Umbra U.S.A., Inc. v. Niagara Frontier Transportation Authority*, 262 A.D.2d 980, 981, 693 N.Y.S.2d 371, 372 (4th Dep't 1999).
- iv. **Representations and Warranties.** Normally, a seller is asked to make representations and warranties regarding environmental conditions, such as the lack of any contamination in excess of applicable and relevant standards, the absence of any enforcement actions, and compliance with environmental laws and regulations. These should be reaffirmed at closing, and should survive closing.
- v. **Release or Indemnity.**
 - (1) Contracts often contain terms where one party accepts responsibility to indemnify the other for environmental contamination, normally limited to that occurring prior to their acquisition of a property. *See Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10 (2d Cir. 1993) (indemnification clause in contract purchasing operations of seller provided that buyer indemnify seller for environmental contamination caused by seller in CERCLA matter); *Horsehead Indus., Inc. v. Paramount Communication, Inc.*, 258 F.3d 132 (3rd Cir. 2001).
 - (2) Typically, a buyer wants broad promises by a seller to indemnify that not only survive closing, but that are assignable. A seller wants to avoid an indemnity, or limit it to material adverse effects that do not

survive closing or has a sunset. Sometimes, a seller can negotiate a release and indemnity that survive closing. Whoever gets the indemnity may seek personal guarantees and security.

- (3) While an indemnity provision may be enforceable to require a buyer or seller to reimburse the other for cleanup costs, the court in *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996) strictly construed indemnity language in a purchase contract, and allowed the present owner to sue past owners for oil discharges. *See also Gettner v. Getty Oil Co.*, 226 A.D.2d 502, 641 N.Y.S.2d 73 (2d Dep't 1996) (release strictly construed so as to not bar environmental cleanup costs).
- (4) An "indemnification, hold harmless or similar agreement" is not effective to absolve a responsible party from liability, although such arrangements are still enforceable between the parties. CERCLA §107(e), 42 U.S.C. §9607(e); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2d Cir. 1993).
- (5) A contract assignment might not make the assignee liable under an indemnification provision without a direct promise. "The mere assignment of a bilateral executory contract may not be interpreted as a promise by the assignee to the assignor to assume the performance of the assignor's duties, so as to have the effect of creating a new liability on the part of the assignee to the other party to the contract assigned." *Langel v. Betz*, 250 N.Y. 159, 161-162 (1928).

- vi. **Assignment of Cost Recovery Rights to Buyer.** It would be prudent to specifically provide for an assignment of claims the seller may have for cost recovery or other environmental claims. A pending cost recovery or other environmental claim may be assigned to the new owner of a property. CPLR §1018; FRCP Rule 25(c).

8. Due Diligence Procedures

a. Phase I ESA.

- i. **Phase I Requirements.** The Phase I must be conducted by an "environmental professional," 40 C.F.R. §312.21, and completed within one year of closing, with certain aspects updated within 180 days of closing. 40 C.F.R. §312.20. It must either meet ASTM Standards E1527-05 or E1527-13, or the requirements set forth at 40 C.F.R. §§312.20-312.31, including interviews with past and present owners, operators, and occupants, reviews of historical sources of information, searches for recorded environmental cleanup liens, reviews of government records, visual inspections of the facility and adjoining properties, and consideration of specialized knowledge or experience of the purchaser, the relationship of the purchase price to the value of the property if not contaminated, commonly known or reasonably ascertainable information about the property, the degree of obviousness of

the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

- ii. **RECs.** Normally the Phase I ESA will identify whether a recognized environmental condition ("REC") exists. ASTM Standard E1527-13 defines RECs as ‘the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release to the environment." A Phase I may also identify an historic recognized environmental condition ("HREC"), or a controlled recognized environmental condition ("CREC").
 - iii. **Data Gaps.** These are “a lack of or inability to obtain information required by the standards and practices listed in [40 C.F.R. Part 312] despite good faith efforts by the environmental professional or persons" seeking to claim CERCLA defenses. Gaps should be avoided, and often are due to failures to complete FOIL requests, abstract of title reviews or interviews, and can easily be plugged, if only with supplements.
 - iv. **Certification.** Like an instrument survey, Phase I and II ESAs should be certified to the buyer and buyer's attorney, as well as any lender and environmental insurer. In *Ridge Seneca Plaza LLC v. BP Products North America Inc.*, 2013 U.S. App. LEXIS 21999 (2d Cir. 2013), a Phase I ESA was certified to contract vendee, but later a sole-purpose LLC was formed that was assigned the contract and took title. As a result, negligence claims against the consultant were dismissed due to lack of privity.
- b. **Phase II Study.** Phase II is an intrusive investigation where soil, groundwater, vapor or building materials are sampled and tested. A Phase II is normally undertaken when a Phase I ESA identifies RECs that determines a likelihood of contamination. The goal of a Phase II is to confirm environmental contamination, not to detail the nature and extent of contamination. A purchaser should not jump to Phase II, both in order to qualify for defenses, and so as to be able to “see the forest from the trees." While Phase II ESAs are quite different depending on the site conditions and RECs, ASTM Standard E1903-11 addresses Phase IIs. Normally, a Phase II will compare contaminant levels with “applicable or relevant requirements," including Soil Cleanup Objectives set forth at 6 N.Y.C.R.R. Part 375-6, NYSDEC Soil Cleanup Guidance CP-51 (Oct. 2010), surface and groundwater standards at 6 N.Y.C.R.R. Part 703, and vapor standards in agency guidance on vapor intrusion, including NYSDOH, *Guidance for Evaluating Soil Vapor Intrusion in the State of New York* (Dec. 2006).
9. **Conflicts of Interest.** Conflicts of interest are often a concern for environmental lawyers, who may find themselves representing more than one party at a contaminated sites, or dealing with a former client, where “differing interests” are presented. *See, e.g., Prudential Insurance Co. of America v. Anodyne Inc.*, 60 ERC 1346 (S.D. Fla. 2005); *American Special Risk Insurance Co. v. Centerline*, 69 F.Supp.2d 944 (E.D. Mich. 1999). Rule 1.0(f) defines “differing interests” to “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or

other interest.” Often, conflicts can be resolved with written conflict waivers executed by both parties if there are no claims between the parties.

a. **Current Clients.** N.Y. Rules of Professional Conduct 1.7 states, with regard to “Current Clients”:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

b. **Former Clients.** Rule 1.9 generally provides, with respect to “Duty to Former Clients”:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

- c. **Government Attorneys.** Government lawyers may face unique issues. N.Y. Rules of Professional Conduct Rule 1.11 now provides the following rules with respect to current government lawyers in a rule addressing “Special Conflicts of Interest for Former and Current Government Officers and Employees”:

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term “matter” as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where

the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

A part-time municipal attorney is in a particularly sensitive position. In N.Y. State 392 (1975), the Committee made the following comments with respect to the role of part-time public officials:

Lawyers whose public employment is part-time find themselves in a position of special sensitivity. They should take particular care not to engage in activities or accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system, or which would give an “appearance of impropriety even if none exists”. *Cf.* EC 9-3. Thus they must avoid private employment which might involve or give rise to suspicion that unfair influence may be involved either in the securing of private clients or in representing them against the state agency by which they are employed.

N.Y. State 392 (1975). Thus, a town attorney normally should not represent private clients before a town agency. *Op. State Compt.* 2000-22; N.Y. State 143 (1970). If a law firm represents a client in a case involving a town, a lawyer at the firm may only be appointed town attorney if the law firm withdraws from the case or the town obtains independent counsel on the matter. N.Y. State 481 (1978).

d. **Former Government Attorneys.** Public Officers Law §73(8)(a)(I) provides that:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.

Public Officers Law §73 does not apply to local officers. *See* 1954 *Opns. Atty. Gen. (Inf.)* 51. Obviously, special rules apply to lawyers. N.Y. Rules of Professional Conduct Rule 1.11, covering “Special Conflicts of Interest for Former and Current

Government Officers and Employees,” includes the following provisions with respect to former government attorneys:

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose

interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

There are numerous New York State Bar Association Committee on Professional Ethics Opinions under the former Disciplinary Rules and Ethical Considerations which specifically find that former public attorneys may not accept private employment in matters in which they had responsibilities while publicly employed. *See* N.Y. State 73-303 (“after a lawyer leaves public employment he should not accept private employment in any matter in which he had responsibilities while he was a public employee.”); N.Y. State 70-132 (“EC 9-3 states that after a lawyer leaves public employment he should not accept employment in connection with any matter in which he had substantial responsibility proper to his leaving, since to accept employment would give the appearance of impropriety even if none exists.”); N.Y. State 71-176 (the “provisions [of EC 9-3 and DR 9-101(b)] mandate the disqualification of the former attorney for the School District.”). However, “a former deputy town attorney may represent private clients in tax certiorari proceedings against the town where while in office he had no substantial responsibility for proceedings affecting the subject property and obtained no confidential information relating thereto.” N.Y. State 453 (1976). In *Matter of Walden Federal Savings and Loan Association v. Village of Walden*, 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep’t 1995), *app dis’d* 86 N.Y.2d 777, 631 N.Y.S.2d 603 (1995), a law firm was disqualified from representing a bank in Article 78 proceeding against a village to challenge provisions of village code where law firm had represented the village when the challenged provisions were enacted and had, in fact, drafted them.

Other professionals who serve in public office may be bound by their own ethics code to refrain from certain private employment. For example, the American Institute of Certified Planners (AICP) has adopted a Code of Ethics and Professional Conduct, which directs that Certified Planners should “avoid a conflict of interest or even the appearance of a conflict of interest in accepting assignments from clients or employers.” American Institute of Certified Planners Code of Ethics and Professional Conduct Rule (A)(2)(c). The Planners Code of Ethics American Institute of Certified Planners Rule (B)(3) further provides that:

[w]e shall not accept an assignment from a client or employer to publicly advocate a position on a planning issue that is indistinguishably adverse to a position we publicly advocated

for a previous client or employer within the past three years unless (1) we determine in good faith after consultation with other qualified professionals that our change of position will not cause present detriment to our previous client or employer, and (2) we make full written disclosure of the conflict to our current client or employer and receive written permission to proceed with the assignment.

10. No-Contact Rule. Commonly, an environmental lawyer may need to talk directly with NYSDEC or EPA staff, rather than their counsel. N.Y. Rules of Professional Conduct Rule 4.2 (formerly DR 7-104(A)(1)), known as the “no-contact” rule, which provides (in part):

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

In N.Y. State 812 (2007), while this rule was found to apply to communications between an attorney representing a developer and the Planning Board, which was represented by counsel, it was trumped by the First Amendment right to petition, so that the attorney could directly communicate with board members, “provided that counsel for the planning board is given reasonable advance notice that such communications will occur.” In the opinion, the State Bar did “not here address *ex parte* communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations.” It is not entirely clear how this rule applies to contacts with environmental agencies. However, in most instances attorneys do talk directly with staff, with either the explicit or tacit consent of agency counsel, and there is probably a First Amendment right to talk directly to government officials.

**New York State
Court of Appeals**

NORSE ENERGY CORP. USA,

Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

BRIEF OF APPELLANT NORSE ENERGY CORP. USA

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October 28, 2013

DISCLOSURE STATEMENT (22 N.Y.C.R.R. § 500.1[f])

Appellant, Norse Energy Corp. USA (“Norse”)¹ is a New York corporation that is a wholly-owned subsidiary of Norse Energy Holdings, Inc., a Delaware corporation that is a wholly-owned subsidiary of Norse Energy Corp. ASA, a publicly-traded Norwegian company. Vandermark Exploration, Inc. is a New York corporation that is a wholly-owned subsidiary of Norse Energy Corp. USA. Strategic Energy Corp. and MariCo Oil and Gas Corp. are inactive companies that are affiliated with Norse.

¹ Since December 6, 2012, Norse has operated as the debtor in possession in connection with bankruptcy reorganization proceedings pending in the Bankruptcy Court for the Western District of New York (Bk. No. 12-1385). On May 2, 2013, The West Firm, PLLC was authorized by order of the Bankruptcy Court to represent Norse in connection with these proceedings. On October 10, 2013, Norse voluntarily converted its reorganization proceeding to a liquidation proceeding, which was approved by the Bankruptcy Court.

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8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law*
214 (LexisNexis Matthew Bender 2012)9

25 N.Y. Jur. 2d, *Counties, Towns & Mun. Corps.*, § 35165

Black’s Law Dictionary (6th ed. West 1990)33, 36

Dryden, N.Y. Ordinance § 2104(5)22

H.R.J. Res. 407, 74th Cong. (1935)6

Merriam-Webster On-line Dictionary,
<http://www.meriam-webster.com/dictionary>23, 35

N.Y. Dep’t of Env’tl. Conservation, Generic Env’tl. Impact Statement (1992)11

N.Y. Dep’t of Env’tl. Conservation, Draft Supplemental Generic Env’tl. Impact
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The Merriam-Webster Dictionary.....33

The Random House College Dictionary (rev. ed. 1973)33

Bill Jacket, L. 1981, c. 84655

QUESTIONS PRESENTED

Question 1:

Is a municipal zoning ordinance that bans all oil and gas development (“Town Prohibition”) expressly preempted by the Oil, Gas and Solution Mining Law (“OGSML”), which directs that it (1) “shall supersede all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries;” (2) expressly limits the “jurisdiction” of municipalities to local roads and real property taxation; and (3) regulates well location by directing the New York State Department of Environmental Conservation (“NYSDEC” or “Department”) to establish well spacing and wellbore location according to specific statutory requirements designed to meet the statute’s policies of preventing waste, providing for greater ultimate resource recovery, and protecting the correlative rights of “all owners”?

The Opinion and Order of the Appellate Division, Third Department, decided and entered on May 2, 2013 (“Appellate Decision”), holds that the OGSML does not expressly preempt the Town Prohibition. (*See* Record on Appeal [“R.”] at 20.

Question 2:

Is this Court’s precedent regarding express preemption under the Mined Land Reclamation Law (“MLRL”) relevant to or determinative of the

express preemption analysis under a wholly different statute – i.e., here, the OGSML – whose express supersession language, legislative history, policies, and means and subject matter of regulation differ markedly from that of the MLRL?

The Appellate Court found that its holding of no express preemption under the OGSML was supported by this Court’s preemption precedent decided under the MLRL (R. at 16-18.), as have all lower courts that have passed upon this issue

Question 3:

Is a municipal zoning ordinance that bans all oil and gas development (i.e., the Town Prohibition) in conflict with, and thus impliedly preempted by, the OGSML, which implements a comprehensive statewide program that regulates both the “how” and “where” of drilling to provide for the development of oil and gas properties in such a manner as to prevent waste, provide for greater ultimate recovery of oil and gas, and protect the correlative rights of “all owners,” where, by virtue of the municipal-wide ban, there can be no drilling and no resource recovery, which results in the ultimate in waste (zero production) and the total emasculation of mineral owners’ correlative rights by destroying their right to recover oil or gas from under their properties?

The Appellate Decision holds that the OGSML does not impliedly preempt the Town Prohibition under conflict preemption principles. (R. at 19-20.)

JURISDICTION OF THE COURT/PRESERVATION OF ISSUES

This Court has jurisdiction over this matter because the proceeding/action originated in the Supreme Court (*see* R. at 64-66, 35-62), and the Appellate Decision that is the subject of this appeal is an order of the Appellate Division, Third Department, which finally determined the action/proceeding by affirming dismissal of the Complaint. (*See* R. at 20.) By Order, dated August 29, 2013, this Court granted Norse's motion for leave to appeal. (R. at 3-4.)

Further, the express and implied conflict preemption issues presented herein were raised, fully briefed, and decided by the Supreme Court and the Appellate Division, Third Department. (*See* R. at 523, ¶¶ 6-7); (R. at 72-73, ¶¶ 19-26) (express preemption cause of action); (R. at 73-74, ¶¶ 27-35) (conflict preemption cause of action); (*see also* R. at 12-20, 35-62.) Accordingly, all of the issues presented herein are preserved.

PRELIMINARY STATEMENT

This case does not challenge a municipality's rights relative to traditional zoning. This case also does not challenge the ability of a

municipality to act within the bounds of its delegated authority under the New York Constitution and State law. Rather, this case seeks to protect the property rights of mineral owners and their lessees by challenging one town's attempt to use its local zoning power to supplant a comprehensive, uniform statutory scheme created and enforced by the State of New York which regulates oil and gas development in a manner that prevents waste, provides for greater ultimate resource recovery, and protects the rights of all persons, including the correlative rights of all mineral owners.

Specifically, this case seeks a declaration that the express language and underlying policies of the OGSML and the Energy Law prohibit the Town of Dryden ("Town") and the Dryden Town Board (collectively, "Town Board" or "Respondents") from adopting a zoning ordinance that prohibits all oil and gas exploration, drilling, development, extraction, and related activities anywhere in the Town. Because the Town Prohibition bans activities for which control, oversight and regulation are expressly, exclusively and exhaustively delegated to State authorities, the Town Prohibition is preempted by State law.

Accordingly, with the aim of protecting its mineral rights, Norse² respectfully submits this brief in support of its appeal of the Appellate Decision which upheld the Town Prohibition. (*See generally* R. at 20.) In the Appellate Decision, the Third Department rejected Norse’s argument that the Town Prohibition is expressly preempted under the supersedure language in Environmental Conservation Law (“ECL”) § 23-0303(2) and the explicit directives in the OGSML that regulate not only the “how” but also the “where” of oil and gas drilling in New York. (*See* R. at 18-19.) The Appellate Court also rejected Norse’s argument that the Town Prohibition is invalid under conflict preemption principles because it impermissibly conflicts with the policies and substantive provisions of the OGSML and the Energy Law. (R. at 14.) For the reasons detailed below, Norse respectfully submits that the Appellate Court erred on both counts and that the Appellate Decision must, therefore, be reversed.

THE RELEVANT LAW: THE OGSML

New York’s OGSML (codified in ECL article 23) is the result of New York’s membership in the Interstate Oil and Gas Compact Commission

² On July 31, 2012, Anschutz Exploration Corporation (“Anschutz”) assigned its interest in certain oil and gas leases located in the Town to Norse (the “Assignment”). The Assignment explicitly included the right to participate in this litigation in Anschutz’s stead, subject to court approval, which approval was granted by Order of the Appellate Division, Third Department, dated October 5, 2012. *Anschutz Exploration Corp. v. Town of Dryden*, 2012 Slip. Op. 515227 (3d Dep’t 2012).

(“Commission”), a multi-state governmental agency of a group of oil and gas producing states, whose purpose “is to conserve oil and gas by the prevention of physical waste from any cause.” (R. at 524-25, ¶¶ 8-13); ECL art. 23, tit. 21. The Commission arose in a climate where lack of regulation was resulting in overproduction and the waste of oil and gas resources in producing states. (R. at 524, ¶ 8.) The participating states endorsed, and Congress ratified, the Interstate Compact to resolve these issues. *Id.*; H.R.J. Res. 407, 74th Cong. (1935).

The Interstate Compact requires each member state to enact laws that prevent, *inter alia*, “[t]he drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof.” (R. at 524, ¶ 11); ECL § 23-2101, art. III(e). New York became a member state of the Commission, enacted the Interstate Compact in 1941, and remains a member state today. (R. at 525, ¶ 13.) New York thus adopted the OGSML which, from its initial enactment in 1963 through the present day, incorporates the requirements of the Interstate Compact. (*See* R. at 525-28, ¶¶ 13-22.)

First and foremost, in accord with the Interstate Compact, the OGSML is designed to uniformly regulate all aspects of the oil and gas industries’ activities statewide, including as to exploration, development,

production and utilization. (See R. at 100, ¶ 11); (R. at 524-26, 543-87, ¶¶ 8-17 & Exhs. A-D.) To that end, the OGSML contains terms of art informing statutory objectives that are wholly unique to the oil and gas industry, thus distinguishing this statutory scheme from any other, including the MLRL.

These terms are reflected in numerous provisions of the OGSML, including its declaration of policy, which states that:

It is . . . in the public interest to regulate the development, production, and utilization . . . of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected

ECL § 23-0301; *see also Western Land Servs. v. Dep't of Env'tl. Conservation*, 26 A.D.3d 15, 17 (3d Dep't 2005) (recognizing critical legislative purposes of OGSML, including providing for greater resource recovery, preventing waste, and protecting correlative rights).

In accord with the Interstate Compact, the OGSML defines the term of art “waste,” *inter alia*, as “locating, spacing [or] drilling” of a well “in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable . . . , or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil and gas.” ECL § 23-0101(20)(c).

Thus, the OGSML's policy objectives of preventing waste and providing for greater ultimate resource recovery are inextricably linked to well location and spacing, i.e., the "where" of oil and gas drilling and development.

The third policy objective – protecting the "correlative rights of all owners" – is also a phrase of art and is a statutory policy wholly unique to the oil and gas industry. The OGSML defines "owner" to be "the person who has a right to drill into and produce from a pool." ECL § 23-0101(11). The protection of an owner's "correlative rights" means that the owner is entitled to a reasonable opportunity to recover or receive the oil or gas (or the equivalent thereof) attributable to its property, regardless of where the well is drilled. *See Sylvania Corp. v. Kilbourne*, 28 N.Y.2d 427, 430 n.3 & 433 (1971) (discussing correlative rights under Conservation Law precursor to ECL article 23; stating that the doctrine of correlative rights provides for equitable apportionment among landholders of the migratory gas and oil underlying their land); N.Y. Comp. Codes R. & Regs. tit. 6 ("6 N.Y.C.R.R.") § 550.3(ao) (defining protection of correlative rights to mean "that the action or regulation by the department should afford a reasonable opportunity to each person entitled thereto to recover or receive the oil or gas beneath his tracts or the equivalent thereof without being required to

drill unnecessary wells or to incur other unnecessary expenses to recover or receive such oil or gas or its equivalent”).³

This policy and the OGSML’s location-based provisions that are designed to accomplish it (i.e., as to unit size, spacing, orientation, and wellbore location) reflect the unique geophysical nature of oil and gas, as distinguished from solid minerals governed by the MLRL. That is, oil and gas are substances that exist in underground pools, and their movement in the subsurface is determined by geophysical properties. Thus, a well drilled on one property may result in draining the resource underlying other properties, thereby depriving those property owners of the ability to recover the resource or receive compensation for it. Indeed, under the pre-statutory “rule of capture,” this was precisely what happened. *See Wagner v. Mallory*, 169 N.Y. 501, 505 (1902) (stating that under the rule of capture, title to subsurface oil and gas vests in the party who first brings it to the surface and reduces it to possession). The OGSML, however, modified the rule of capture through its spacing and location-related provisions that prevent wasteful practices; thereby, “all [mineral] owners” in a common source of

³ *See also* 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* 214 (LexisNexis Matthew Bender 2012) (“*Williams & Meyers*”) (stating “[t]here appear to be two aspects to the doctrine of correlative rights: (1) as a corollary to the rule of capture, each person has a right to produce [] from his land and capture such oil or gas as may be produced from his well, and (2) a right of the landowner to be protected against damage to a common source of supply and a right to a fair and equitable share of the source of supply”).

supply are assured an opportunity to either recover the resource or be compensated in kind, thus protecting their “correlative rights.” *See* ECL § 23-0301; *see also* *Sylvania Corp.*, 28 N.Y.2d at 433 (upholding constitutionality of statutes designed to prevent waste; stating that, in so doing, the correlative rights of owners in a common source of supply are protected). Notably, there is no comparable concept, policy, or related terminology in any other New York law, including the MLRL.

The OGSML also seeks to protect the rights of all landowners and the general public. *See* ECL § 23-0301. This general welfare policy is achieved, however, through the comprehensive scheme contained in the OGSML, which the NYSDEC administers statewide through uniform rules and regulations promulgated under the OGSML, in accord with the detailed environmental impact review required under ECL article 8, the New York State Environmental Quality Review Act (“SEQRA”). *See, e.g.*, 6 N.Y.C.R.R. pts. 550-559. To date, this process has, among other things, involved preparation of a Generic Environmental Impact Statement relative to oil and gas development (“1992 GEIS”), as well as the ongoing development of the exhaustingly comprehensive Supplemental Generic Environmental Impact Statement (“SGEIS”) relative to high-volume hydraulic fracturing – a process which has been ongoing for more than five

years. N.Y. Dep't of Env'tl. Conservation, Generic Env'tl. Impact Statement (1992), *available at* <http://www.dec.ny.gov/energy/45912.html>; N.Y. Dep't of Env'tl. Conservation, Draft Supplemental Generic Env'tl. Impact Statement (rev. 2011), *available at* <http://www.dec.ny.gov/energy/75370.html>. In furtherance of the policy to “protect all persons,” the SGEIS incorporates even more stringent regulatory controls and prohibitions relative to the “where” of oil and gas drilling, including a host of location-related prohibitions, setbacks, and environmental restrictions. (R. at 529-32, ¶¶ 30, 33, 34, 36, 37.)

Thus, the general welfare is protected pursuant to these comprehensive, uniform statewide controls, which are to be implemented consistently with the OGSML's other explicit policies derived from the Interstate Compact – i.e., protecting the correlative rights of “all owners,” preventing waste, and providing for greater ultimate resource recovery. *See Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 433, 433-35 (Sup. Ct. Erie Cnty. 1982) (stating the OGSML and its implementing regulations “are designed to protect the public, prevent waste and ensure a greater ultimate recovery of oil and gas;” noting legitimacy of the town's concerns, but finding those concerns accommodated by the OGSML's substantive provisions; finding local governments “precluded from legislating on the

same subject matter” as the OGSML), *aff’d*, 89 A.D.2d 1056 (4th Dep’t 1982), *lv. denied*, 58 N.Y.2d 602 (1982).

Indeed, legislative history – which tracks the statute’s evolution from 1963 through 1981 (when the supersedure language was added) – confirms that the OGSML vests exclusive control over oil and gas activities in the State, including the responsibility for proper well spacing and location based on sound geologic principles (i.e., the “where” of drilling); therefore, pursuant to the supersession language, that same subject matter is off-limits to municipalities. (*See generally* R. at 527-29, 589, 593, 596, 600-610, 616-617, 619-20.)

More specifically, as enacted in 1963, the OGSML’s precursor (former Conservation Law, L. 1963, c. 959) sought to: (1) “foster, encourage and promote” natural gas development, production and utilization in a manner that would prevent waste; (2) authorize and provide for the operation and development of oil and gas properties in such a manner that greater ultimate recovery may be had; and (3) fully protect the correlative rights of all owners and the rights of all persons, including landowners and the general public. (R. at 526-27, 555, 589, 592, 594, 597, 600, ¶¶ 17-21 & Exhs. D & E.); *see also* ECL § 23-0301 (Historical and Statutory Notes detailing derivation from L. 1963, c. 959). These policies were to be

achieved by vesting administration of the statute in the State, including the responsibility for establishing well spacing and wellbore location based on sound geologic principles. (R. at 528-29, 589, 593, 596, 600-10, 616-17, 619-20, ¶¶ 22-25 & Exhs. E-H); *see also* ECL § 23-0501(2) (Historical and Statutory Notes detailing derivation from L. 1963, c. 959).

In the years following the OGSML's enactment, New York experienced the energy crisis of the 1970s, which the Legislature found "inimical to the health, safety and welfare of the people" of New York State. *See* Energy Law § 1-101 (Historical and Statutory Notes). In response, the Legislature took a number of steps. In 1976, the Legislature enacted the State Energy Law and created the State Energy Office. L. 1976, c. 819, § 2. The Energy Law was created, *inter alia*, "to obtain and maintain an adequate, continuous supply of safe, dependable and economical energy for the people of [New York State]." Energy Law § 3-101(1). In addition, the Energy Law directed that "[e]very agency of the state shall conduct its affairs so as to conform to the state energy policy expressed in this chapter." Energy Law § 3-103.

Also in response to the energy crisis of the 1970s and in furtherance of the functions of the State Energy Office, in 1978, the Legislature amended Energy Law § 3-101(5), declaring it to be the energy policy of the

State “to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas, [and] natural gas from Devonian shale formations” L. 1978, c. 396. Concomitantly, the Legislature amended the OGSML’s declaration of policy (codified in ECL § 23-0301) by replacing the words “foster, encourage and promote” oil and gas development, production and utilization with the word “regulate.” L. 1978, c. 396; *see also* ECL § 23-0301.

Nothing else in the OGSML was changed. The OGSML’s articulated policies – to prevent waste, provide for greater ultimate recovery, and protect the correlative right of all owners and the rights of the general public – remained exactly the same. And, the substantive provisions designed to achieve those objectives also remained unchanged. Likewise, the directive in Energy Law § 3-103 – that every state agency conduct its affairs to conform to the policies in Energy Law § 3-101, now including promoting the prudent development of indigenous state energy resources – also remained the same.

Accordingly, the 1978 amendments merely strengthened the Legislature’s commitment to the effective development of New York’s indigenous resources, with the NYSDEC being required to conduct its

activities under the OGSML to effectuate that goal (*see* Energy Law § 3-103), while still providing for greater ultimate recovery, preventing waste and protecting the correlative rights of “all owners” and the rights of the general public (per ECL § 23-0301) via the OGSML’s substantive location-based directives. *See Cooperstown Holstein Corp. v. Town of Middlefield* Record on Appeal [“CHC R.”] at 725-26, ¶¶ 27-32.⁴

Despite the Legislature’s clear and repeated commitment to efficiently developing New York’s indigenous energy resources, for more than twenty years, piecemeal local regulation often frustrated that purpose. Accordingly, in 1981, the Legislature amended the ECL by enacting an express supersedure provision, ECL § 23-0303(2), directing that the OGSML supersedes “all local laws and ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or . . . under the real property tax law.” *See* L.1981, c. 846 § 4; (R. at 529-30, 622-23, 625-26, ¶¶ 27-32 & Exhs. I & J);

⁴ This Court may take judicial notice of statutes and their legislative history, regardless of whether they are part of the record or were relied upon below. *See State v. Green*, 96 N.Y.2d 403, 408 n.2 (2001) (stating although the State did not rely below on environmental lien provisions, the court may take judicial notice of these provisions and their legislative history); *Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001) (stating courts make take judicial notice of public records where data reflect legislative facts, as opposed to evidentiary facts, and their absence from the record does not prevent their consideration for the first time on appeal); *Seidel v. Bd. of Assessors*, 88 A.D.3d 369, 378 (2d Dep’t 2011) (stating the court may take judicial notice of the bill jacket, even though it is not part of the record). Moreover, *Cooperstown Holstein Corp.* is a companion case to that here, and that record is before this Court on appeal as well.

(R. at 100-102, ¶¶ 11-15); *see also* ECL § 23-0303 (Historical and Statutory Notes discussing 1981 amendments).

The 1981 amendments further clarified that (1) the Legislature's original intent (dating back to at least 1963) was *not* to allow local control over oil and gas activities; (2) the supersedure language was enacted to remedy the problems resulting from decades of local regulation; and (3) exclusive jurisdiction over the entire oil and gas industry and all of its activities would vest in the NYSDEC through the OGSML's comprehensive scheme providing for efficient, safe resource development, with local authority limited solely to local roads and taxation. (CHC R. at 949, 950-51, 995, ¶¶ 34, 39-41 & Exh. G) (detailing legislative history to A.6928); (R. at 101-102, ¶¶ 14-19); (*see also* R. at 529-32, ¶¶ 26-37.)

Importantly, in return for expressly preempting all local control over oil and gas activity (with the only exceptions being relative to local roads and real property taxes), the Legislature created two new rights for local authorities to compensate for any costs or damages that might result from oil and gas development. The 1981 amendments (1) added subdivision 3 to ECL § 23-0303, establishing a liability fund to compensate for any damage potentially resulting to municipal land or property; and (2) amended article 5, title 5, of the Real Property Tax Law, authorizing municipalities to levy

taxes on natural gas based upon production. (R. at 530-32, 622, 628, ¶¶ 33-37 & Exhs. I & K); (see also R. at 100-102, ¶¶ 12-19); see also ECL § 23-0303 (Historical and Statutory Notes discussing 1981 amendments).

That the Legislature intended the 1981 amendments to definitively eliminate all local control over oil and gas activities is clear from the legislative history. The Memorandum in Support of one of the bills integrated into the 1981 amendments (A.6928) speaks directly to the scope and intent of the supersedure provision:

The provision for supersedure by the [OGSML] of local laws and ordinances clarifies the legislative intent behind the enactment of the oil and gas law in 1963. The comprehensive scheme envisioned by this law and the technical expertise required to administer and enforce it, necessitates that this authority be reserved to the State. Local government's diverse attempts to regulate the oil, gas, and solution mining activities serve to hamper those who seek to develop these resources and threaten the efficient development of these resources, with Statewide repercussions. With adequate staffing and funding, the State's [OGSML] regulatory program will be able to address the concerns of local government and assure efficient and safe development of these energy resources.

(CHC R. at 949, 995, ¶ 34 & Exh. G) (emphasis added).

Thus, the Legislature's intent is clear: create a "comprehensive scheme" for oil and gas regulation "reserved to the State" and prevent "[l]ocal government's diverse attempts to regulate the oil [and] gas . . .

activities” that for years had “serve[d] to hamper those who [sought] to develop these resources and threaten the efficient development of these resources[.]” Also clear is the Legislature’s intent that local government concerns be accommodated through statewide regulation implemented by the NYSDEC; and, indeed, the NYSDEC uniformly interpreted the 1981 amendments as preempting localities’ authority over oil and gas activities, including location. (*See* R. at 105, ¶¶ 27-29 & Exh. A.) In other words, with the sole exception of local roads and taxes, ECL § 23-0303(2) left no room for local control over any oil and gas activities, including where those activities could occur, thus preempting the most severe type of local regulation at issue here - a broad-based ban on all oil and gas activities. *See* (CHC R. at 949, 950-51, ¶¶ 34, 39-42.)

THE INSTANT DISPUTE: FACTUAL BACKGROUND & PROCEDURAL HISTORY

Nature Of The Dispute

Beginning in or around December 2006, Norse, through its predecessors, began acquiring oil and gas leases in the Town of Dryden, Tompkins County, New York. (R. at 79, ¶¶ 6, 7.) The purpose of the oil and gas leases was to explore and develop natural gas resources underlying the property. (R. at 79, ¶ 5.) Norse’s predecessors-in-interest obtained gas leases covering approximately 22,000 acres in the Town before the

enactment of the Town Prohibition, ultimately investing approximately \$5.1 million in the exploration and development relative to these leases. (R. at 80, ¶ 11)

On August 2, 2011, the Town Board enacted the zoning amendment at issue here which expressly prohibits all oil and gas exploration, extraction, processing and storage and support activities, thus effectively banning all oil and natural gas drilling within the geographical borders of the Town and thereby depriving Norse and all other mineral rights owners in the Town of their respective oil and gas estates. (R. at 70-72, ¶¶ 12-17.)

The Instant Action

On September 16, 2011, Norse's predecessor-in-interest (Anschutz) brought an action in the Supreme Court, Tompkins County (Rumsey, J.), challenging the validity of the Town Prohibition. (R. at 64-66.) On October 21, 2011, the Town Board answered and moved for summary judgment, seeking a declaration that the Town Prohibition is valid and a judgment dismissing the Complaint. (R. at 110-118, 472.) Anschutz opposed the motion and cross-moved for summary judgment in its favor that the Town Prohibition was expressly and impliedly preempted by the OGSML (codified in ECL article 23). (R. at 523, ¶¶ 6-7); (R. 72-73, ¶¶ 19-26.)

(express preemption cause of action); (R. at 73-74, ¶¶ 27-35) (conflict preemption cause of action); (*see also* R. at 42-57).

The Supreme Court Decision

On February 21, 2012, the Supreme Court rendered its Decision and Order (“Decision”), granting the Town Board’s motion for summary judgment, concluding that, with the exception of a provision invalidating permits issued by other local or state agencies, the Town Prohibition was not preempted by the OGSML. (R. at 35-62.)

The Supreme Court rejected the express preemption claim and implicitly rejected the conflict preemption claim. (R. at 46-59.) In holding the Town Prohibition not expressly preempted under ECL § 23-0303(2), the Supreme Court opined that it was “constrained” by *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987) (“*Frew Run*”). (R. at 46.) The court described the supersedure language of the MLRL at issue in *Frew Run* to be “similar” or “nearly identical” to that in the OGSML, finding no meaningful difference between the “local law” language of the MLRL supersedure clause versus the “local law and ordinance” language in ECL § 23-0303(2). (R. at 47-48.) The court also dismissed the significance of the OGSML’s explicit jurisdictional exceptions (i.e. local roads and taxes) by (1) effectively ignoring the exception for local taxing authority, and (2)

portraying the regulation of local roads (i.e. truck traffic) as part of the operations of a well. (R. at 49-50.)

Examining the legislative policies of the OGSML and the MLRL, the court also found no “meaningful difference in the purposes of the two laws.” (R. at 50.) Relying on *Frew Run*, the court found that the OGSML had to be interpreted in a way that would avoid abridging the Town’s powers to regulate land use, and that would be achieved by limiting application of the statutory policies of the OGSML only to locations where oil and gas activity could be conducted in accord with local zoning. (R. at 52.)

Finally, the court relied on *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996) (“*Gernatt*”), to find that the supersession analysis must produce the same result whether there is an outright ban on all development or simply a limited restraint on location. (R. at 54-55.) In so holding, the court failed to consider that (1) *Frew Run* did not involve a municipal-wide ban, and (2) by the time *Gernatt Asphalt* was decided, the MLRL had been amended to include express language affirming full local zoning authority. Additionally, the court opined that it would be illogical to find that a limited restraint on location would be allowable, but that a ban would not. (R. at 55.) In so finding, the court ignored or took short notice of jurisprudence from sister jurisdictions holding exactly to the contrary

under oil and gas statutes virtually identical to the OGSML. (*See* R. at 57.) In the end, the court found that *Gernatt* controlled the preemption analysis here and held that the Town Prohibition, as modified by striking Section 2104(5), is not preempted by the OGSML. (R. at 57-59.)

Norse's predecessor-in-interest (Anschutz) timely appealed from the Decision. (R. at 24.) Later, Norse was substituted as a party in the place and stead of Anschutz by Order of the Appellate Division, Third Department. (R. at 1.) In addition, several interested groups were granted permission to file *amicus curiae* briefs on the appeal. (*See* R. at 9.)

The Appellate Decision

On May 2, 2013, the Appellate Division, Third Department, rendered the Appellate Decision, affirming the Decision. (R. at 6-21.) Specifically, the Third Department held that (1) the express supersession clause of the OGSML, ECL § 23-0303(2), does not expressly preempt the Town Prohibition; and (2) the OGSML does not impliedly preempt the Town Prohibition under principles of conflict preemption. (R. at 20.)

On the issue of express preemption, the Third Department improperly focused on one clause in the express preemption language and then employed a constrained so-called "plain language" analysis of the term "regulation." (R. at 12.) Adopting an inappropriately narrow definition from

the Merriam-Webster On-Line Dictionary, the Third Department concluded that the phrase “regulation of the . . . industries” in the OGSML pertained only to the “details or procedure” of the oil and gas industries and did not address land use decisions. (R. at 12-13) (citing Merriam-Webster On-line Dictionary, <http://www.meriam-webster.com/dictionary/regulation>).

The Appellate Court also found support for its conclusion in precedent decided under the MLRL, but failed to address, *inter alia*, the language distinctions between the supersedure provisions of the OGSML and the MLRL. Specifically, the Third Department failed to discuss the “local laws *and ordinances*” language of the OGSML (which “ordinance” language is lacking in the MLRL) and the express limited exceptions in the OGSML that carve out local “jurisdiction” only as to roads and real property taxation. *See* (R. at 12.) The Appellate Court also did not explain why these exceptions would have been necessary if the term “regulation” refers only to the details or procedures of oil and gas drilling, given that neither local roads nor taxes has anything to do with the details or procedures of oil and gas drilling. Lastly, the Appellate Court did not address how the express policy objectives of the OGSML – preventing waste, providing for greater ultimate resource recovery, and protecting correlative rights – inform the analysis concerning the scope of the supersedure provision. Although Norse fully

briefed these matters, the Appellate Court did not address them in its analysis.

The Third Department’s analysis of legislative history also left many questions unanswered. (R. at 13.) First, the Appellate Court examined the 1978 amendments, which modified the OGSML’s declaration of policy by replacing the “*foster, encourage and promote* development” language with “*regulate* the development” language. Observing that the NYSDEC is charged with “regulating” oil and gas drilling, while the Energy Office is charged with “promoting” oil and gas development, the Appellate Court concluded that the phrase “regulation of the . . . industries” in ECL § 23-0303(2) cannot include where the activity may take place. (R. at 14.) Beyond the fact that this conclusion is unsupported by legislative history, the court’s analysis fails to address the dispositive issue in this case: what does “regulation of the . . . industries” mean in the context of the OGSML? And, if the OGSML “regulates” where drilling may occur (as it does), then the “where” of drilling is off-limits to municipalities under the express language of ECL § 23-0303(2).

The legislative history of the 1981 amendments, which enacted the supersession language, also does not support the Appellate Court’s findings. (R. at 15-16.) Misreading or ignoring legislative articulations by the

sponsor, and failing to appreciate the significance of the taxation and damage fund trade-offs granted to municipalities, the Third Department concluded that the NYSDEC is charged only with regulating the “technical, operational” aspects of oil and gas activities, but not where drilling may occur (i.e. local zoning determinations). (*See* R. at 15-16.) Thus, the Appellate Court opined it “[was] evident that the Legislature’s intention [in enacting the 1981 amendments] was to insure uniform statewide standards and procedures” in any area – if any – where municipalities allow drilling to occur. (R. at 15.) This finding, however, ignores the Legislature’s explicit declaration that the intent of the 1981 amendments was to “promote development of domestic energy reserves” by removing local controls which, for decades, had hampered efficient, effective development. *See* (CHC R. at 949, 995, ¶ 34 & Exh. G.) The Appellate Court failed to address this point.

The Appellate Court also failed to address how its finding could be squared with the OGSML’s explicit location-related requirements. Due to the geophysical characteristics of oil and gas lying in underground pools, well location is directly tied to potential production. Therefore, municipal-wide bans on drilling make it impossible to satisfy the OGSML’s location-related directives pertaining to unit size, shape, orientation, and wellbore

location – which are designed to achieve the statute’s objectives of preventing waste, protecting the correlative rights of all owners, and providing for greater ultimate resource recovery. *See* ECL §§ 23-0501, 23-0503.

Further, the Appellate Court erred in relying on MLRL precedent, notwithstanding the stark differences between the two statutes as to supersession text, policy objectives, subject matter and means of regulation. Although the Appellate Court observed that the policies of the OGSML include protecting the correlative rights of “all owners,” providing for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery may be had, and preventing waste (which is expressly defined in terms of locating and spacing wells so as not to cause reduction in the amount of the resource ultimately recoverable), the Appellate Court nonetheless found that because these matters did “not address any traditional land use issues that would otherwise be the subject of a local municipality’s zoning authority,” local zoning was not preempted. *See R. at 14.*)

Troublingly, however, the Appellate Court did not identify any precedent establishing a bright-line rule that the only way State law can preempt local zoning is if the State statute addresses so-called traditional

land use issues. Nor did the Appellate Court explain how it would be possible to achieve any of the OGSML's objectives if localities could ban all development on a municipal-wide (and potentially statewide) basis, thereby preventing any resource recovery, creating the ultimate in waste, and wholly obliterating mineral owners' rights. (*See generally* R. at 13-16.)

Significantly, the MLRL does not share the same policy objectives as the OGSML. Nonetheless, the Appellate Court cited MLRL precedent in finding that municipal drilling bans – which preclude development, result in total waste of the resource, and destroy mineral owners' correlative rights – only “incidentally impact” the oil and gas industry and do not frustrate the OGSML's goals or the State's interest in efficient, effective resource recovery. (R. at 17-18.) Thus, the Third Department held that “ECL § 23-0303(2) does not serve to preempt” the Town Prohibition. (R. at 18.)

As for implied preemption, the Appellate Court correctly determined that the OGSML's express supersession clause did not foreclose an implied preemption analysis. (R. at 18.) In conducting the substantive conflict preemption analysis and finding no conflict preemption, however, the Appellate Court employed flawed reasoning comparable to that in its express preemption analysis. (R. at 19.)

Specifically, while the Appellate Court acknowledged the statutory provisions relating to unit size, spacing and well location, it classified these matters as “regulatory” – which it defined as relating only “to the details and procedures” of the well. (R. at 19.) Rather than undertake the relevant inquiry – i.e., whether local drilling bans prevent or impede compliance with these requirements – the Appellate Court concluded that because these matters did “not address any traditional land use issues that would otherwise be the subject of a local municipality’s zoning authority,” there was no conflict. (R. at 19.) Indeed, the Appellate Court concluded that local bans and the OGSML “may harmoniously coexist; the zoning law will dictate in which, if any, district drilling may occur, while the OGSML [will] instruct[] operators as to the proper spacing . . . to prevent waste.” (R. at 19.) Thus, the Appellate Court found no conflict even if “where” drilling is allowed in a municipality (or, by extension, throughout the entire State) is nowhere.

Finally, the Appellate Court also found that the Town Prohibition does not conflict with the OGSML’s policies. (R. at 19.) The Court opined that (1) nothing in the statute or its legislative history suggested an intention to maximize recovery at the expense of local land use decision-making, and (2) because the statute sought to protect the rights of all persons, including the general public, drilling bans did not conflict with the statute. (R. at 19.)

The Appellate Court did not explain, however, how broad-based municipal-wide drilling bans – which wholly obliterate landowners’ mineral estates – could be squared with the explicit statutory directive that “the correlative rights of *all [mineral] owners*” be protected, as opposed to being taken. Nor did the Appellate Court address the reality that the comprehensive statewide scheme enacted in the OGSML (including the still-evolving SGEIS process under SEQRA) is the means through which “all persons . . . and the general public” are protected relative to environmental impacts, thereby rendering municipal drilling bans unnecessary and, indeed, in conflict with the OGSML.

In short, the Appellate Decision allows every municipality in the State of New York to ban any and all oil and gas development. The inevitable result is zero resource recovery, the ultimate in waste, and the obliteration of mineral owners’ correlative rights. This result starkly conflicts with the language and policies of the OGSML and the Energy Law and, therefore, cannot stand.

ARGUMENT

POINT I

THE STATE HAS THE POWER TO PREEMPT LOCAL ZONING

As the Appellate Court correctly acknowledged, “[t]he preemption doctrine represents a fundamental limitation on home rule powers.” (R. at 12.) “While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies ‘the untrammelled primacy of the Legislature to act * * * with respect to matters of State concern.’” *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (quoting *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 497 [1977]). Where the Legislature has expressly stated the intent to supersede local regulation, any local regulation of that subject matter is invalid, regardless of home rule powers. *See Wambat Realty Corp.*, 41 N.Y.2d at 492-98.

Further, as the Appellate Court also observed, the preemption doctrine is not limited to express preemption, but also includes implied preemption (i.e., conflict and field preemption). (R. at 1); *see Albany Area Builders Ass’n*, 74 N.Y.2d at 377. Under the doctrine of conflict preemption, local laws that conflict with State law (i.e., making compliance with both

impossible) or that stand as an obstacle to accomplishing the full objectives of the State law are invalid. *See generally id.*

Norse respectfully maintains that the OGSML preempts the Town Prohibition, both expressly under ECL § 23-0303(2) and under conflict preemption principles. Therefore, the Appellate Decision must be reversed.

POINT II
ECL § 23-0303(2) EXPRESSLY PREEMPTS
THE TOWN PROHIBITION

Whether the OGSML expressly preempts the Town Prohibition must be decided based on the specific supersedure language at issue, read in the context of the OGSML as a whole and informed by its evolution, unique policies, and legislative history – and not arbitrarily-selected dictionary definitions. *See New York State Psychiatric Ass’n v. Dep’t of Health*, 19 N.Y.3d 17, 23-24 (2012); *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010). Contrary to the Appellate Court’s approach and result, a holistic analysis of the OGSML reveals that the Town Prohibition is expressly preempted by ECL § 23-0303(2).

A. ECL § 23-0303(2) Supersedes All Local Zoning Ordinances And Limits Local Jurisdiction Solely To Roads And Taxes

ECL § 23-0303(2), states:

The provisions of this article shall supersede *all local laws or ordinances* relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government *jurisdiction* over local roads or the rights of local governments under the real property tax law.

(Emphasis added).

This language is unambiguous and its application is straightforward:

(1) all local laws or ordinances that purport to regulate the oil and gas industry are preempted; and (2) local government authority is limited solely to regulation of local roads and the levying of property taxes. Thus, zoning ordinances that regulate where drilling may occur – which is a subject matter having nothing to do with roads or taxes – are preempted.

A plain language analysis of ECL § 23-0303(2) proves this point. First, the supersedure language applies unqualifiedly not only to “all local laws,” but also to “all . . . local [] ordinances.” A zoning ordinance is the archetype of a “local ordinance” – indeed, it is the most common form of a local ordinance. And, notably, this provision contains no exception for zoning ordinances. Thus, by plain language application, zoning ordinances fall within the preemptive scope of the OGSML. *See People v. Paulin*, 17 N.Y.3d 238, 245 (2011) (refusing to write into a statute an exception that

was not there); *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995) (stating “[n]ew language cannot be imported into a statute to give it a meaning not otherwise found therein” [citation omitted]).

Second, the supersedure language specifically limits the “jurisdiction” retained by local governments. “Jurisdiction” is a term with strong legal significance. It means “areas of authority,” “the authority of a sovereign power to govern or legislate,” “the power or right to exercise authority,” “the extent or range of [] authority,” or “the subject matter to which authority applies.” *See* Black’s Law Dictionary 853 (6th ed. West 1990);

Merriam-Webster On-line Dictionary, <http://www.meriam-webster.com/dictionary/jurisdiction>; The Random House College Dictionary 727 (rev. ed. 1973). Thus, the New York State Legislature made clear that, with respect to oil and gas regulation, a locality’s “power or right to exercise authority” is specifically limited to only two discrete areas – local roads and property taxes – and, therefore, *not* drilling location, well spacing, wellbore location, or other forms of land use restrictions or prohibitions.

Third, that the Legislature created certain exceptions to the supersedure language, but did not include any exception for “zoning ordinances” is further revealing. By excepting local roads and taxes, it is clear the Legislature knew how to articulate exceptions to the preemption

rule it was crafting. That the Legislature specifically included “all . . . local ordinances” in the supersession language and did *not* except zoning ordinances means that the exclusion was intended. *See Weingarten v. Bd. of Trs. of N.Y.C. Teachers’ Ret. Sys.*, 98 N.Y.2d 575, 576 (2002) (“where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded”); *see also* Stat. § 240 (“where a law expressly describes a particular act . . . an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded”). Thus, zoning ordinances that regulate drilling location – which has nothing to do with roads or taxes – are preempted.

Indeed, the specific limitation of municipal jurisdiction to local roads and real property taxes would be given no effect if the supersession language is, as the lower courts held, limited to the “how” of drilling (i.e., drilling operations, or the details and procedures of drilling), but not the “where.” If the phrase “regulation of the [] industries” were intended to be so limited, it would have been unnecessary for the Legislature to carve out exceptions relative to local roads and property taxation. As Norse explained to the courts below, neither road usage nor property taxes has anything to do with drilling operations, i.e., the method, manner, procedure or details of

conducting oil and gas drilling.⁵ Thus, the Legislature would not have needed to carve out these two exceptions (which do *not* involve operations or the details/procedure of drilling) if, “regulation of the [] industries” were so confined.

The Appellate Court made no mention of this analysis in the Appellate Decision, notwithstanding that Norse fully briefed this matter. Rather than looking at the totality of the supersession language in context – including the carve-out for local “jurisdiction” as to only roads and taxes – the Appellate Court resorted to the Merriam-Webster’s On-line Dictionary definition of “regulation” to hold that “regulation” in ECL § 23-0303(2) is limited solely to the details, procedures, or technical operational aspects of drilling (i.e., the “how,” but not the “where,” of drilling). (R. at 12.)

The Appellate Court’s analysis is misguided on a number of grounds. First, in selectively relying on the Merriam-Webster On-line Dictionary definition of the word “regulation,” the Appellate Court ignored other arguably more appropriate definitions that defy the court’s constrained reading. For example, Black’s Law Dictionary defines regulations to be rules “issued by various governmental departments to carry out the intent of

⁵ Merely because an operator might use local roads in the course of conducting drilling operations (e.g., to get to and from the drill site) does not transform local road usage into a drilling operation; otherwise, local roads would be part of judicial administration because judges and jurors use roads to get to the courthouse.

the law” and “to guide the activity of those regulated by the agency.” Black’s Law Dictionary at 1286. In accord with established principles of statutory construction, this underscores that the meaning of “regulation” is inextricably tied to the agency’s enabling statute, further demonstrating the error in selectively relying on an on-line dictionary definition of a subset of supersession language divorced from the remainder of the supersession clause and the entire statute.

Furthermore, State statutes that authorize localities’ zoning authority explicitly refer to a locality’s power “by local law or ordinance to regulate and restrict . . . the location and use of . . . land for trade [and] industry” as constituting “regulation.” *E.g.*, Town Law § 261; *see also* Village Law § 7-700; Gen. City Law § 20(24); Stat. of Local Gov’ts § 10(6). Thus, as evidenced by these statutes, the Legislature plainly understands that the term “regulation” encompasses local zoning, thus defying the Appellate Court’s contrary interpretation.

The Appellate Court also erred by failing to give any meaning to the statutory language that the Legislature enacted – i.e., the term “jurisdiction” and the two limited discrete exceptions to supersession (local roads and taxes). The Appellate Court seemingly ignored the “jurisdiction” language. And, its interpretation of the term “regulation” impermissibly renders the

local roads and taxation exceptions wholly superfluous – i.e., since if regulation is limited to “how” drilling occurs, there would be no need to except local roads and taxes.

The Appellate Decision – which ignores the language the Legislature did enact and effectively incorporates restrictions that the Legislature did not enact – cannot be sustained and, therefore, must be reversed. *See Criscione v. City of N.Y.*, 97 N.Y.2d 152, 157 (2001) (stating that meaning and effect should be given to every word of a statute); *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001) (stating that words in a statute are not to be rendered superfluous); *see also Paulin*, 17 N.Y.3d at 245 (refusing to write into a statute an exception that was not there).

B. The Meaning Of “Regulation . . . Of The Industries” Must Be Gleaned From The OGSML As A Whole, In Light Of Its Policies

Although ECL § 23-0303(2) is clear on its face that all local zoning ordinances are superseded, were there any doubt about what “regulation of the [oil and gas] industries” means, that question can be resolved only by examining the entirety of the statutory and regulatory scheme under the OGSML. Here, the dispositive point is this: because ECL § 23-0303(2) directs that the OGSML supersedes all local ordinances relating to the “regulation of the [oil and gas] industries,” by plain language application, if

the OGSML “regulates” where drilling may occur – which it does – then that subject matter is off-limits to municipalities.

Examining the OGSML in its entirety, together with its implementing regulations and other pertinent regulatory documents (namely, 6 N.Y.C.R.R. pts. 550-559; the 1992 GEIS; and the proposed revised draft SGEIS), it is apparent that these statutes, rules and regulations comprehensively “regulate” the oil and gas industry statewide, including drilling location. Indeed, these authorities unambiguously speak not only to “how” oil and gas activity takes place, but “where” those activities may take place (*e.g.*, well location, spacing unit boundaries, setbacks, etc.). (*See generally* R. 532-33, ¶¶ 38-43.); *see also* ECL § 23-0101(20)(c).

This point is plain in numerous provisions of the OGSML. ECL § 23-0303(1) entrusts administration of the OGSML to the NYSDEC, and, pursuant to ECL § 23-0301, mandates that the Department “regulate . . . in such a manner as will prevent waste.” ECL § 23-0101(20)(c) expressly defines waste to include “[t]he *locating, spacing, [or] drilling* . . . of any oil or gas well [] in a manner which causes . . . reduction in the quantity of oil or gas ultimately recoverable from a pool” (emphasis added). This, of course, is in accord with the requirements of the Interstate Compact, requiring state laws that prevent “locating” and “spacing” of wells to “bring

about physical waste of oil or gas or loss in the ultimate recovery thereof.”
See ECL § 23-2101. In other words, the OGSML and the Interstate Compact which it implements expressly instruct the Department to regulate the “where” of oil and gas activity, including the location of gas wells, to promote the full development of the resource.

Further, ECL § 23-0501(1)(b)(1) details specific acreage and wellbore location requirements relative to unit boundaries for various pools. ECL § 23-0503(2) directs that the Department “shall” issue a drilling permit if the proposed unit “conforms to statewide spacing and is of approximately uniform shape with other spacing units within the same field or pool, and abuts other spacing units in the same pool, unless sufficient distance remains between units for another unit to be developed,” again with the aim of preventing waste and providing for greater ultimate recovery from the pool. These directives plainly regulate the size, shape and location of spacing units and the location of the wellbore (both as to surface location and the subterranean path of the wellbore), *i.e.*, the “where” of drilling, and commit these decisions to the Department, leaving no room for local regulation.

Similar confirmation is found in (1) the OGSML’s implementing regulations, which regulate spacing unit size and setbacks for drilling, *see, e.g.*, 6 N.Y.C.R.R. pt. 553; and (2) the revised draft SGEIS, *see, e.g.*, section

3.2.4 (prohibiting drilling activities at explicitly identified locations, including primary aquifers). Again, all of these provisions instruct the Department in very detailed terms to comprehensively regulate the “where” of oil and gas activity.

The Appellate Court failed to appreciate the legal significance of the OGSML’s “where-related” provisions in the preemption analysis. Instead, the Appellate Court classified them as “regulatory in nature” and concluded that because these provisions did “not address any traditional land use issues that would otherwise be the subject of a local municipality’s zoning authority,” there was no preemption of local zoning. (*See R.* at 14.) In this regard, the Appellate Court missed the relevant inquiry: given that these “where” directives are part of “regulation” of the oil and gas industry under the OGSML, that subject matter – the where of drilling – is off-limits to municipalities under the plain language of ECL § 23-0303(2). *See Envirogas*, 112 Misc. 2d at 433 (finding local governments “precluded from legislating on the same subject matter” as the OGSML), *aff’d*, 89 A.D.2d 1056 (4th Dep’t 1982), *lv. denied*, 58 N.Y.2d 602 (1982).

Notably, under statutory schemes where the regulation of location is far less explicit than that under the OGSML, other courts have not hesitated to find regulation of location preempted. For example, in *Sunrise Check*

Cashing & Payroll Servs., Inc. v. Town of Hempstead, the Second Department held that a local zoning ordinance restricting check-cashing establishments to industrial and light industrial districts was preempted by the State Banking Law, article 9-A, specifically Banking Law § 369(1). 91 A.D.3d 126, 135-40 (2d Dep’t 2011). Legislative findings accompanying article 9-A noted that the article was “to provide for the *regulation* of the business of cashing checks,” which was to be performed by the superintendent of banks (“Superintendent”). *Id.* at 135 (emphasis added). The Second Department examined the substantive provisions of the Banking Law which vested in the Superintendent the authority to issue a license based upon whether the proposed check-cashing establishment was properly located – i.e., which provisions bear a striking parallel to the OGSML’s provisions vesting authority in the State and, *inter alia*, directing the NYSDEC to issue a well drilling permit where the application conforms with statewide spacing requirements. *See id.* at 136-38. Based upon these considerations, the court found the local zoning ordinance preempted because “the Legislature ha[d] specifically delegated to the Superintendent the task of determining whether particular locations [were] appropriate for check-cashing establishments.” *Id.* at 138.

Accordingly, where, as here, the Legislature has asserted that all local ordinances relating to the regulation of the industry are superseded and has affirmatively vested exclusive authority in the State to determine where drilling may occur based on explicit statutory and regulatory criteria, then that subject matter (i.e., the where of drilling) is expressly preempted. *See* ECL § 23-0303(2); *Sunrise Check Cashing*, 91 A.D.3d at 135-40; *see also Ames v. Smoot*, 98 A.D.2d 216, 219-22 (2d Dep’t 1983) (invalidating local ordinance that banned aerial pesticide spraying in the village where ECL article 33 vested in the Commissioner authority to promulgate regulations prescribing the time, place, manner and method of application).

The Appellate Court’s result also does not account for the OGSML’s unique policy objectives, which are directly pertinent to the preemption analysis. Subsurface geology – not municipal boundary lines or zoning – controls being able to properly locate the wellbore and establish spacing units for a given pool. In other words, well location (the “where” of drilling) is inextricably tied to whether and how an operator can effectively recover the resource so as to provide for greater ultimate recovery, prevent waste, and protect correlative rights.

This is precisely why the OGSML *does* regulate location – because the “where” and “how” of oil and gas drilling are not distinct, unrelated

issues but, rather, are interdependent and inextricably linked. Only by regulating well location and spacing (the “where” of drilling) can the State ensure that the unique objectives of the OGSML – *i.e.*, providing for greater ultimate recovery, preventing waste, and protecting correlative rights – will be achieved. Significantly, the policies of preventing waste and protecting correlative rights are wholly unique to the oil and gas industry and have no place in the context of the development of other resources, such as solid minerals. Because the OGSML regulates well location, there is no room for parochial local ordinances, like the Town Prohibition, that prevent *any* resource development and, thereby, promote the very ultimate in waste and result in the destruction of mineral owners’ correlative rights – in direct violation of the statute.

Consider the following hypothetical as illustrative of the point. There exists a natural gas field that underlies equally (50/50) two separate, but adjacent, towns. One of these towns has passed a zoning ordinance that bans all oil and gas activity. The property owners under whose land this natural gas field lies all want to see it developed and have entered into lease agreements with an oil and gas operator. The State has granted the required permits. The goal of New York’s oil and gas regulatory regime is to see that this natural gas field is developed to its maximum potential, with waste

prevented and correlative rights protected. Yet, despite the landowners' desires and the State's permits, because one town has banned all oil and gas activity, upwards of 50% of this natural gas field cannot be accessed or developed by the operator.

This scenario does not provide for greater ultimate recovery; it diminishes potential recovery. Also, assuming the operator proceeds to develop the accessible acreage, by definition, the operator commits waste by leaving upwards of 50% of the gas in the ground and failing to develop the resource in the most efficient manner possible. In addition, the correlative rights of the owners of the unrecovered 50% are obliterated, as the municipal ban denies them access to the resource and the ability to recover it. Moreover, if there is insufficient acreage to create a new unit in the town that allows drilling because of other abutting units, the town ban actually has extraterritorial impact on the mineral owners in the adjoining town and destroys the correlative rights of the mineral owners in both towns.

Accordingly, quite contrary to the Appellate Court's articulation, this is the antithesis of an "incidental[] impact[]" on the oil and gas industry. (*See* R. at 17.) The Appellate Court's holding – *i.e.*, that "regulation of the [] industries" means *only how* oil and gas operations are conducted (*i.e.*, details, procedure, technical/operational aspects), not *where* they are

conducted – flies in the face of the OGSML’s words, policies, and entire evolutionary history. (See R. at 12-13); *see also Northeast Natural Energy, LLC v. City of Morgantown, W.V.*, Civ. Action No. 11-C-411, Slip Op. (Cir. Ct., Monongalia Cnty., W.V., Aug. 12, 2011) (holding local ban invalid because it encroached on the state’s power to regulate oil and gas development).

C. The OGSML’s History Evidences Legislative Intent To Eliminate Local Control

The history of the OGSML’s evolution likewise reflects the Legislature’s clear intent that ECL § 23-0303(2) was enacted to preempt all local control of oil and gas development. As demonstrated by the legislative history to A.6928 (one of the bills ultimately incorporated into the 1981 amendments), the supersession language was enacted to remedy problems caused by two decades of parochial local regulation. (CHC R. at 949, 995). Thus, the Legislature: (1) expressly eliminated all local control over oil and gas activities (with the only exceptions being relative to local roads and real property taxes), (2) vested full, exclusive authority in the State to effectuate efficient development to provide for greater ultimate recovery, prevent waste, and protect owners’ correlative rights, and (3) ensured protection to localities through the OGSML’s comprehensive scheme. In exchange, the Legislature provided as trade-offs ad valorem taxing authority and a damage

fund to compensate municipalities for any damages potentially resulting from oil and gas activities. (*See generally* R. at 529-32, 622-26, 628, ¶¶ 26-37 & Exhs. I, J & K); (R. at 100-02, ¶¶ 11-19); (CHC R. 949, 950-51, 995¶¶ 34, 39-42 & Exh. G.).

In reviewing pieces of legislative history but seemingly ignoring other, the Appellate Court found it “evident” that the Legislature’s intent was to supersede only “technical operational activities of the oil [and] gas . . . industry” but that nothing indicated a clear intent to usurp municipal authority over land use decisions. (R. at 15-16.) On its face, however, the legislative history, most pointedly, the Memorandum in Support of A. 6928 (which the Appellate Court failed to mention), speaks to the contrary, as does the factual context in which the 1981 amendments arose. (*See generally* R. at 529-32, 622-26, 628, ¶¶ 26-37 & Exhs. I, J & K); (R. at 100-02, ¶¶ 11-19); (CHC R. 949, 950-51, 995¶¶ 34, 39-42 & Exh. G.)

Moreover, contrary to the Appellate Court’s finding, nothing in the legislative history or the statutory language speaks to any “operations” restriction on the scope of supersession. And, indeed, the legislative carve-outs for retaining municipal jurisdiction over local roads and taxes would have been unnecessary if the Legislature’s intent were to limit the scope of supersession to only the operational aspects of wells. The Appellate Court

did not address these issues in its analysis. Accordingly, the Appellate Court’s historical analysis is in error and does not support the court’s “no preemption” finding. Thus, the Appellate Decision must be reversed.

POINT III

MLRL PRECEDENT IS IRRELEVANT TO THE OGSML EXPRESS PREEMPTION ANALYSIS

Contrary to the Appellate Court’s articulations, MLRL precedent does not support the court’s holding of no express preemption under the OGSML. (*See R. at 16.*) Given (1) the stark distinctions between the supersession language of the MLRL and OGSML, (2) the different manner and subject matter of regulation of each of these statutes, (3) the unique policies of the OGSML – protecting correlative rights and preventing waste – which have no analog in the MLRL, and (4) the different evolution of and legislative history pertaining to each of these statutes, MLRL precedent is not relevant to the OGSML preemption analysis, let alone controlling or constraining as the lower courts in this State have improperly found.

A. Distinctions In Supersession Language

The Appellate Court erred in finding that the MLRL and OGSML have “similar supersession provision[s]” and, thus, relying on *Frew Run* and *Gernatt*. (*See R. at 18.*) Contrary to the Appellate Court’s articulation, the

supersession language of the MLRL was, and remains, materially different from ECL § 23-0303(2). (*See* R. at 18.)

As enacted in 1974 and in effect when *Frew Run* was decided, the MLRL’s supersession language provided:

For the purposes stated herein, this article shall supersede all other state and *local laws* relating to the extractive mining industry; provided, however, that *nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances* or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

ECL § 23-2703(2) (L. 1974, c. 1043) (emphasis added); (R. at 635, 637, Exh. M) Unlike the OGSML, which broadly supersedes “all local laws or ordinances,” the MLRL applied only to “local laws” and, most significantly, explicitly *excepted* from supersession “local zoning ordinances,” thus, actually inviting local zoning.

Moreover, the MLRL exception was preceded by “nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances,” whereas the OGSML exceptions for local roads and property taxes are preceded by the phrase “but shall not supersede local government jurisdiction” The MLRL language, thus, did not suggest that it was providing a narrow exception from a broad supersedure provision. In contrast, the OGSML language suggests precisely that:

namely, that everything else other than what “shall not be supersede[d]” (local roads and real property taxation) is, in fact, superseded.

This reading is further confirmed by the Legislature’s use of the word “jurisdiction” in the OGSML – *i.e.*, that local “jurisdiction” (“the power or right to exercise authority”) is narrowly limited solely to local roads and taxation (and therefore does not include authority to control drilling location). There was no comparable limiting “jurisdiction” language in the MLRL. Instead, the MLRL expressly confirmed, if not invited, local zoning control, both in the supersedure provision and other substantive provisions. *Compare* ECL § 23-0303(2) (L.1981, c. 846), *with* ECL § 23-2703(2) (L.1974, c. 1043); *Paulin*, 17 N.Y.3d at 245 (refusing to write exceptions into statutes); (*see also* R. at 534, 641, 643, ¶ 47 & Exh. M) (discussing MLRL provisions ECL § 23-2711[3], requiring notice at the application phase to local governments having jurisdiction over the proposed [mining] site, and ECL § 23-2711[10], recognizing local permitting authority). These significant material differences between the supersession language of the MLRL and the OGSML (and their respective substantive provisions) render the Appellate Court’s reliance on *Frew Run* misplaced. (*See* R. at 18.)

Likewise, *Gernatt* also does not support the Appellate Court’s holding here. *See id.* By the time *Gernatt* was decided, the MLRL had been

amended to include express language leaving no doubt that municipalities retain full zoning authority under that statute. *See Gernatt*, 87 N.Y.2d 668. Indeed, this Court in *Gernatt* noted that the 1991 amendments to ECL § 23-2703 (the MLRL supersession provision) “expressly excluded [] from its preemptive reach” any restriction on municipal authority to regulate permissible land uses within the municipality. 87 N.Y.2d at 683. This express exclusion from the scope of supersession under the MLRL does not exist in the OGSML’s supersession language, ECL § 23-0303(2). Thus, *Gernatt* is irrelevant to deciding the question of preemption under the OGSML, and the Appellate Court’s supersession analysis and result are, therefore, in error.

B. Distinctions In Subject Matter Of Regulation

In relying on MLRL precedent to inform the OGSML express preemption analysis, the Appellate Court also erred by failing to recognize the legally significant distinctions between the two statutes relative to what each actually regulates – which is critical in determining what is superseded. In short, the OGSML substantively regulates the “where” of drilling and, therefore, localities may not. In contrast, the MLRL does not regulate where mining may occur, meaning that localities may determine mining location. (*See R. at 105, & Exh. A.*)

More specifically, the OGSML and its implementing regulations contain explicit, comprehensive location-based directives as to where drilling may occur. These provisions include requirements as to unit size, configuration, orientation, wellbore location, setbacks and other location-related restrictions regulating the “where” of well drilling based upon subsurface geologic conditions and environmental surface conditions. *See, e.g.*, ECL §§ 23-0501, 23-0503. The MLRL, however, does not regulate the “where” of subsurface mining – that is, in contrast to the drilling location and spacing requirements in the OGSML, there are no comparable requirements in the MLRL specifying mine location or the spacing of mine shafts. *See generally* ECL art. 23, tit. 27.

This stark distinction in the subject matter of regulation is directly pertinent to interpreting the meaning of the phrase “regulation of the . . . industries” and hence the scope of supersession under ECL § 23-0303(2). *See Sunrise Check Cashing*, 91 A.D.3d at 136-38 (finding local zoning preempted based on, *inter alia*, examining substantive provisions of Banking Law which vested in the Superintendent authority to issue a license based on whether proposed check-cashing establishment was properly located); *see also Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 5-7 (1973) (finding local zoning affecting location of urban development projects

preempted; interpreting scope of supersession by reading totality of preemption language in context of the statute and its legislative history). In other words, this distinction – that the OGSML regulates location, but the MLRL does not – renders MLRL precedent inapt to this analysis.

Highlighting this conclusion are other substantive terms of the MLRL which show that, from its enactment to the present time, the MLRL repeatedly and expressly reaffirmed, if not, invited local zoning control. (R. at 534, 635, 637, 641, 643, ¶¶ 47 & Exh. M); ECL §§ 23-2703(2)(b) & (3), 23-2711(3) & (7). This is reflected in express legislative articulations, among others, that (1) municipalities retain the power to enact and enforce local ordinances, including as to permissible uses in zoning districts, and retain “jurisdiction” over the proposed mine site, (2) state mining permits cannot be issued if local ordinances prohibit mining at the proposed site, and (3) notice of an application for a state mining permit must be sent to the locality for a determination of whether mining is allowed at the proposed site. (*See generally* R. at 534, 635, 637, 641, 643, ¶¶ 47 & Exh. M); ECL §§ 23-2703(2)(b) & (3), 23-2711(3) & (7).

The OGSML speaks to the contrary. It (1) directs that the NYSDEC “shall” issue the permit if the proposed application conforms to statewide spacing (ECL § 23-0503[2]); (2) nowhere makes any affirmative statement

respecting retention of local zoning power, instead limiting local “jurisdiction” solely to local roads and taxes (*see generally* ECL §§ 23-0303[2], 23-0501, 23-0503), and (3) contains no requirement that notice of a well drilling application be provided to the locality for a determination of whether the use is permissible (*see generally* ECL art. 23, tit. 3 & 5).

Viewing the term “regulation” in context of the OGSML as a whole, the legally significant distinctions between the OGSML and MLRL could not be more pronounced. The term “regulation” as used in the OGSML encompasses where the activity takes place, leaving no room for local zoning. Thus, the Appellate Court erred in relying on MLRL precedent to interpret the meaning of “regulation” in ECL § 23-0303(2).

C. Distinctions In Statutory Evolution And Legislative History

The historical evolution and legislative history of the OGSML – as distinguished from the MLRL – further underscore the Appellate Court’s error in relying on MLRL precedent. *See New York State Psychiatric Ass’n*, 19 N.Y.3d at 24 (stating that “[t]o determine the intent of a statute, ‘inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision’” [citation omitted]); *Frew Run*, 71 N.Y.2d at 131, 132 (noting relevance of statutory policies, purposes and history in preemption analysis).

First, both statutes arose from very different factual circumstances. The supersedure language of the OGSML was added, by amendment, (1) in response to almost two decades of parochial local regulation relating to oil and gas development, (2) to combat the energy crisis of the 1970s, and (3) to reassert the State’s role as the exclusive regulator of oil and gas activity in the State. (R. at 100-02, 104-05, ¶¶ 11-19, 24-26) There is no comparable “cause and effect” history regarding the supersedure provision of the MLRL, as the MLRL’s supersedure provision was included in the initial enactment, and there has never been a sand and gravel crisis in New York State necessitating the elimination of local control over solid minerals mining.

Moreover, the legislative history of the MLRL establishes that stakeholder groups clearly understood that the MLRL retained (if not invited) local control over mining operations, which generated considerable controversy and industry opposition. (R. at 534-35, 649-56, ¶¶ 48-51 & Exhs. N-P.). For example, the Memorandum in Opposition submitted by the New York State Chapter of the Associated General Contractors of America noted that the legislation “would not insure an evenly administered State-wide program, since it would allow local governments to enact yet more stringent standards and requirements.” (R. at 534-35, 652, ¶ 49 & Exh. N.) No such discussion or opposition based on local control is present anywhere

in the legislative history of the OGSML, suggesting that lawmakers and oil and gas stakeholders understood the statute's supersedure provision would preempt local laws or ordinances that might seek to control oil and gas development (with the only exception being relative to local roads and taxes). *See generally* Bill Jacket, L. 1981, c. 846; (*see also* R. at 102, ¶¶ 15-19.) Of course, this is precisely what the unambiguous language of the OGSML's supersedure provision does.

D. Distinctions In The Substances Regulated And Statutory Policy Objectives

The physical differences between the substances regulated by the MLRL and the OGSML explain the difference in approaches taken relative to supersession. The MLRL regulates the mining of solid minerals. Solid mineral resources do not move within the subsurface, and often require significant development and disruption, both temporally and in areal extent, to the land surface in order for extraction to occur in a series of phases. Accordingly, the MLRL establishes a partnership with localities relative to mine location and the ultimate reclamation of affected lands.

This is reflected in the MLRL's (1) supersedure provision, which reaffirms local zoning authority, (2) declaration of policy, which articulates multiple purposes aimed at balancing a variety of interests, many of which concern matters traditionally within the control of local governments, and

(3) the multitude of reclamation provisions which pervade the MLRL but do not at all limit municipal power to determine permissible uses in zoning districts. *See Frew Run*, 71 N.Y.2d at 132-33 (noting that the 1974 version of the MLRL provided a statewide standard for regulation of operations, “while recognizing the legitimate concerns of localities in the aftereffects of mining by permitting stricter local control of reclamation” [citation omitted]); ECL § 23-2703(2)(a) & (b) (precluding stricter local standards for mining activity and reclamation, but affirmatively recognizing local zoning authority to determine permissible land uses); (*see R.* at 533-34, 536, ¶¶ 44-47, 54.); *see also* ECL §§ 23-2703(2) & (3), 23-2711(3) & (7), 23-2713, 23-2715; former ECL §§ 23-2703(2), 23-2711(3) & (10), 23-2713, 23-2715. Simply put: local zoning control makes sense in the context of a large surface activity like solid minerals mining.

In contrast, the OGSML principally regulates the development of liquid or gaseous substances, such as oil and gas. Oil and gas are found in subterranean pools, the boundaries of which do not conform to any particular jurisdictional pattern. The ability to efficiently extract oil and gas deposits is dependent on the geophysical properties of the underlying pool (e.g., pressure characteristics, porosity, etc), and drilling pattern, spacing and wellbore location all affect whether optimal recovery can be had or

production exaggerated in one area or diminished in another. In other words, production and the ability to fulfill the policy objectives of the OGSML depend upon proper well and spacing unit location, as well as spacing unit size, layout and orientation. In addition, oil and gas development tends to be far less surface-intensive and of far shorter duration than solid mineral extraction, thus having fewer implications for traditional land use concerns. It is for this reason that the State determines “where” drilling occurs -- i.e., because this is the only way that greater ultimate recovery can be had, waste prevented, and property owners’ correlative rights protected, while at the same time ensuring that local concerns are accommodated through the comprehensive statewide controls entrusted to the NYSDEC under the statute. Local control, particularly municipal-wide bans like the Town Prohibition, are, at best, duplicative and thus unnecessary to ensure environmental protection; and, indeed, they are counterproductive, as they make it impossible to achieve the OGSML’s objectives, as reflected in the history leading up to the enactment of ECL § 23-0303(2) in 1981. (R. at 100-01, 103-05, ¶¶ 11-19, 21-26); (*see* R. at 531-32, ¶ 36.)

The bottom line is that local zoning ordinances like the Town Prohibition make it impossible for the NYSDEC to comply with, and for

New York State to achieve, the objectives of the OGSML and the Interstate Compact of preventing waste, providing for greater ultimate recovery, and protecting correlative rights. *See Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (finding that a total ban on drilling precludes the ability to prevent waste or protect correlative rights). Thus, the Appellate Decision must be reversed.

POINT IV
THE TOWN PROHIBITION IS IN CONFLICT PREEMPTED BY THE
OGSML AND THE ENERGY LAW

The Appellate Court correctly found that the OGSML's express supersession provision does not foreclose an implied preemption analysis. (*See R.* at 18-19) (and citations therein); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (stating same in context of federal preemption of state law); *accord Doomes v. Best Transit Corp.*, 17 N.Y.3d 594, 602-03 (2011) (evaluating implied preemption, notwithstanding express supersedure language). Likewise, the supersedure language of ECL § 23-0303(2) does not foreclose an implied preemption challenge under an entirely different statute, namely, Energy Law § 3-101(5) and 3-103.⁶

⁶ This Court may take judicial notice of the Energy Law, both as part of the legislative history of ECL § 23-0303(2) and by virtue of its being a legislative fact. *See Green*, 96 N.Y.2d at 408 n.2; *Affronti*, 95 N.Y.2d at 720.

The Appellate Court erred, however, in holding that the Town Prohibition “neither conflicts with the language nor the policy of the OGSML” and that municipal-wide drilling bans “may harmoniously coexist” with the OGSML . (See R. at 19.) As discussed above, the Town Prohibition presents a multitude of irreconcilable “head-on” conflicts with the OGSML, both as to explicit wellbore location and spacing directives and policy objectives. *See Point IIB, supra.*

For example, ECL § 23-0503(2) directs the Department to issue a well drilling permit if the proposed drilling unit (1) conforms to statewide spacing requirements, (2) is of approximately uniform shape with other spacing units in the same field, and (3) abuts other spacing units overlaying the same resource pool, unless there is sufficient distance between units for another unit to be developed. This specific provision, which was carefully crafted to apply uniformly statewide, ensures that wells are drilled and spaced in locations to provide for greater ultimate resource recovery, prevent waste, and protect mineral owners so that they are fully compensated for their pro rata share of well production. It is simply not possible for the NYSDEC to comply with this express statutory mandate if individual localities, like the Town, can “zone out” drilling in entire municipalities.

Local bans on all oil and gas development also make it impossible for the NYSDEC to comply with the objectives of the OGSML. Local bans, like the Town Prohibition, preclude the NYSDEC from issuing drilling permits for locations where drilling *should* occur (i.e., based on the geophysical properties of the underlying resource and environmental conditions relating to surface location in order to maximize recovery, prevent waste and protect correlative rights). Importantly, the OGSML directs that drilling is to occur in a manner that prevents waste, defined in the OGSML to include “locating . . . [a] well [] in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable” ECL § 23-0101(20)(c). Yet, ensuring waste is precisely what the Town Prohibition does – i.e., it prohibits wells from being located in the ideal location to provide for greater ultimate resource recovery and, in fact, precludes any recovery whatsoever, resulting in the ultimate in waste and the total destruction of correlative rights. This, of course, is in direct conflict with the OGSML.

Moreover, municipal bans like the Town Prohibition also patently conflict with the Energy Law. Energy Law § 3-101(5) articulates the statewide goal “to foster, encourage and promote the prudent development [] of all indigenous state energy resources including . . . natural gas from

Devonian shale formations.” Energy Law § 3-103 directs that “every agency of the state must conduct its affairs [] to conform to the state energy policy” If the Appellate Decision is allowed to stand, every municipality in New York could ban all oil and gas development – a result that plainly would conflict with (1) the “promotion” directive of the Energy Law, (2) all of the objectives of the OGSML (*i.e.*, provide for greater ultimate recovery, prevent waste, protect mineral owners’ correlative rights), (3) the NYSDEC’s implementation of the explicit location-based directives of the OGSML, and (4) the NYSDEC’s ability to act in a manner that conforms with the Energy Law’s policy to promote the development of indigenous natural gas resources.

The policy implications of the Appellate Decision are severe, as there could not be a starker example of local control that will wholly discourage, in fact, preclude, oil and gas development. The Town Prohibition, in one fell swoop, wiped out a more than \$5.1 million investment of one operator. This begs the question: what prudent operator would ever invest in oil and gas development in New York if, after the fact, municipalities could, based upon a 3-2 majority vote, enact broad-based drilling bans that obliterate the operator’s entire property interest? The answer is obvious: municipal-wide

bans on oil and gas activity cannot be squared with the directive, policies, or goals of the OGSML or the Energy Law.

In the end, even if the Town Prohibition is not “regulation” *per se*, so as to come within the supersedure provision of ECL § 23-0303(2), a point that Norse vigorously disputes, the Town Prohibition *still* conflicts with the express directives of the OGSML relative to spacing and wellbore location and the fundamental goals of the Energy Law and the OGSML. The Town Prohibition, at *best*, frustrates the NYSDEC’s ability to comply with the mandates of the OGSML and Energy Law; and, at *worst*, stands as an insurmountable obstacle to meeting the objectives of both statutes. In either instance, the Town Prohibition is in conflict with New York’s general laws and, therefore, is conflict preempted. *See Lansdown Entm’t Corp. v. N.Y.C. Dep’t of Consumer Affairs*, 74 N.Y.2d 761, 764-65 (1989) (finding direct conflict between local ordinance and State law; stating “assuredly a local law which conflicts with the State law must [] be preempted”); *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 51 (2009) (Graffeo, J., concurring) (stating that local curfew ordinance contradicted the Family Court Act and was thus invalid); *Cohen v. Bd. of Appeals of Saddle Rock*, 100 N.Y.2d 395, 400 (2003) (finding local variance regulation preempted; stating in the critical area of overlap, the Legislature prevails).

Finally, two courts that have considered the propriety of municipal bans on oil and gas activity otherwise permitted by state law have invalidated those bans. *See Voss*, 830 P.2d at 1068; (CHC R. at 904-05); *Northeast Natural Energy, LLC*, Civ. Action No. 11-C-411, Slip Op. at 8-9. The *Voss* case involved a comprehensive state regulatory regime very similar to the OGSML and a local drilling ban comparable to the Town Prohibition. Colorado's high court concluded that the local ban was fundamentally at odds with Colorado's goals and policy objectives of preventing waste, providing for greater ultimate recovery, and protecting correlative rights – *i.e.*, the very same goals and policy objectives of the OGSML. Specifically, the Colorado Supreme Court observed:

Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact on the correlative rights of the owners of oil and gas interests in a common source of supply by exaggerating production in one area and depressing it in another. . . . *Because oil and gas production is closely tied to well location, [a municipality's] total ban on drilling . . . could result in uneven and potentially wasteful production [The] total ban, in that situation, would conflict with the [state agency's] express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool*

so as to prevent waste and to protect the correlative rights of owners . . . In our view, the state’s interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city’s total ban on drilling within city limits.

Voss, 830 P.2d at 1067 (emphasis added); *see also id.* at 1067 n.3 (quoting state law, defining “waste” in a manner identical to that in ECL § 23-0101[20][c]). Given the factual realities of oil and gas development (which are largely the same regardless of where the reserves are located), and the identical goals and policy objectives pursued by the New York and Colorado oil and gas regimes, the Colorado Supreme Court’s reasoning in *Voss* – while not binding on this Court – is particularly compelling and appropriate here.

The Appellate Court did not mention *Voss* or *Northeast Natural Energy, LLC*, notwithstanding that Norse discussed both cases in its briefing. Given the Appellate Court’s heavy reliance on MLRL precedent in its express preemption analysis, it appears that this flawed reasoning was implicitly carried over into the implied preemption analysis.

Finally, to the extent the Appellate Court rested its finding of no conflict preemption on the policy to “protect the rights of all persons... including the general public” in ECL § 23-0301, its rationale is also

misguided. The Appellate Court failed to acknowledge the Legislature's express articulations that the comprehensive statewide scheme under the OGSML is intended to, and does, protect the general public through extensive regulatory controls. (*See* R. at 20); (CHC R. at 1046.) Nor did the Appellate Court address the conundrum of how the policy to "protect correlative rights" could be squared with municipal-wide drilling bans, like the Town Prohibition, that indisputably obliterate correlative rights, not only territorially but potentially beyond the municipality's boundaries as well. In short, the Appellate Court's reasoning and result cannot be squared with the directives or policies of the OGSML or Energy Law.

In sum, the Town Prohibition conflicts with the language and policies of both the OGSML and Energy Law §§ 3-101(5) and 3-103. Accordingly, the Town Prohibition is conflict preempted and, therefore, invalid, and the Appellate Decision must be reversed. *See, e.g., Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107-08 (1983); 25 N.Y. Jur. 2d, *Counties, Towns & Mun. Corps.*, § 351.

CONCLUSION

For all of the foregoing reasons, Norse respectfully requests that this Honorable Court reverse the Appellate Decision and grant summary judgment in Norse's favor.

Dated: October 28, 2013
Albany, New York


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Time Requested: 20 Minutes

**New York State
Court of Appeals**

NORSE ENERGY CORP. USA,

Appellant,

-against-

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

APL-2013-00245

**BRIEF OF RESPONDENTS TOWN OF DRYDEN AND
TOWN OF DRYDEN TOWN BOARD**

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*Lansdown Entertainment Corp. v. New York City Department of Consumer
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NEW YORK STATUTES AND LOCAL LAWS (CONT'D)

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Town of Dryden Zoning Ordinance § 901, *available at*
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Town of Dryden Stormwater Management,Erosion and Sediment Control
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Tex. Nat. Res. Code Ann. § 85.04550

Tulsa, Okla. Code of Ordinances tit. 42-A6 n. 3

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Cal. Att’y Gen. Op. No. SO 76-32, 16 (1976), *available at*
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Gregory H. Sovas, Director, Division of Mineral Resources, DEC,
Presentation at Albany Law School’s Environmental Forum: *Sustainable
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DEC, *Revised Draft Supplemental Generic Env’tl. Impact Statement
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available at [http://www.dec.ny.gov/docs/materials_minerals_pdf/
rdsgeisch6b0911.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6b0911.pdf)31, 32

Clifford Krauss, *Oil Companies Are Sued for Waste of Natural Gas*, N.Y.
Times, Oct. 17, 2013, [http://www.nytimes.com/2013/10/18/business/
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north-dakota.html?_r=0](http://www.nytimes.com/2013/10/18/business/energy-environment/oil-companies-are-sued-over-natural-gas-flaring-in-north-dakota.html?_r=0).42 n. 22

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Town of Dryden Comprehensive Plan (Dec. 8, 2005), *available at*
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Tulsa City Officials Urged to Put Possible Oil Drilling Info Online, May 20,
2009, <http://www.mobilitytechzone.com/news/2009/05/20/4190333.htm>6

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Question 1:

Pursuant to its constitutionally guaranteed and statutorily delegated home rule powers over land use planning and zoning, *see* N.Y. Const. art. IX § 2(c)(ii)(10); N.Y. Stat. Local Gov'ts § 10(6); N.Y. Town L. § 261, the Town of Dryden adopted an amendment to its Zoning Ordinance to clarify that oil and gas exploration and production were heavy industrial uses of land that had never been permitted in any zoning district and thus were prohibited uses within Town borders. Should this Court read the Oil, Gas and Solution Mining Law (“OGSML”), which supersedes only those local laws “relating to the regulation of the oil, gas and solution mining industries,” N.Y. Env'tl. Conserv. L. (“ECL”) § 23-0303(2), as a clear expression of legislative intent to preempt the Zoning Ordinance, which relates to an entirely different subject matter—land use, generally—thereby abrogating powers to regulate land use through zoning expressly delegated to towns in the Statute of Local Governments and the Town Law?

Answer 1:

No. The Appellate Division, Third Department, correctly found nothing in the language, statutory scheme, or legislative history of the OGSML indicating an intent to usurp the authority traditionally delegated to

municipalities and held that the OGSML does not expressly preempt a locality's right to enact a zoning ordinance that regulates land use generally and designates oil and gas mining as a prohibited use within municipal borders. *See* Record on Appeal ("R.") at 16, 18.

Question 2:

Does the OGSML implicitly preempt the Town of Dryden's Zoning Ordinance, even though the Zoning Ordinance's regulation of land use does not conflict with the policies of the OGSML or its regulation of oil and gas activities, operations, and processes?

Answer 2:

No. The Appellate Division, Third Department, correctly held that, because zoning ordinances that effect a ban on drilling do not conflict with the policies of the OGSML, and the two distinct regulatory schemes may harmoniously coexist, the OGSML does not implicitly preempt the Zoning Ordinance. *See* R. at 19–20.

PRELIMINARY STATEMENT

Appellant Norse Energy Corp. USA (“Appellant”) asks this Court to impute to the New York Legislature the intention to exalt oil and gas development above all other land uses. Appellant would have this Court rule that the OGSML grants drillers an entitlement unique in the history of this state—the right to conduct heavy industrial operations throughout municipal territory, regardless of neighboring property interests or other local concerns. According to Appellant, the industry has the right to place oil and gas wells and their toxic waste next to family homes, outdoor cafes, and dairy farms in zoning districts that otherwise would be reserved for residential, commercial, and agricultural uses—and local residents have no voice in the matter.

As Respondents Town of Dryden and Town of Dryden Town Board (“Respondents”) demonstrate below, Appellant’s express and implied preemption claims are unsupported by the language, history, or purposes of the OGSML. The extreme and unprecedented right that Appellant asserts also is flatly inconsistent with this Court’s unequivocal statement that:

[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town . . . if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole

Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 684 (1996).

Appellant has not challenged the reasonableness of the Zoning Ordinance as an exercise of the Town of Dryden’s police powers. Appellant thus may not “seek[] to protect . . . mineral owners and their lessees,” Brief of Appellant Norse Energy Corp. USA (“App. Br.”) at 4, at the expense of other landowners in Dryden and the general public.

By contrast with Appellant, Respondents seek no extraordinary privilege but rather invoke their traditional home rule powers to protect the public health, safety, and general welfare through a comprehensive land use plan and related zoning that designates permitted and prohibited uses within town borders.¹ In asserting their constitutionally guaranteed and legislatively delegated authority, Respondents do not strive to regulate technical aspects of the oil and gas industry, which they freely acknowledge is the prerogative of the State.² R. 495–96. Respondents therefore can exercise their zoning power consistently with state regulation of industrial

¹ This Court repeatedly has acknowledged that “[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.” *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96 (2001); see *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 745 (1977) (characterizing zoning “as a vital tool for maintaining a civilized form of existence for the benefit and welfare of an entire community”) (internal quotation marks and citation omitted); *Thomas v. Town of Bedford*, 11 N.Y.2d 428, 433 (1962) (“In any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community.”).

² The trial court invalidated and severed subsection 2104(5) of the Zoning Ordinance, which purports to regulate the enforcement of permits rather than clarifying land use prohibitions, see R. 45–46, but neither party appealed that ruling, and it is not in issue here.

operations, activities, and processes—just as towns throughout New York exercise their zoning power consistently with state regulation of extractive mining under the Mined Land Reclamation Law (“MLRL”). Because there is no need to read the OGSML as an abridgement of authority conferred by the Statute of Local Governments and the Town Law, the trial court properly granted, and the Appellate Division unanimously affirmed, summary judgment in favor of Respondents on Appellant’s express and implied preemption claims.

Contrary to Appellant’s dire prediction, *see* App. Br. at 61, there is no evidence that reaffirming the decisions below will “wholly discourage, in fact, preclude, oil and gas development.” Even Appellant’s supporters admit that more than 40 towns have passed resolutions favoring shale gas development in New York. *See* Brief of Amici Curiae The Business Council of New York State, Inc., Clean Growth Now, National Association of Royalty Owners, NARO-NY and the Joint Landowners Coalition of New York, Inc. 26 (filed Oct. 17, 2012) (“Br. of Pro-Drilling Amici”), <http://www.jlcnny.org/site/attachments/article/1374/Brief%20BC%20CGN%20NARO%20JLC%20101712.pdf> (providing map). Moreover, the oil and gas industry has thrived under longstanding dual regimes in other states, including states that permit localities to enforce outright bans on drilling, such as

Oklahoma.³ Because Appellant thus lacks any basis in law or fact for its claim that local zoning is incompatible with state regulation of the oil and gas industry, this Court should affirm the Appellate Division decision in its entirety and hold that the OGSML does not preempt local zoning, either expressly or by implication.

COUNTERSTATEMENT OF THE FACTS

Since the late 1960s, land use in the Town of Dryden has been governed by a Comprehensive Plan (adopted in 1968 and amended in 2005) and a Zoning Ordinance (adopted in 1969 and amended from time to time) that never contemplated oil and gas development or related activities as permitted uses. R. 122, 474, 484–85. Indeed, the heavy industrialization associated with such uses is inconsistent with the core goal in the 2005 plan, which is to “[p]reserve the rural and small town character of the Town of Dryden, and the quality of life its residents enjoy, as the town continues to grow in the coming decades.” Town of Dryden Comprehensive Plan 32 (Dec. 8, 2005), *available at* <http://dryden.ny.us/Downloads/CompPlanFull.pdf>. When drillers nevertheless began to lease mineral rights for intensive shale gas development in the Town, R. 79, the citizens of

³ The City of Tulsa, Oklahoma—home state of Appellant’s predecessor in interest—prohibited drilling for more than a century until 2010, *see, e.g., Tulsa City Officials Urged to Put Possible Oil Drilling Info Online*, May 20, 2009, <http://www.mobilitytechzone.com/news/2009/05/20/4190333.htm> (noting that Tulsa first prohibited drilling in 1906), and now regulates the industry extensively, *see* Tulsa, Okla. Code of Ordinances tit. 42-A, <http://library.municode.com/index.aspx?clientId=14783>, under the authority of the Oklahoma Supreme Court, *see Vinson v. Medley*, 737 P.2d 932, 936 (Okla. 1987) (“A city is empowered to enact zoning laws to regulate the drilling of oil-and-gas wells with a view to safeguarding public welfare.”).

Dryden urged their Town Board to amend the Town’s Zoning Ordinance to clarify that the use of land for activities related to oil and gas exploration and extraction was not permitted within Town borders, R. 119–471, 473–74. On August 2, 2011, the bipartisan Town Board unanimously adopted the requested amendment, which clarified the existing Zoning Ordinance by explicitly describing oil and gas uses (which never were previously permitted) as Prohibited Uses. R. 44, 70–72, 111, 474–75.

On September 16, 2011, one of the drillers that had leased mineral rights in Dryden—Anschutz Exploration Corporation (“Anschutz”)—sued Respondents, alleging that the OGSML preempted the Zoning Ordinance. R. 63–109. The Supreme Court rejected that claim, R. 35–62, and Anschutz appealed, R. 24–25. Anschutz then assigned two leases and its claims in this litigation to Appellant for \$10.00 (ten dollars), and Appellant was substituted for Anschutz for purposes of the intermediate appeal. *See* App. Br. at 5 n. 2. Appellant now is liquidating its assets under Chapter 7 of the Bankruptcy Code and seeks to have the bankruptcy Trustee prosecute the appeal in this Court. *See* Appellant’s Mot. for Substitution of Party 1 (filed Nov. 6, 2013).

ARGUMENT

The question presented in this case is whether the Legislature clearly expressed an intention to revoke traditional local land use powers, when it authorized the State to regulate the oil and gas industries.⁴ Simply invoking the State’s undisputed right to restrict home rule, as Appellant does, *see* App. Br. at 30, fails to address the question whether the State exercised that right when enacting the OGSML. To answer that question, this Court must decide whether the OGSML evinces the “clear expression of intent to preempt” local land use authority that is required to limit constitutionally protected and legislatively delegated zoning powers. *See Gernatt Asphalt*, 87 N.Y.2d at 682 (concluding that “in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not be read as preempting local zoning authority”); *Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 71 N.Y.2d 91, 97 (1987) (noting that the intent to preempt must be “clearly evinced”). “[I]t is not enough that the State

⁴ New York’s Constitution and statutes long have recognized extensive home rule powers, including the traditional authority of municipalities to control the use of land within their borders. Article IX of the New York Constitution directs the Legislature to secure to every local government the power to adopt laws relating to the “government, protection, order, conduct, safety, health and well-being of persons or property” within the locality, as long as the State Legislature has not restricted adoption of such laws, and the local laws are not inconsistent with state constitutional provisions or any general law on the *same* subjects. N.Y. Const. art. IX § 2(c)(ii)(10). Pursuant to that constitutional mandate, the Legislature enacted a series of statutes establishing a wide range of local powers, including the right to protect their community’s physical and visual environment, *see* N.Y. Mun. Home Rule L. § 10(1)(ii)(a)(11) and (12), by exercising zoning and planning powers, *see* N.Y. Stat. Local Gov’ts § 10(1), (6), and (7); N.Y. Town L. § 261.

enact legislation dealing with a certain issue. There must rather be a clear expression of intent ‘to exclude the possibility of varying local legislation’” *Zagoreos v. Conklin*, 109 A.D.2d 281, 292 (2d Dep’t 1985) (citations omitted). Because the OGSML does not satisfy the “clear expression” requirement, Appellant’s preemption claims fail.

Both the Supreme Court and the Appellate Division understood that the OGSML could not be found to supersede Dryden’s Zoning Ordinance in the absence of a clear expression of legislative intent to preempt local land use control. *See* R. 16 (Appellate Division), R. 48 (Supreme Court). Both courts carefully examined the statute as a whole, in light of its history and purposes, and found the requisite expression lacking. *See* R. 12–16, 48–53. As the Appellate Division stated:

We find nothing in the language, statutory scheme or legislative history of the statute indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions. In the absence of a clear expression of legislative intent to preempt local control over land use, we decline to give the statute such a construction

R. 16; *see* R. 48 (setting forth the Supreme Court’s opinion that “there remains an absence from the OGSML—as . . . amended in 1981 to add the supersedure clause—of a clear expression of legislative intent to preempt local zoning control over land use concerning oil and gas production”), 53 (“That the OGSML does not

contain a clear expression of legislative intent to preempt local zoning authority . . . is further apparent when it is compared to state statutes that indisputably preempt the local zoning power.”) (internal citations omitted). For the reasons set forth below, this Court also should hold that, because the OGSML lacks a clear expression of intent to preempt local land use regulation, the statute does not divest municipalities of their power to enforce zoning restrictions.

POINT I

THE OGSML DOES NOT EXPRESSLY PREEMPT THE TOWN OF DRYDEN’S ZONING ORDINANCE.

Although this case presents the Court of Appeals’ first opportunity to determine whether the OGSML’s regulation of the oil and gas industry expressly preempts local regulation of land use through zoning, the Court need not look far for guidance in approaching that question. On three prior occasions, this Court has addressed express preemption claims with respect to a closely analogous statute—the MLRL—and on each occasion, the Court has declined to find that state regulation of the mining industry superseded local land use regulation. The Court first ruled that the 1974 enactment of the MLRL did not supersede local zoning, *see Frew Run Gravel Products v. Town of Carroll*, 71 N.Y.2d 126, 134 (1987), and, after the Legislature codified that ruling in a 1991 amendment of the statute, the Court twice rejected preemption claims, *see Gernatt*, 87 N.Y.2d at 690 (upholding local power, even though the challenged ordinance altogether

eliminated mining as a permitted use); *Hunt Bros. v. Glennon*, 81 N.Y.2d 906, 909 (1993) (upholding land use controls by a park agency that operated like a zoning body). In this case of first impression, the Court’s decisions in *Frew Run*, *Hunt Bros.*, and *Gernatt* regarding the scope of the MLRL’s preemption clause offer the most persuasive authority available for interpretation of the OGSML’s parallel and similarly worded provision.⁵ As Respondents show below, the reasoning of those precedents fatally undermines Appellant’s express preemption claim.

A. This Court Consistently Has Upheld Local Land Use Regulation Against Express Preemption Claims Under the MLRL.

The leading case on the express preemption provision of the MLRL is *Frew Run*. In that case, a local landowner obtained a state permit to conduct a sand and gravel mining operation in a district of the Town of Carroll zoned exclusively for agricultural and residential uses. When the Town attempted to enforce its zoning ordinance, the landowner sued, citing the supersession provision of the MLRL, which provided:

⁵ Appellant correctly perceives that *Frew Run* and its progeny pose a serious obstacle to an express preemption claim under the OGSML. To counteract the weight of that authority, recognized by every New York court to consider such a claim, Appellant devotes an entire point to its contention that “MLRL Precedent Is Irrelevant to the OGSML Express Preemption Analysis.” App. Br. at 47. In cases of first impression, however, this Court commonly looks for similar cases from which to draw implications for the new set of facts, *see, e.g., Georgitsi Realty, LLC v. Penn-Star Ins. Co.*, 21 N.Y.3d 606, 609 (2013) (consulting two cases for guidance regarding the meaning of a term that the Court had not previously interpreted), and Appellant identifies no cases more closely analogous to this one than those decided under the MLRL. Moreover, by repeatedly citing *Frew Run* when convenient to support its own argument, *see* App. Br. at 53, 56, Appellant recognizes the relevance of the case.

For the purposes stated herein, this article shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

R. 635–36.⁶ Although the statute plainly stated that the MLRL shall supersede “all” other local laws relating to the extractive mining industry, except those imposing heightened reclamation regulations, this Court upheld the zoning restriction. *See Frew Run*, 71 N.Y.2d at 130–34.

To reject the preemption claim, this Court had only to look “to the plain meaning of the phrase ‘relating to the extractive mining industry’ as one part of the entire Mined Land Reclamation Law, to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.”

Id. at 131 (citations omitted). Examining the plain meaning of that phrase, the Court explained:

[W]e cannot interpret the phrase “local laws relating to the extractive mining industry” as including the Town of Carroll Zoning Ordinance. The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose The purpose of a municipal zoning ordinance in dividing a governmental

⁶ Pages 635 through 647 of the Record on Appeal set forth the original MLRL, N.Y. L. 1974, ch. 1043. The first two pages of Chapter 1043 (pages 2666 and 2667) are reproduced out of order, appearing respectively as R. 636 and R. 635.

area into districts and establishing uses to be permitted within the districts is to regulate land use generally.

Id. Although the Town’s land use regulation “inevitably” affected the sand and gravel mining operation, the Court found that the “incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the ‘extractive mining industry’ which the Legislature could have envisioned as being within the prohibition of the statute” *Id.* (citations omitted); *see DJL Rest. Corp.*, 96 N.Y.2d at 97 (“Local laws of general application—which are aimed at legitimate concerns of a local government—will not be preempted if their enforcement only incidentally infringes on a preempted field”) (citations omitted).

That the plain meaning of the supersession clause was consistent with the purposes of the MLRL, the *Frew Run* Court continued, was evident from the legislative history and the statute as a whole. The twin purposes of the statute were to foster mining by eliminating a confusing and costly patchwork of local ordinances regulating extractive operations and to protect the environment by establishing basic land reclamation standards. Rejecting the idea that the statute was meant to preempt local land use controls, the Court commented that “nothing suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands.” *Frew Run*, 71 N.Y.2d at 133. The Court therefore refused “drastically [to]

curtail the town’s power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments (L 1964, ch 205) and in Town Law § 261,” as the landowner had urged. *Id.* The Court concluded:

By simply reading ECL 23-2703 (2) in accordance with what appears to be its plain meaning—i.e., superseding any local legislation which purports to control or regulate extractive mining operations excepting local legislation prescribing stricter standards for land reclamation—the statutes may be harmonized, thus avoiding any abridgement of the town’s powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10 (6) and Town Law § 261. This is the construction we adopt.

Id. at 134 (citation omitted). In 1991, the Legislature confirmed and codified the *Frew Run* Court’s interpretation of the supersession clause in the MLRL, when it amended ECL § 23-2703(2) expressly to permit local zoning.

This Court extended its holding in *Frew Run* when it decided *Hunt Bros.* in 1993. *See* 81 N.Y.2d at 909. In *Hunt Bros.*, a sand and gravel mine operator challenged the power of the Adirondack Park Agency (“APA”) to require an APA permit in addition to the state permit that the operator had obtained, alleging that the MLRL preempted the agency’s rules. The Court rejected the claim, stating:

In *Matter of Frew Run Gravel Prods. v. Town of Carroll* (71 NY2d 126, 131), we held that this supersession clause does not preclude local zoning ordinances that are addressed to subject matters other than extractive mining and that affect the extractive mining industry only in incidental ways. Such local laws do not “frustrate the statutory purpose of encouraging mining through

standardization of regulations pertaining to mining operations” (*id.*, at 133). Thus, only those laws that deal “with the actual operation and process of mining” are superseded (*id.*, at 133).

Id. Finding that the APA—like “a local planning board and a local zoning entity”—was charged broadly with regulating development in the Adirondack Park region, as opposed to regulating matters “relating to the extractive mining industry,” the Court held that the MLRL did not deprive the agency of all jurisdiction to regulate the mine operator. *Hunt Bros.*, 81 N.Y.2d at 909 (citing *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 491 (1977)).

In its 1996 decision in *Gernatt*, this Court endorsed—for a third time—the distinction crafted in *Frew Run* between “zoning ordinances and local ordinances that directly regulate mining activities.” 87 N.Y.2d at 681. The Court explained:

Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities

Id. at 681–82 (citations omitted). Applying that distinction, the *Gernatt* Court held that the amended MLRL, which allowed localities to “determine permissible uses *in zoning districts*,” ECL § 23-2703(2) (emphasis added), did not preempt zoning amendments completely banning mining in the Town of Sardinia, even though

they “eliminated mining as a permitted use in *all* zoning districts,” *Gernatt*, 87 N.Y.2d at 681 (emphasis in original).

The *Gernatt* Court explicitly rejected the argument that a ban necessarily conflicts with the statutory purpose to foster mining. *See id.* at 683. In no uncertain terms, the Court stated: “At bottom, petitioner’s argument is that if the land within the municipality contains extractable minerals, the statute obliges the municipality to permit them to be mined somewhere within the municipality. Nothing in the MLRL imposes that obligation on municipalities” *Id.* As the courts below correctly recognized in upholding Dryden’s Zoning Ordinance, and as Respondents demonstrate below, nothing in the OGSML imposes an obligation on local governments to permit the mining of oil and gas within municipal borders.

B. The Reasoning of *Frew Run*, *Hunt Bros.*, and *Gernatt* Applies Squarely to the Preemption Clause of the OGSML.

As this Court stated in *Frew Run*, Appellant’s express preemption claim “turns on the proper construction of [the OGSML’s supersession clause],” as reflected in “the plain meaning of the phrase ‘relating to the [regulation of the oil, gas and solution] mining industry’ . . . as one part of the entire [OGSML], to the relevant legislative history, and to the underlying purposes of the supersession clause as part of the statutory scheme.” 71 N.Y.2d at 131 (interpreting the supersession clause of the MLRL). An examination of those features of the OGSML confirms that its supersession clause does not preclude local zoning

authority any more than the parallel provision did in the MLRL. Consequently, there is no reason for this Court to depart from its persuasive analysis in *Frew Run* and its progeny.

The similarities between the supersession clauses of the MLRL and the OGSML are striking on their face. Both provisions consist of a general rule that describes the subject matter of the preempted local regulation, followed by exceptions that identify elements of the otherwise preempted subject matter that remain under local control. The OGSML provides:

The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.

ECL § 23-0303(2). The general rule of the MLRL was broader than that of the OGSML, preempting “all other state and local laws relating to the extractive mining industry” in any way—not just those relating to the “regulation” of the industry—yet this Court found no indication of any intent (much less a clear expression of intent) to preempt local land use laws. Likewise, the narrower prohibition of the OGSML’s general rule does not preclude local zoning.

The second clause of the OGSML’s supersession provision lists exceptions from the scope of the general rule, *see* ECL § 23-0303(2) (excluding regulation of local roads and real property taxes), as did the second clause of the MLRL

interpreted in *Frew Run*, see R. 637 (excluding heightened reclamation standards and requirements). According to Appellant, the OGSML’s listing of specific exceptions related to industrial activities implies that all other regulations are prohibited, including regulations relating to the different subject of land use.⁷ See App. Br. at 33–34. The *Frew Run* Court could not have reached its holding had it adopted Appellant’s reasoning.

Instead, the Court concluded that the “incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment . . . which the Legislature could have envisioned as being within the prohibition of the statute”⁸ *Frew Run*, 71 N.Y.2d at 131; see also *Gernatt*, 87 N.Y.2d at 681 (“[Z]oning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted”). By reading the general rule of the supersession provision to cover only extractive mining activities

⁷ Under Appellant’s argument, mining operators would be allowed to strew trash all over their property or ignore stormwater pollution resulting from land clearance, notwithstanding local laws prohibiting that conduct, see Town of Dryden Zoning Ordinance § 901, available at http://dryden.ny.us/Planning-Department/ZoningLaw/Zoning_Ordinance_Amendments_adopted_7_19_2012.pdf; Town of Dryden Stormwater Management, Erosion and Sediment Control Law, available at http://www.dryden.ny.us/Stormwater_Forms/Ground_Disturbance_Packet/Final_SW_Const_Law.pdf, because neither of those subjects is specifically listed as an exception from the general preemption rule.

⁸ The Court reached this conclusion even though the MLRL’s exceptions clause explicitly stated that the only type of zoning ordinance outside the scope of the general rule was one that imposed stricter land reclamation standards or requirements. The plain language of the OGSML—which is silent on zoning in both the general rule and the exceptions clause—thus provides all the more reason not to interpret that statute as preempting local land use regulation.

and operations, this Court was able to harmonize the MLRL with state statutes conferring local zoning powers and to give full effect to both. *See Frew Run*, 71 N.Y.2d at 134. Likewise, the OGSML can be harmonized with state statutes conferring local zoning powers, giving effect to both, by reading the general rule of its supersession provision to cover only oil and gas mining activities and operations. This Court thus should interpret the language of the OGSML not to curtail Dryden’s power to regulate land use under the Statute of Local Governments and the Town Law. *See Consol. Edison Co. of N.Y. v. Dep’t of Env’tl. Conserv.*, 71 N.Y.2d 186, 195 (1988) (“If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted.”) (internal quotation marks and citations omitted); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective.”).

The legislative history of the OGSML supports the lower courts’ interpretation of the plain language of the supersession clause. That history may be found in the bill jacket for Senate Bill 6455-B, which amended the OGSML and was enacted into law as Chapter 846 of the Laws of 1981 (the “1981 Amendments”). R. 488–521. This Court readily can determine that nothing in the bill jacket so much as mentions zoning, planning, land use regulation, or other

quintessentially local functions protected by constitutional and statutory home rule provisions. The bill jacket's lone reference to supersession does no more than restate the provision's general rule, *see* R. 499 ("The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries."), which is consistent with the decisions below that the OGSML preempts regulation of industrial operations, while leaving local control of land use intact.

The rest of the bill jacket reveals the purposes of the 1981 Amendments. As the Governor recognized in his Memorandum approving Senate Bill 6455-B, before the statute's amendment, the Department of Environmental Conservation ("DEC") had been "unable, with existing funding and powers, to fulfill its regulatory responsibilities under the Environmental Conservation Law." R. 497. As the industry expanded, that regulatory vacuum created acute problems for municipalities, which faced serious impacts from industrial activity but received none of the protection promised under state law. Having no other choice, local governments had filled the void by adopting their own rules for oil and gas operations, using their own staff to administer the programs, and exacting a

variety of payments from industry to finance local expenses.⁹ The 1981 Amendments sought to change that dynamic.

Specifically, the 1981 Amendments revised “the existing law to increase funding, provide an updated regulatory program, and grant the Department of Environmental Conservation additional enforcement powers” R. 497–98. As Gubernatorial advisor Francis J. Murray, Jr., stated:

This bill has three main purposes. First, it imposes fees on the oil, gas and solution mining industries to finance a substantial portion of DEC’s regulatory program in this area. Secondly, it revises and updates many of DEC’s present regulations governing the leasing of lands and the operations of the oil, gas and solution mining industries. Thirdly, it codifies specific offenses under the oil, gas and solution mining law and authorizes the imposition of administrative, civil and criminal sanctions.

R. 493; *see also* R. 491 (noting the sponsors’ view that the bill’s purposes would be served in part by “establishing new fees to fund additional regulatory personnel”). The 1981 Amendments thus responded to “the recent growth of

⁹ Appellant’s supporters admitted as much in the court below, stating:

Three decades ago, New York’s scheme for regulating the oil and gas industry degenerated into a chaotic and tangled mess. Due to a lack of state control of the oil and gas industry, municipalities were free to enact their own ordinances and regulations to oil and gas drilling and development.

New York’s patchwork of oil and gas regulations created a litany of problems: untrained staff entered well sites, creating safety concerns; local municipalities absorbed significant and unsustainable costs to hire professional petroleum engineering staff; . . . and exorbitant local taxation.

See Br. of Pro-Drilling Amici at 22.

drilling in the State,” which had exceeded DEC’s regulatory capacity, R. 491, but nothing about the new funding mechanisms, new operational regulations, or new enforcement provisions required the preemption of local zoning authority.

In support of its contrary argument, Appellant cites a legislative memorandum related to a *different* bill, Assembly Bill 6928. *See* App. Br. at 17 (citing the record in *Cooperstown Holstein Corp. v. Town of Middlefield* (“CHC R.”) at 949, 995). That bill also proposed amendments to the OGSML, but it was not enacted into law. Even if the legislative history of a bill that never passed were relevant to the 1981 Amendments, it would not support Appellant’s preemption claim.¹⁰

The cited memorandum confirms that Assembly Bill 6928 also was responding principally to deficiencies in DEC funding, not the scope of local zoning power. *See* CHC R. 992 (describing the proposed law as “AN ACT [to

¹⁰ Nor can Appellant find support in affirmations of its former counsel, Yvonne Hennessey, *see* App. Br. 6–7, 11–13, 15, whose opinions have no bearing on legislative intent. Likewise, Appellant cannot rely on the legally inadmissible Affidavit of Gregory H. Sovas, with attached exhibit, *see* App. Br. 7, 16–17, 46, 54 (citing R. 100–02), both of which the trial court declined to consider on evidentiary grounds, R. 51 n.12. Mr. Sovas is an industry consultant, who purports to describe what a now-deceased “senator and advocate for the oil and gas industry” said on a telephone call 30 years ago. R. 102. Such unadorned hearsay is not competent evidence, *Brocco v. Mileo*, 170 A.D.2d 732, 733 (3d Dep’t 1991), and post-enactment statements, even of a sponsor, are irrelevant to the question of legislative intent, *see Civil Serv. Emps. Ass’n v. Cnty. of Oneida*, 78 A.D.2d 1004, 1005 (4th Dep’t 1980). As the trial court noted, the affidavit is not part of the legislative history and its contents are irrelevant to the question of “pure statutory interpretation” presented in this case. R. 51 n.12. The affidavit was included in the intermediate appellate record only because Respondents expected Appellant to contest the evidentiary ruling. Because Appellant did not do so, it waived its appeal of that ruling, and this Court should disregard the affidavit and exhibit.

amend state law] in relation to the creation of a natural resources *fund*; . . . in relation to a *fee* to be paid for producing oil and gas, . . . and making an *appropriation* to [DEC] for carrying out certain provisions of the act”) (emphasis added). Those deficiencies left the agency without the “technical expertise required to administer and enforce” the OGSML and prompted local governments to fill the vacuum with “diverse attempts to regulate the oil, gas and solution mining activities.” *Id.* at 995. The bill proposed to address the “concerns of local government” about costs they absorbed in the absence of financing for DEC, by proposing new funding mechanisms that would allow the State to fulfill its responsibilities for oversight of the “oil, gas and solution mining regulatory program.” *Id.* To ensure a reliable source of revenue to cover residual costs that the industry imposed on municipalities, while avoiding duplicative state and local fees on drilling operations, “local taxing authority remain[ed] unaffected,” *id.* at 993. Both the bill and supporting memorandum were completely silent on the continued exercise of traditional zoning powers, however, and thus add no support for Appellant’s claim that the 1981 Amendments were intended to preempt local land use control.

Until this case, only one court—a trial court—had discussed the import of the 1981 Amendments. *See Envirogas v. Town of Kiantone*, 112 Misc. 2d 432 (Sup. Ct. Erie County 1982), *aff’d mem.*, 89 A.D.2d 1056 (4th Dep’t 1982). The

provisions challenged in *Envirogas* were financial requirements imposed on “gas and oil well drilling operations,” including both a permit fee and a compliance bond. 112 Misc. 2d at 432, 434. In evaluating the plaintiff’s claim that the OGSML preempted the local law, the court reasoned that “where a State law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating *on the same subject matter . . .*” *Id.* at 433 (emphasis added). The court then noted that the newly amended OGSML covered the same subject matter as the local law—funding to cover costs imposed by the oil and gas industry—addressing the Town’s concerns by enabling municipalities to seek compensation for damages and authorizing DEC to impose financial security requirements. *Id.* at 434–35. On that basis, the court concluded: “Since the State Legislature clearly intended Article 23 of the ECL to supersede and preclude the enforcement of all local ordinances *in the area of oil and gas regulation*, [r]espondents’ actions are . . . contrary to law.”¹¹ *Id.* at 435 (emphasis added).

The decision in *Envirogas*, like those in *Frew Run*, *Hunt Bros.*, and *Gernatt*, thus recognized that local legislation “in the area of oil and gas regulation” is preempted by state law “on the same subject matter.” *Id.* at 433, 435. The

¹¹ Indeed, the OGSML contains a second supersession provision that applies specifically to fees. See ECL § 23-1901(2) (“This title shall supersede all other laws enacted by local governments or agencies concerning the imposition of a fee relating to circumstances described in this title.”). Small wonder that the *Envirogas* court found the Town of Kiantone’s fee preempted.

Envirogas court was not asked to adjudicate a state preemption claim against a local law *on a different subject matter*—namely, land use, generally. *Envirogas* thus should not be read to bar or abridge zoning powers legislatively delegated to towns.

The foregoing analysis of the text and legislative history of the OGSML is consistent with its underlying purposes and policy, which can be fulfilled even if Dryden’s Zoning Ordinance is upheld, just as local land use regulation could be enforced without undermining the purposes and policy of the MLRL. The declaration of policy in the MLRL when *Frew Run* was decided provided in pertinent part:

The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining and minerals industry The legislature further declares it to be the policy of this state to provide for . . . reclamation of affected lands; to encourage productive use including but not restricted to: . . . the establishment of recreational, home, commercial, and industrial sites

R. 635. The MLRL thus recognized the role of the State not only in fostering mining but also in providing for reclamation and encouraging productive “recreational, home, commercial, and industrial” land uses ordinarily addressed by localities. *Id.* Notwithstanding the statutory language suggesting that the *State* would address land use concerns, the *Frew Run* Court held that the MLRL’s supersession clause should not be read to “preclude the town board from deciding

whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district.” 71 N.Y.2d at 133. The *Gernatt* Court came to the same conclusion, even with respect to a ban on mining. *See* 87 N.Y.2d at 681–83.

The OGSML’s declaration of policy provides as follows:

It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected

ECL § 23-0301. The OGSML thus seeks to “regulate” (but not to foster) the industry, and the statute identifies no role for the State in encouraging productive land uses.¹² Reconciling the purposes of the OGSML with local land use

¹² For a detailed discussion of the OGSML’s subsidiary objectives (preventing waste, providing for a greater ultimate recovery, and protecting the correlative rights of owners and the rights of landowners and the general public), see Point II(A), *infra*. Appellant suggests that the “unique” statutory objectives and “terms of art” in the OGSML distinguish its statutory scheme from “any other, including the MLRL.” App. Br. at 7. Of course, every statute has “unique” objectives and defines terms specific to the covered subject, because the Legislature does not waste its time passing laws that duplicate prior enactments. The differences in statutory schemes do not preclude courts interpreting one law from relying on cases interpreting another. Indeed, Appellant urges this Court to do exactly that in citing *Ames v. Smoot*, 98 A.D.2d 216 (2d Dep’t 1983) (relating to pesticide application), *Lansdown Entertainment Corp. v. NYC Department of Consumer Affairs*, 74 N.Y.2d 761 (1989) (relating to alcohol consumption), and *Anonymous v. City of Rochester*, 13 N.Y.3d 35 (2009) (relating to curfews), *see* App. Br. at 42, 62, none of which involved either mining or a zoning ordinance, unlike this Court’s precedents under the MLRL.

regulation therefore is even easier than it was when the *Frew Run* Court interpreted the MLRL.

The Town of Dryden is not attempting “to regulate the development . . . of oil and gas” any more than the Towns of Sardinia or Carroll or the APA were attempting to regulate gravel extraction. The towns and the APA left regulation of extractive activities, processes, and operations to the State, while exercising State-delegated powers to determine permitted land uses within their borders. *See Gernatt*, 87 N.Y.2d at 682; *Hunt Bros.*, 81 N.Y.2d at 909 (acknowledging that “only those laws that deal with the actual operation and process of mining are superseded”) (internal quotation marks and citation omitted); *Frew Run*, 71 N.Y.2d at 133. The Town of Dryden similarly has avoided regulation of oil and gas activities, processes, or operations and has restricted local regulation to land use and zoning, consistent with the purposes of both the OGSML and the Zoning Ordinance. Reading the supersession clause of the OGSML in light of its language, history, and purposes, this Court therefore should find that local zoning is not the type of regulation that the Legislature intended to preempt.

C. Appellant Fails to Distinguish this Court’s Precedents.

Appellant attempts to avoid application of *Frew Run* and its progeny by offering tortured distinctions between the language, history, purposes, and regulatory scheme of the MLRL and those of the OGSML. For good reason, the

courts below were “unable to discern any meaningful difference” between the two statutes. R. 59; *see* R. 16 n. 8. This Court, too, should reject Appellant’s attempt to exalt linguistic form over substance, to rewrite the legislative history and purposes, and to ascribe doctrinal significance to geological features of minerals.

Appellant distorts the plain meaning of the MLRL in arguing that it “applied only to ‘local laws’ and, most significantly, explicitly *excepted* from supersession ‘local zoning ordinances,’ thus actually inviting local zoning.” App. Br. at 48.

The supersession clause of the MLRL at issue in *Frew Run* provided:

[T]his article shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this article shall be construed to prevent any local government from enacting local zoning ordinances or *other* local laws which impose stricter mined land reclamation standards or requirements than those found herein.

R. 635, 637 (emphasis added). The express terms of this clause bar local regulation of the extractive mining industry, except with respect to “zoning ordinances or *other* local laws” imposing heightened reclamation requirements.

The Legislature’s use of the term “other” signaled that it regarded zoning ordinances as a species of the more general category “local laws.” To parse the clause as Appellant does—“inviting” adoption of any and all zoning ordinances, while superseding only local laws (as if ordinances and local laws were wholly

distinct instead of overlapping concepts), *see* App. Br. 48–49—impermissibly reads the word “other” out of the statute.¹³

The MLRL’s supersession clause therefore must be understood as this Court construed it, as preempting all local laws related to extractive mining, except local laws (including zoning ordinances) that impose stricter land reclamation requirements than those in the MLRL. *See Frew Run*, 71 N.Y.2d at 132–33 (“[T]he Legislature intended in ECL 23-2703(2) to prohibit any local regulation pertaining to actual mining activities, but not to preclude more stringent local laws pertaining to reclamation.”).¹⁴ The MLRL never gave localities *carte blanche* to pass any and all zoning ordinances (even those regulating actual mining activities) and cannot be distinguished from the OGSML on that basis.¹⁵ The textual analysis in the *Frew Run* line of precedents applies squarely to the OGSML because, like

¹³ As Appellant recognizes, the Court may not adopt an interpretation of the statute that renders its language mere surplusage. *See* App. Br. at 37 (citing *Criscione v. City of New York*, 97 N.Y.2d 152, 157 (2001) (“We have recognized that meaning and effect should be given to every word of a statute.”) (internal quotation marks and citation omitted); *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001) (same)).

¹⁴ It was the clarity of the intent to allow stricter reclamation laws that prompted stakeholder opposition to the MLRL, as Appellant notes. *See* App. Br. at 54. There was no opposition to the MLRL on the grounds that it preserved local power to regulate land use, just as there was no opposition to the OGSML on that ground. The absence of such opposition is not evidence that either statute preempted zoning, and neither statute does.

¹⁵ Nor is it true that the MLRL “affirmatively recogniz[ed] local zoning authority to determine permissible land uses” in zoning districts, as Appellant claims. App. Br. at 56. The MLRL did not include the language alluded to by Appellant at the time that *Frew Run* was decided. That language was added when the Legislature codified the decision in *Frew Run*, making express what this Court found implicit in the original statutory terms—that supersession of *all* local laws relating to the extractive mining industry did *not* preempt local zoning. Appellant’s interpretation of the MLRL thus distorts not only its language but also its history.

the MLRL, the OGSML broadly preempts all local regulation of industrial activities (whether through zoning ordinance or other local law), with narrow express exceptions.

The core distinction for purposes of this case is not Appellant’s contrived division between zoning ordinances and local laws but the difference between regulation of extractive industry operations (whether surface mining or oil and gas development) and regulation of land use.¹⁶ *See Frew Run*, 71 N.Y.2d. at 131 (“The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose”); *accord Gernatt*, 87 N.Y.2d at 682 (“[T]he distinction is between ordinances that regulate property uses and ordinances that regulate mining activities”); *Hunt Bros.*, 81 N.Y.2d at 909 (“[W]e held that this supersession clause does not preclude local zoning ordinances that are addressed to subject matters other than extractive mining”). Both the MLRL and the OGSML regulate technical aspects of the affected industry in considerable (although necessarily different) detail; neither regulates land use generally. Thus, as long as localities do not attempt to regulate oil and gas operations (other than in the two excepted areas of local roads and real property

¹⁶ Which dictionary one chooses to consult for the meaning of “regulation,” *see* App. Br. at 22–23 (complaining about the Appellate Division’s use of the Merriam-Webster On-Line Dictionary), has no effect on the fundamental difference between regulation of the industry and regulation of land use.

taxes), they are free to implement their comprehensive land use plans, including prohibitions on heavy industrial uses.

The OGSML’s two exceptions from state preemption of industrial operations—for local government jurisdiction over local roads and real property taxes—are consistent with this reading.¹⁷ Prior to the 1981 Amendments, DEC was inadequately funded to oversee technical oil and gas operations, and individual towns that were forced to fill the regulatory void covered their costs by imposing local fees and financial assurance requirements on industry operations within their borders. *See supra* Point I(B) (describing legislative history). When the Legislature finally funded DEC to do its job, the amended statute withdrew from localities the authority to demand fees and bonds but protected their ability to recover costs imposed by oil and gas operations by preserving their right to tax industry under the Real Property Tax Law.

Similarly, the Legislature preserved local jurisdiction over local roads, even though municipal limitations on street excavations and the size and weight of vehicles directly regulate oil and gas operations, which require numerous vehicular trips and disruptive construction of new access roads and pipelines. *See* DEC,

¹⁷ Appellant makes much of the fact that the OGSML uses the term “jurisdiction” when identifying the scope of power over industry operations reserved to localities, whereas the MLRL specifies the scope of local jurisdiction without using that term. *See* App. Br. at 48–49. The distinction is one without a difference. The supersession provisions of both statutes have exceptions clauses that carve out an area of permitted regulation of the affected industry; neither statute precludes local power over zoning.

Revised Draft Supplemental Generic Env'tl. Impact Statement on the Oil, Gas and Solution Mining Regulatory Program 6-302 (Table 6.60) (2011) (estimating the use of nearly 1,800 heavy truck trips per horizontal shale gas well), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6b0911.pdf.

Allowing municipalities to regulate industry operations on local roads saved municipalities substantial costs and shielded the Legislature from charges that it was conferring special treatment on oil and gas vehicles not afforded to other businesses—an objection that had been raised against tax provisions in the 1981 Amendments. R. 496, 501. The OGSML's supersession clause thus allows municipalities to regulate oil and gas activities in two defined areas, and no others, but there is nothing in the text of the OGSML, any more than there was in the MLRL, to suggest that the Legislature intended to preempt local regulation of land use.

Appellant's effort to avoid application of the *Frew Run* line of precedents by distinguishing the legislative history of the MLRL and OGSML is no more persuasive than its effort to distinguish the language and purposes of the two statutes. Appellant claims that "[t]he supersedure language of the OGSML was added, by amendment, . . . in response to almost two decades of parochial local regulation relating to oil and gas development," whereas "the MLRL's supersedure

provision was included in the initial enactment.” App. Br. at 54. The *Frew Run* Court expressly recognized, however, that:

the Mined Land Reclamation Law was enacted . . . to eliminate “[r]egulation on a town by town basis [which] creates confusion for industry and results in additional and unfair costs to the consumer” (Mem of Department of Environmental Conservation in support of Assembly Bill 10463-A, May 31, 1974, Governor’s Bill Jacket, L 1974, ch 1043). Thus, one of the statute’s aims is to encourage the mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing “patchwork system of [local] ordinances” (*id.*).

71 N.Y.2d at 132. Just as the MLRL could serve its standardizing function without abridging local land use powers, so can the OGSML. Appellant offers no explanation why it should matter if standardizing provisions are enacted as an initial matter or in response to events intervening after a statute’s original passage.

Appellant also fails to explain what difference it makes that the 1981 Amendments followed the energy crisis of the 1970s. *See* App. Br. at 54. The original MLRL stated clearly that one of its purposes was “to foster and encourage the development of an economically sound and stable mining and minerals industry,” R. 635, and it achieved that goal by reasserting the State’s role as the exclusive regulator of that industry (except with respect to land reclamation standards and requirements). Even if “there has never been a sand and gravel crisis in New York State,” App. Br. at 54, there plainly were circumstances

“necessitating the elimination of local control over solid minerals mining,” *see id.*, or the MLRL and its supersession clause never would have been enacted.

Appellant cannot avoid application of the precedents interpreting the MLRL by invoking allegedly “significant distinctions between the two statutes relative to what each actually regulates.” App. Br. at 50. Appellant argues that “the OGSML substantively regulates the ‘where’ of drilling and, therefore, localities may not.” *Id.* According to Appellant, the MLRL does not regulate where mining may occur, so localities may determine the locations of mines. *Id.* Appellant’s argument fails for two reasons.

First, the OGSML does regulate unit size, placement of wellheads, and other aspects of oil and gas well location, but zoning provisions do not purport to address those technical elements of industrial operations. In Appellant’s lingo, *see App. Br.* at 8, 11, both regulatory regimes address the “where” of drilling, but they do so in different and mutually consistent ways. As the Appellate Division recognized:

[T]he well-spacing provisions of the OGSML concern technical, operational aspects of drilling and are separate and distinct from a municipality’s zoning authority, such that the two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste.

R. 19; *see also* R. 52 (noting that “[n]one of the provisions of the OGSML address[es] traditional land use concerns”). As long as localities do not attempt to

regulate the technical, operational aspects of drilling, their land use measures are not preempted by the OGSML.¹⁸

Second, the MLRL also addresses, and always has addressed, aspects of mine location. From the beginning, permits required under ECL § 23-2711 could not be obtained unless DEC approved a “mined land-use plan,” with a map of the affected land, “an outline of the area of the minerals to be removed,” and a description of the “location” of haulageways. R. 640–43. Permits could be denied if the mine location, or the location of other mine-related facilities, failed to meet statutory requirements.¹⁹ Nevertheless, *Frew Run* held that a mine operator who obtained a state permit could be precluded from using land set off limits to mining by local zoning, because the MLRL’s supersession clause did not preempt land use regulation. The same reasoning applies to the OGSML.

Finally, the “physical differences between the substances regulated by the MLRL and the OGSML,” App. Br. at 55, provide no support for Appellant’s

¹⁸ Were Respondents to adopt technical standards different from those promulgated under the OGSML, such as a provision changing the maximum size of spacing units or extending the minimum depth of primary well casing below the water table, the local requirement would be preempted, even if it were styled as an amendment to the Zoning Ordinance. *Cf. Hawkins v. Town of Preble*, 145 A.D.2d 775, 776 (3d Dep’t 1988) (finding preemption because a bar on mining below the water table is “an express limitation of the mining process”). Dryden’s Zoning Ordinance is, by contrast, a classic example of land use regulation not addressed in the OGSML.

¹⁹ Conversely, the MLRL provided that a permit “shall” be issued following approval of the application. R. 641. Appellant thus cannot distinguish OGSML from the MLRL by pointing to the provision of the OGSML stating that DEC “shall” issue a permit to drill if certain requirements are met. *See* App. Br. at 52.

preemption claim. Contrary to Appellant's suggestion, *see* App. Br. at 42–43, 55–56, both deposits of the solid minerals mined pursuant to the MLRL and reserves of oil and gas developed pursuant to the OGSML may cross the borders of municipalities (or municipal zoning districts), one of which prohibits industrial uses. In neither case would the relevant industry be able to use the land surface for extraction of the resource in the prohibited zone. This Court nevertheless held that local land use control was not preempted by the MLRL. Similarly, nothing about the geology of oil and gas requires preemption of local zoning by the OGSML.

D. The Legislature's Clear Expressions of Intent to Preempt Local Land Use Regulation in Other Contexts Confirm That the OGSML Does Not Preempt Dryden's Zoning Ordinance.

The OGSML contrasts starkly with other statutes clearly evincing a legislative intent to preempt local law. Some of those statutes contain language unmistakably precluding enforcement of local zoning or land use laws. Even those lacking unambiguous supersession clauses do not withdraw local power to regulate land use without ensuring that there are alternative mechanisms for consideration of the interests traditionally protected by zoning. The absence of the requisite provisions or procedures from the OGSML belies any legislative intent to have oil and gas regulation supersede local land use law.

The statute governing siting of industrial hazardous waste facilities is a good example of a law expressly preempting local zoning. In relevant part, it provides:

Notwithstanding any other provision of law, no municipality may, except as expressly authorized by this article . . . require any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a facility with respect to which a certificate hereunder has been granted

ECL § 27-1107 (emphasis added). Similarly, state law expressly preempts local power to exclude group homes from residential districts zoned for single families, by providing that “a community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances.” N.Y. Mental Hyg. L. § 41.34(f); *see Inc. Vill. of Nyack v. Daytop Vill.*, 78 N.Y.2d 500, 506–07 (1991) (contrasting Section 41.34 of the Mental Hygiene Law, which expressly preempts local zoning authority, with Section 19.07, which does not).

The Legislature does not lightly curtail longstanding home rule powers to regulate land use. When it does so, it creates alternative mechanisms to ensure State consideration of local interests. For example, in laws governing the siting of major electrical generating facilities, the Legislature has required that a copy of the application be filed with the municipality in which the facility will be located; has secured direct protection for local communities by requiring measures guaranteeing their safety and security, as well as an environmental justice analysis; and has provided for local participation in the regulatory process. *See Pub. Serv.*

L. §§ 164(1)(e), (f), (h), (i), (2)(a); 166(j)–(n); *see also* ECL §§ 27-1105, 27-1113 (providing similar protections when siting hazardous waste facilities); *see also* *Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1 (1973) (interpreting Urban Development Corporation Act, which required either compliance with zoning or extensive municipal participation to address local concerns).²⁰ Because the OGSML offers none of these protections for the community, unlike the

²⁰ Appellant cites the Appellate Division decision in *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*, 91 A.D.3d 126 (2d Dep’t 2011), *aff’d on other grounds*, 20 N.Y.3d 481 (2013), in support of its argument that any regulation of the location of oil and gas activities also preempts land use regulation. *See* App. Br. at 40–42. Appellant neglects to acknowledge that, on appeal from that decision, this Court declined to reach the preemption issue. Even if the Second Department ruling remained good law, however, the case does not support Appellant’s position, because the Banking Law at issue in *Sunrise Check Cashing* offers express protections for local communities that are absent from the OGSML. The Banking Law states in pertinent part:

If . . . the superintendent shall find that the granting of such application will *promote the convenience and advantage of the area in which such business is to be conducted*, . . . the superintendent shall thereupon execute a license In finding whether the application will promote the convenience and advantage to the public, *the superintendent shall determine whether there is a community need for a new licensee in the proposed area to be served.*

N.Y. Banking L. § 369(1) (emphasis added). Moreover, a license may not be granted without consideration of community needs, economic development plans, and demographic patterns. *See Sunrise Check Cashing*, 91 A.D.3d at 138. Because the state collects factual evidence grounding a specific determination about the community need for a check-cashing establishment in a particular location, the locality cannot make a contrary finding and exclude the licensed business from an approved site. *Id.* at 139. No such determination of community need for oil and gas development in a specific location is required under the OGSML; nor does the statute address economic development and demographic concerns traditionally protected by zoning.

preemptive statutes discussed above, there is no basis for finding in that statute a clear expression of intent to preempt local zoning.²¹

POINT II

THE DOCTRINE OF IMPLIED PREEMPTION DOES NOT PRECLUDE ENFORCEMENT OF THE ZONING ORDINANCE.

This Court repeatedly has indicated that, “[w]hen dealing with an express preemption provision . . . it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption.” *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008); *see Frew Run*, 71 N.Y.2d at 130. Rather, the express clause governs. *Frew Run*, 71 N.Y.2d at 130 (“[W]e deal here with an express supersession clause The appeal turns on the proper construction of this statutory provision.”). Even if this Court considers the doctrine of implied or conflict preemption, upon finding that the OGSML’s express supersession clause does not preempt local land use regulation, that doctrine would not bar the adoption and enforcement of the Town of Dryden’s Zoning Ordinance.

²¹ Appellant’s argument that the MLRL “establishes a partnership with localities relative to mine location” and seeks to balance interests in “matters traditionally within the control of local governments,” App. Br. at 55, thus undermines its preemption claim. Those features of the 1974 statute would have offered *more* evidence of preemptive intent than provisions of the OGSML, which does not provide for local government participation in the siting process or accommodate traditionally local land use concerns. Given that the MLRL nevertheless was found not to preempt local land use regulation, there is still less reason to find that the OGSML does so.

Under the doctrine of implied or conflict preemption, a court must “search for indications of an implied legislative intent to preempt in the Legislature’s declaration of a State policy or in the comprehensive and detailed nature of the regulatory scheme established by the statute.” *Id.* As a matter of both law and practice, however, the Zoning Ordinance is compatible with the purposes and regulatory provisions of the OGSML. This Court therefore should affirm the decisions below, rejecting Appellant’s implied preemption claim.

A. The Declaration of Policy in the OGSML Is Consistent with Local Regulation of Land Use.

The OGSML declares it to be “in the public interest to *regulate* the development, production and utilization of natural resources of oil and gas in this state” ECL § 23-0301 (emphasis added). The statute provides that regulation should be designed to “prevent waste” and that the regulated development should allow “greater ultimate recovery” of the resources and protect “the correlative rights of all owners and the rights of all persons including landowners and the general public.” *Id.* All of these subsidiary purposes can be fulfilled even if Dryden’s Zoning Ordinance is fully enforced.

Contrary to Appellant’s contention, *see* App. Br. at 58, respect for local land use regulation is not inconsistent with the declared policy of the OGSML. As defined in the OGSML, preventing “waste” means avoiding “inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy” as well as

imprudent or improper operations that cause “unnecessary or excessive surface loss or destruction” of the resource. *Id.* § 23-0101(20)(b)–(c). The statutory definition reflects its origination early in the development of oil and gas law.

Historically, ownership of such resources was governed by the common-law principle of “law of capture,” which held that the first person to reduce subsurface oil or gas to physical possession became the owner of same regardless of whether the product was in fact extracted from beneath the surface of that person’s property Thus, the only way to protect one’s interest in the minerals beneath his or her land was to drill a well. This resulted in the drilling of excessive wells, which, in turn, created considerable waste.

W. Land Servs., Inc. v. Dep’t of Envtl. Conservation, 26 A.D.3d 15, 16–17 (3d Dep’t 2005); *see Wagner v. Mallory*, 169 N.Y. 501, 505 (1902) (describing the rule of capture). Waste resulted because excessive drilling in the “pool” or “reservoir” where the oil or gas collected after migrating from source rock depleted the subsurface pressure required for flow to the surface and thereby reduced the “quantity of oil or gas ultimately recoverable.” ECL § 23-0101(20)(b)–(c); CHC R. 923. The OGSML therefore *limited* the number of wells that could be drilled to protect the reservoir pressure; nothing in the statute requires additional drilling where local communities do not want it.

Moreover, the pressure concerns addressed by the early OGSML do not arise in modern oil and gas development from shale or other low-permeability formations, where the resource is trapped in the source rock and released from

small pores only by fracturing. *See* CHC R. 923. Waste nevertheless occurs in production from shale when poorly constructed wells allow hydrocarbons to migrate into groundwater or when wells are rushed into production before there is infrastructure to collect and transport extracted gas, leading drillers to vent or flare usable product.²² *See id.* In either case, a policy directing that oil and gas not be dissipated, lost, or destroyed *in areas where development is authorized* is not a command immediately to develop every last molecule of the resource wherever it can be found; nor does it mean that local municipalities have no say about whether and where heavy industry may locate within their borders. *See Gernatt*, 87 N.Y.2d at 684.

The interest in protecting correlative rights also derives from an era of conventional oil and gas development. When a conventional pool underlies the land of multiple property owners, the migratory resources under one owner's land can be extracted from a vertical well drilled on another's property, yielding an unfair windfall for the first driller. *See Sylvania Corp. v. Kilbourne*, 28 N.Y.2d 427, 433 (1971) (citing precedent recognizing the need to secure to landowners

²² Indeed, the venting of gas has been understood as the classic example of waste for more than a century. *See, e.g., Ohio Oil Co. v. State of Indiana*, 177 U.S. 190 (1900) (upholding state law prohibiting the escape of gas from a well into the open air). Wasteful flaring of \$100 million of gas per month has prompted 10 class action lawsuits in the Bakken Shale region of North Dakota. *See* Clifford Krauss, *Oil Companies Are Sued for Waste of Natural Gas*, N.Y. Times, Oct. 17, 2013, http://www.nytimes.com/2013/10/18/business/energy-environment/oil-companies-are-sued-over-natural-gas-flaring-in-north-dakota.html?_r=0.

equitable apportionment of the “migratory” gas under their land). To counteract the perverse incentive for each owner to drill, when multiple wells would lower the reservoir pressure and reduce the ultimate recovery, the Legislature developed a system for limiting drilling and protecting the correlative rights of landowners who lost the right to develop their own wells. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 550.3(ao) (defining correlative rights so as to prevent drilling of “unnecessary wells”); *see also Samson Resources Co. v. Corp. Comm’n*, 702 P.2d 19, 22 (Okla. 1985) (noting that “correlative rights are those rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply”) (internal quotation and citation omitted).

That system—a combination of unitization, voluntary and compulsory integration, and compensation for forced pooling—has carried over to the development of unconventional plays, such as shale, notwithstanding the inapplicability of the system’s original rationale. Although there is no risk of losing shale gas if a vertical well is drilled on neighboring land, operators still are permitted to create drilling units encompassing land from multiple owners, who then are compensated from profits after production. The correlative rights of all owners within a unit thus are protected, *where development is authorized to proceed* and if extraction is profitable. Under the OGSML, however, the State must protect “the rights of all persons, including landowners and the general

public,” not only the correlative rights of mineral owners within a drilling unit.

The law therefore should not be read to force development where communities do not want it, regardless of adverse impacts on small town quality of life or neighboring property values.

B. The Declaration of Policy in the Energy Law Is Consistent with Local Regulation of Land Use.

Appellant notes that although the OGSML declares it to be in the public interest to “regulate” oil and gas production, the Energy Law declares that state policy is to “foster, encourage and promote” such development. *See* App. Br. at 13–14 (citing Energy Law § 3-101(5)). Because the Legislature plainly recognized the difference between “regulation” and “encouragement,” and because this Court previously found that state “regulation” of mining does not preempt local land use controls, Appellant now seeks to invoke the policies of the Energy Law in support of its implied preemption claim. *See id.* at 58. Because Appellant did not raise that claim in its Verified Petition and Complaint, R. 67–77, it is precluded from raising the claim on appeal. Even if this Court permits Appellant to add a belated preemption claim under the Energy Law, however, the Zoning Ordinance does not conflict with the policies of the Energy Law any more than it conflicts with those of the OGSML.

In *Frew Run* and its progeny, this Court repeatedly has affirmed that local land use regulation is *not* preempted by the MLRL, even though that statute *does*

declare that it is state policy to “foster and encourage” the mining industry. ECL § 23-2703(1). The similar policy invoked Appellant thus does not support its claim that Dryden’s Zoning Ordinance is preempted by the Energy Law.

Moreover, Appellant argues that the State is authorized and required to “maximize recovery” regardless of any other considerations, App. Br. at 60, only by singling out that policy to the exclusion of others that are equally significant. The Energy Law expressly provides that it is the policy of New York State:

1. to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy for the people of the state and to accelerate development and use within the state of renewable energy sources, all in order to promote the state’s economic growth, to create employment within the state, *to protect its environmental values and agricultural heritage, to husband its resources for future generations, and to promote the health and welfare of its people;*

. . . and

6. *to encourage a new ethic among its citizens to conserve rather than waste precious fuels; and to foster public and private initiative to achieve these ends at the state and local levels.*

N.Y. Energy L. § 3-101 (emphasis added). Husbanding resources for future generations and encouraging a conservation ethic are not consistent with unbridled development of gas reserves. *See Sylvania Corp.*, 28 N.Y.2d at 430 (noting the State’s interest in avoiding “wasteful exhaustion of resources”).²³

²³ Indeed, Appellant admits that the purpose of the Interstate Oil and Gas Compact Commission, to which Appellant ascribes the origin of the OGSML, “is to conserve oil and gas by the prevention of physical waste from any cause.” App. Br. at 6 (citing R. at 524–25).

Appellant thus turns the statute on its head in arguing that waste is promoted and correlative rights are violated when oil and gas resources remain underground. *See* App. Br. at 7–8. Rather, the reserves are husbanded for future generations, which are always free to lift local bans on oil and gas development.²⁴ Therefore, like the petitioner in *Gernatt*, Appellant cannot insist that Respondents permit resource extraction within the Town of Dryden. Rather, under the Energy Law as under the OGSML, localities may adopt and enforce zoning provisions that designate permitted and prohibited uses within their borders.

C. OGSML Provisions Governing Industrial Operations Are Consistent with Dryden’s Zoning Amendment.

The OGSML contains detailed provisions governing oil, gas, and solution mining operations, including the issuance of well drilling permits, the production and storage of oil and gas, and fees that may be imposed on permit holders, but it does not serve as a land use planning law, and it does not convert DEC into a land use planning agency. The extensive powers granted to DEC, *see* ECL § 23-0305, do not include the authority to direct wells into or away from particular municipalities, or particular zoning districts, and DEC does not undertake

²⁴ Were there an obligation to develop all available resources, drillers would not be free to forgo development during periods of over-production. *See* CHC R. 923–24. Instead, by conserving precious fuels, the state prevents waste and protects correlative rights, which receive no meaningful protection when unnecessary wells depress prices to the point where drillers operate at a loss.

statewide or even regional planning for oil and gas development.²⁵ The operator, not the State, proposes a spacing unit in its application for a drilling permit. *See* ECL § 23-0501(2)(a). Each application is considered independently—not on a statewide basis or pursuant to a comprehensive land use plan—to ensure that it satisfies the policy objectives of the statute, namely, efficient recovery of the resource and fair compensation to all holders of mineral rights, including those whose rights are forcibly pooled. *See id.* § 23-0503(2)–(3). Operators can plan the size and shape of spacing units to conform to local zoning laws and then conduct their activities in compliance with state rules establishing technical requirements. *See id.* § 23-0503(2), (3)(a).

The fact that the State regulates oil and gas activities and infrastructure does not mean that the Town of Dryden must allow the industry to operate within its borders. This Court rejected precisely that argument in *Gernatt*. *See* 87 N.Y.2d at

²⁵ Before Mr. Sovas became an industry consultant, he worked for DEC, and he strenuously protested against the idea that DEC was a land use agency. *See* Gregory H. Sovas, Director, Division of Mineral Resources, DEC, Presentation at Albany Law School’s Environmental Forum: *Sustainable Development and Mining, Perspectives on New York’s Mined Land Reclamation Law* 4 (Apr. 17, 1998), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/albanyla.pdf (“It is important to recognize that DEC is not a land use agency, and that the authority remains at the local government level. It has always been our position that localities need to determine appropriate land uses and that DEC, even if we believe that a site may not be zoned properly, will not interfere in those decisions.”); *id.* at 8 (“DEC is not a land use agency, and we must abide by the local zoning whether we agree or not.”); *id.* at 10 (“DEC does not want conflicts with local governments and does not have an interest in siting mines in areas where the locals don’t want them.”). If this Court does not rule Mr. Sovas’ testimony inadmissible in this proceeding, these statements should raise serious questions as to his credibility.

684 (“A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”) (citations omitted). Nothing in the OGSML suggests that the State seeks to force quiet rural towns enjoying clean air and water to sacrifice the comprehensive planning that protects their community character and to surrender the quiet enjoyment of their land to a noisy and dirty industry. Because the Town of Dryden is not imposing restrictions on oil and gas operations or activities in conflict with the OGSML’s regulatory scheme, but rather is regulating the use of land, the Town’s Zoning Amendment should be upheld against Appellant’s conflict preemption claim. *Cf. DJL Rest. Corp.*, 96 N.Y.2d at 97 (finding that the Alcoholic Beverage Control Law did not preempt New York City’s Amended Zoning Resolution because the Resolution “applies not to the regulation of alcohol, but to the *locales* of adult establishments”) (emphasis in original); *Schadow v. Wilson*, 191 A.D.2d 53, 56 (3d Dep’t 1993) (upholding a special use permit requirement because “it regulates land use generally, i.e., the location of mining operations in the Town, not the mining activity itself”).

POINT III

STATE OIL AND GAS REGULATION COEXISTS WITH LOCAL LAND USE REGULATION IN MANY STATES.

Appellant’s final argument is framed as a rhetorical question: “what prudent operator would ever invest in oil and gas development in New York if, after the fact, municipalities could, based upon a 3-2 majority vote, enact broad-based drilling bans that obliterate the operator’s entire property interest?” App. Br. 61. This question not only is irrelevant to the legal issue presented in this case but also assumes an answer that is flatly contradicted by practices in other states.²⁶ In fact, several other oil- and gas-producing states permit localities to prohibit drilling within their borders, including California, Illinois, and Texas. *See* Cal. Att’y Gen. Op. No. SO 76-32, 16 (1976), *available at* <ftp://ftp.consrv.ca.gov/pub/oil/publications/prc03.pdf> (opining that the State of California’s approval of an oil or gas well “would . . . not nullify a valid prohibition of drilling or a permit requirement by a county or city in all or part of its territory”); *Tri-Power Resources, Inc. v. City of Carlyle*, 359 Ill. Dec. 781, 786 (Ill. App. Ct. 2012) (holding that non-home-rule units of government in Illinois have the same power as home-rule municipalities to prohibit oil and gas wells within their borders);

²⁶ Even if enforcing local zoning would stop oil and gas investment in its tracks, whether the interest in attracting oil and gas development should trump the interest in preserving rural community character and sustainable local economies is a policy question for the Legislature, not an issue of law for this Court.

Unger v. State, 629 S.W.2d 811, 812 (Tex. App. 1982) (agreeing that, in Texas, a municipality “has full authority both to regulate and prohibit the drilling of oil wells within its city limits”); *see also, supra*, note 3 (describing Tulsa, Oklahoma’s 100-year ban on drilling). Those prohibitions operate notwithstanding state mandates to prevent waste, *see, e.g.*, 225 Ill. Comp. Stat. 725 / 1.1 (prohibiting waste); Tex. Nat. Res. Code Ann. § 85.045 (same), and thus also belie Appellant’s claim that enforceable local bans “plainly would conflict with . . . all of the objectives of the OGSML.” App. Br. at 61.²⁷

Those prohibitions, and other local regulation of the oil and gas industry, plainly do not defeat investment in any of those states. Where profitable reserves exist, the industry accommodates itself to the local controls, just as it accommodates itself to varying state regulations of technical operations. Thus, as a matter of both law and practice, the OGSML may be harmonized with local land use laws, including Dryden’s Zoning Ordinance. This Court therefore should reject Appellant’s express and implied preemption claims.

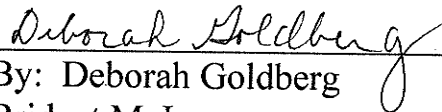
²⁷ To the extent that *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061 (Colo. 1992), and *Ne. Natural Energy, LLC v. City of Morgantown, W.V.*, No. 11-C-411, Slip Op. 8-9 (Cir. Ct., Monongalia Cnty., Aug. 12, 2011), CHC R. 897–906, hold otherwise, they are inconsistent with the New York Court of Appeals decision in *Gernatt*. Moreover, the decision in *Voss* relied on the need to conform drilling patterns to the “pressure characteristics of the pool,” 830 P.2d at 1067, a consideration that is irrelevant to the unconventional plays underlying small rural towns in upstate New York, including Dryden. *See supra* Point II(A). In West Virginia, unlike in New York, local governments are required “to supplement and complement the efforts of the State by coordinating their programs with those of the State.” CHC R. 902.

CONCLUSION

For the reasons stated above, this Court should affirm the decisions below awarding summary judgment in favor of Respondents.

Dated: New York, New York
December 13, 2013

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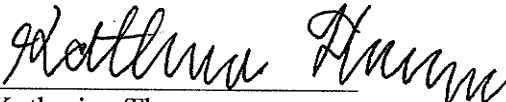
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

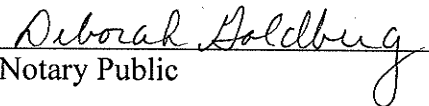
KATHARINE THOMPSON, being duly sworn, deposes and says:

1. I am over eighteen years of age and am not a party to the above action.
2. On the 13th day of December, 2013, with the consent of counsel for the appellant, I served one true and correct copy of the foregoing Brief of Respondents Town of Dryden and Town of Dryden Town Board via electronic mail upon said counsel at the addresses listed below:

Thomas S. West, Esq.
Cindy Monaco, Esq.
The West Firm
twest@westfirmlaw.com
cmonaco@westfirmlaw.com
Attorneys for Appellant


Katharine Thompson

Sworn to before me this
13th day of December, 2013.


Notary Public

DEBORAH GOLDBERG
Notary Public, State of New York
No. 31-4951179
Qualified in New York County
Commission Expires May 22, 2015

**Outline for the Presentation on Article 10 of
the Public Service Law versus SEQR, New York
State Bar Association, Environmental Law
Section, January 31, 2014**

Presenters:

Sam Laniado, Esq., Read & Laniado, Albany, James A. Muscato, II, Esq.,
Young/Sommer LLC, Albany, Lawrence H. Weintraub, Esq., New York State
Department of Environmental
Conservation, Office of General Counsel, Albany

Topic	Time	Presenter
Brief introduction to Article 10 of the Public Service Law; and Certificating of gas-fired, electric generating power plants under Article 10 versus state and local permitting and environmental review under SEQR	20 minutes	Sam Laniado, Esq.
Certificating of wind turbines under Article 10 in comparison to state and local permitting and environmental review under SEQR	15 minutes	James A. Muscato, Esq.
DEC's role in the Article 10 process vs. its role in the SEQR process	10 minutes	Lawrence H. Weintraub, Esq.
Questions, comments and discussion	5 minutes	Moderator

State Environmental Quality Review (SEQR)
FINDINGS STATEMENT
March 3, 2010

Pursuant to Article 8 - State Environmental Quality Review Act (SEQR) of the Environmental Conservation Law and 6 NYCRR Part 617, the NYS Department of Environmental Conservation (DEC), as Lead Agency, makes the following findings.

Name of Action: Hounsfield Wind Farm, Galloo Island, Town of Hounsfield, Jefferson County, New York

Project Sponsor: Upstate NY Power Corporation

Acceptance date of final environmental impact statement: December 23, 2009

FEIS is available at: <http://www.dec.ny.gov/permits/54687.html>

Alternative site: <http://upstatenypower.com/feis.html>

Summary Description of Action:

Upstate NY Power Corporation (“the Project Sponsor” or “Upstate Power”) is proposing construction of a 246 megawatt (MW)¹ wind-powered electrical generation facility (the “project”) on Galloo Island in the Town of Hounsfield, Jefferson County.

The project development area consists of 1,934 acres of land and is privately owned. Project components include the following structures and activities:

1. Construction and operation of 82 wind turbine generators (WTG). The proposed WTG will be a 3.0 MW generator with a 90 meter blade rotor diameter and a hub height of 80 meters, for a total maximum height of 125 meters (410 feet) from blade tip to ground.
2. Installation and operation of associated 34.5 KV electrical collection lines connecting all WTG to an on-island electrical substation. The electrical collection lines will be both above ground and below ground.
3. Construction of 18.3 miles of private service roads (up to 38 feet wide) between each WTG.
4. Construction of one permanent meteorological (met) tower, approximately 80 meters in height.
5. Construction of a temporary offloading facility for initial delivery of equipment, labor and materials during the time when the permanent slip is under construction.
6. Construction of a permanent slip channel and offloading/storage area, which together make the offloading facility, to allow for delivery and storage of materials and equipment.
7. Construction of three temporary construction staging areas with a combined total land area between 15 and 20 acres.

¹ These findings describe a new preferred alternative developed through analysis of the DEIS and FEIS records, indicating that wind turbine generators (WTG) # 2 and # 3, together with associated access roads and electrical collection lines, as described in the FEIS project layout, would constitute a “direct take” of habitat that supports a state-listed threatened species, the Upland Sandpiper. This is more fully discussed in Section 9, Avian Species, and Section 18, Alternatives.

8. Construction of a temporary concrete batch plant.
9. Construction of a woody mulch area for disposal of cleared vegetation.
10. Construction of sediment basins for erosion and stormwater control.
11. Construction of operation and maintenance facilities.
12. Construction of permanent and temporary housing facilities for construction, operation and maintenance staff. Permanent residential facilities include two three-story structures of 12 units each, and a community building housing kitchen and dining facilities, infirmary, laundry and recreational facilities. Temporary housing consists of 4 modular buildings, each having 32 rooms.
13. Construction of a potable and fire protection lake water intake system.
14. Construction of a sewage treatment system.
15. Construction of an auxiliary power generating system.
16. Construction of a helicopter pad and garage.

In addition, Upstate Power intends to construct a transmission line to deliver power generated by the Galloo Island wind generation facility to the electrical grid, together with substations for connection to the electrical grid and other related facilities. The transmission line, substations, and connection facilities are subject to review by the New York State Public Service Commission (PSC) under Public Service Law Article VII. While DEC is a statutory party to the Article VII proceeding (Public Service Law §124), it does not have jurisdiction over the transmission line, substations and connection facilities (Public Service Law §130). At the same time, actions of the Public Service Commission under Public Service Law Article VII are excluded from review under the State Environmental Quality Review Act (SEQR) pursuant to ECL §8-0111(5)(b) and (6 NYCRR §617.5(c) (35). The Department of Public Service (DPS) maintains a public website for all information regarding that agency’s review of this Article VII application, at <http://documents.dps.state.ny.us/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=09-t-0049>. DPS staff have been active in the review of the wind turbines on Galloo Island and DEC has been an active participant in the review of the transmission line.

Location: The proposed project is located on Galloo Island in eastern Lake Ontario, approximately 5.6 miles west of the closest mainland shoreline (Stony Point in the Town of Henderson) and approximately 12 miles west of the Village of Sackets Harbor, Town of Hounsfield, Jefferson County, New York. (See Attachment # 1, Site Location, and Attachment # 2, Revised Project Layout).

Agency Jurisdiction(s): Under the Environmental Conservation Law, the following DEC permit approvals are required for this project:

DEC Project No.	Description of DEC Permits	Statutory and Regulatory Authority
6-2238-00193/00001	P/C/I SPDES – Surface Discharge	ECL Article 17 and 6 NYCRR Part 750

DEC Project No.	Description of DEC Permits	Statutory and Regulatory Authority
6-2238-00193/00002	Freshwater Wetlands	ECL Article 24 and 6 NYCRR Part 663
6-2238-00193/00004	Water Quality Certification	Section 401 of the Clean Water Act and 6 NYCRR Part 608
6-2238-00193/00006	Excavation & Fill in Navigable Waters	ECL Article 15 and 6 NYCRR Part 608
6-2238-00193/00010	Incidental Take Permit for State-Listed Threatened and Endangered Species	ECL Article 11
GP-0-10-001	SPDES General Permit for Stormwater Discharges from Construction Activities	ECL Article 17 Titles 7 & 8 and ECL Article 70
GP-0-06-002	SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities	ECL Article 17 Titles 7 & 8 and ECL Article 70
	State Air Facility Permit (or Registration) for Temporary Power Generators during project construction	ECL Article 19 and 6 NYCRR Part 201

State Environmental Quality Review (SEQR) Process.

Attachment # 3 is a chronology of SEQR milestones that have led to development of these findings. Principal documents related to this SEQR review have been made available on the DEC website at: <http://www.dec.ny.gov/permits/54687.html>, and the Upstate NY Power Corp. website at: <http://upstatenypower.com/SEQRA.html>. Additionally, all SEQR were made available for public review at the following local repositories:

- Town of Hounsfield, Office of the Town Clerk
- Hay Memorial Library, Sackets Harbor
- Henderson Free Library, Henderson

Facts and Conclusions in the EIS Relied Upon to Support the Decision

In developing this SEQR Findings Statement, the DEC has reviewed and considered the following documents:

- *Draft Environmental Impact Statement (DEIS) for the Hounsfield Wind Farm*, accepted February 27, 2009.
- *Final Environmental Impact Statement (FEIS) for the Hounsfield Wind Farm*, issued December 23, 2009.
- *Town of Hounsfield Planning Board SEQR Findings Statement*, adopted January 6, 2010.
- *Engineer's Report for: Wastewater Infrastructure Improvements on Galloo Island, Hounsfield Wind Farm Project, Jefferson County, New York*, May 2009, URS Corporation.
- *Joint Application for Permit for the Hounsfield Wind Farm Project*, January 2010, C&S Engineers, Inc.
- *Endangered/Threatened Species License Application, Supplemental Material*, Upstate NY Power Corp., February 10, 2010.

DEC is required to consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS in its SEQR Findings Statement. Under Environmental Conservation Law section 8-0109, DEC is required to choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process. Here, the findings begin by setting out the public need and benefits of the project. In the case at hand, the public need and benefits of the project themselves further environmental protection goals related to reduction of green house gases. The findings then set out the categories of resources affected by the project and any significant impacts that the project may have on them. Under each of these headings, DEC has set forth how such impacts have been avoided and if not avoided then mitigated to the maximum extent practicable. DEC then balanced and weighed the residue of impacts against the public need and benefits of the project or social, economic and other essential considerations.

DEC finds that the project has been designed to avoid, or where not completely avoided, minimize and mitigate adverse environmental impacts revealed through the EIS process. DEC also finds that the social, economic and other essential considerations underlying the project are considerable even when balanced against the residue of impact in the preferred alternative. The following facts and conclusions are provided in support of DEC's issuance of a positive SEQR Findings Statement.

1. Public Need and Benefits.

The public need and benefits of the project are best understood with reference to the climate change and energy issues facing the State of New York.

- a. The project will help the State achieve its goal of reducing carbon emissions that contribute to climate change.

Global climate change is one of the most important environmental challenges of our time. There is scientific consensus that human activity is increasing the concentration of greenhouse gases (GHGs) in the atmosphere and that this, in turn, is leading to serious climate change. By its nature, climate change will continue to affect the environment and natural resources of the State of New York.² In response, Governor Paterson's Executive Order 24 establishes a goal to reduce GHG emissions eighty percent by the year 2050, and includes a goal to meet 45% of New York's electricity needs through improved energy efficiency and clean renewable energy by 2015.³ Emissions of CO₂ account for an estimated 88% of the total annual GHG emissions in New York State. The overwhelming majority of these emissions — estimated at 250 million tons of CO₂ equivalent per year — result from fuel combustion. Overall, fuel combustion accounts for approximately 88.3% of total GHG emissions.

- b. The Project will help the State achieve the goals of the 2009 State Energy Plan.⁴

State Energy Law §6-104 requires the State Energy Planning Board to adopt a State Energy Plan.⁵ The New York State Energy Plan contains a series of policy objectives. Among these objectives is to increase the use of energy systems that enable the State to significantly reduce greenhouse gas (GHG) emissions while stabilizing energy costs and improving the State's energy independence through development of in-state energy supply resources. The State Energy Plan recognizes that wind energy projects will play a role in fulfilling this objective.

Based on the State Energy Plan, other public benefits of the project include the following:

- i. Production and use of in-state energy resources can increase the reliability and security of energy systems, reduce energy costs, and contribute to meeting climate change and environmental objectives.
- ii. To the extent that renewable resources and natural gas are able to displace the use of higher emitting fossil fuels, relying more heavily on these in-state resources will also reduce public health and environmental risks posed by all sectors that produce and use energy.

²New York State Department of Environmental Conservation. *Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements*. July 15, 2009. <http://www.dec.ny.gov/regulations/56552.html>.

³ New York State. *Executive Order No 24: Establishing A Goal To Reduce Greenhouse Gas Emissions Eighty Percent By The Year 2050 And Preparing A Climate Action Plan*. August 6, 2009. http://www.state.ny.us/governor/executive_orders/xeorders/eo_24.html.

⁴ State Energy Planning Board. *2009 State Energy Plan*. December 2009. <http://www.nysenergyplan.com/stateenergyplan.html>.

⁵ State Energy Law §6-104(5) provides: "The state energy plan shall provide guidance for energy-related decisions to be made by the public and private sectors within the state. Any energy-related action or decision of a state agency... shall be reasonably consistent with the forecasts and the policies and long-range energy planning objectives and strategies contained in the plan....A state agency... may take official notice of the most recent final state energy plan adopted by the board prior to any final energy-related decision by such agency...."

- iii. By focusing energy investments on in-state opportunities, New York can reduce the amount of dollars “exported” out of the State to pay for energy resources.
- iv. By re-directing those dollars back into the State economy, New York can start to increase its economic competitiveness with other states that are less dependent on energy supply imports to support their local economies.⁶
- v. Increasing the percentage of energy derived from renewables will reduce the net retail price of electricity for all customers.
- vi. Renewable energy helps to reduce price volatility of energy supplies. Renewable energy contributes to the reduction of energy price volatility in the long-term.

2. Topography, Geology and Soils

a. Potential Impacts.

1) The FEIS project layout included a proposed a borrow pit on the northeast portion of Galloo Island, between WTGs 71 and 72, approximately 2.1 acres in size, with an additional 3 acres of affected land for processing, stockpiles, a loading area, and sediment basins. This activity would have required a permit from the DEC under Article 23 of the Environmental Conservation Law (ECL) – Mined Land Reclamation, however the Project Sponsor has revised the project to eliminate the need for this borrow pit.

2) Impacts to bedrock are anticipated from blasting during construction. Blasting of bedrock will be required for the construction of turbine foundations, portions of the electrical connection lines, and for construction of the slip channel. Bedrock that is excavated will be reused on the island as material for the roads and aggregate for the concrete batch plant. Given the proposed turbines’ distance from the mainland, there should be no blasting-related impacts to the mainland.

3) Soils at the proposed access roads and turbine locations generally do not present significant engineering or development constraints. Soil disturbance from all anticipated construction activities will total approximately 300 acres. Of this total, approximately 159 acres will be converted to built facilities (such as roads, crane pads and structures), while the remaining soils will be restored to pre-construction conditions and stabilized following completion of construction. Only temporary, minor impacts to topography and geology are expected as a result of construction activities.

b. Discussion and Findings.

1) Because the Project Sponsor has eliminated the need for the proposed borrow pit, no further discussion of impacts related to this component of the project is warranted.

2) Project components have been sited to avoid or minimize, to the maximum extent practicable, temporary and permanent impacts to topography, geology, and soils. The topography of the island limits some of the locations where WTGs can be located. In particular, WTGs will be constructed at least 75 feet or more from the shoreline cliffs to ensure that sufficient counterweight is available to maintain the structural integrity of the foundation. Additional potential adverse environmental impacts associated with soil disturbance (erosion, sedimentation, compaction) have been minimized by siting turbines in relatively level locations where practicable and using existing roads for turbine

⁶ Ibid.

access wherever possible. The Project Sponsor has undertaken steps to minimize the amount of blasting required on the island. All necessary blasting will be subject to oversight by an environmental monitor. In addition, use of Best Management Practices in the revised blasting plan set forth in Appendix L of the FEIS will further reduce adverse impacts.

3) Excavated materials from all construction activities will be stockpiled during construction and subsequently reused on site for re-grading or re-vegetation. Topsoil will be segregated and replaced on top of existing ground surface. Geotechnical investigations will be conducted before construction to confirm DEIS/FEIS conclusions regarding depth to bedrock and surficial and bedrock geology, and to assist in finalizing foundation design. Blasting for the excavation of tower foundations will comply with the blasting plan. Impacts to soils will be further minimized by the following measures:

- Prior to the commencement of construction activities, erosion and sediment control practices will be installed and implemented in accordance with the requirements in the Stormwater Pollution Prevention Plan ("SWPPP") and SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-10-001). Coverage under GP-0-10-001 must be obtained prior to the commencement of construction activity.
- Following construction, all temporarily disturbed areas will be stabilized and restored as specified in the SWPPP.
- Adherence to Best Management Practices to avoid or control erosion and sedimentation, stabilize disturbed areas, and minimize the potential for spills of fuels or lubricants, as set forth in the SWPPP.
- Contractors and subcontractors will be given copies of the final construction documentation and plans, which will contain all applicable soil protection, erosion control, and soil restoration measures.

3. Land and Land Use

a. Potential Impacts.

1) Galloo Island consists of 1,966 acres, with approximately 1,936 acres currently under control of a single private owner. At its closest point the island is approximately 5.6 miles from the mainland of New York State. The current land uses are open space and recreational. Land use on the island involves intensive management to maintain an abundant deer population, including production and storage of feed. Upon obtaining all required approvals for the construction and operation of the project, the Project Sponsor will purchase the privately owned portion of the island and will become the sole landowner for the project. The project will permanently occupy approximately 159 acres of land on Galloo Island with structures such as WTGs, roads, housing and the operations center. The project will additionally impact approximately 141 acres of land temporarily for construction activities, laydown areas and the concrete batch plant.

2) The Lake Ontario shoreline facing Galloo Island includes rural, historic, tourism, residential and farm-oriented land uses. No physical changes to these mainland uses will occur as a result of the project. The Hounsfield Wind Farm is sited on an island in the midst of open water. This location

will allow the project to be seen at a number of locations along the lake shore, but its appearance will be greatly diminished in scale due to the distance of more than six miles (at most locations more than 10 miles) from the shore.

3) A small portion of Galloo Island is owned by the State of New York. This land along the southern end of the Island and near Gill Harbor is designated as State Wildlife Management Area. DEC does not actively manage these areas at this time. Based on the revisions to the project, no facilities or improvements will be placed on New York State Land on Galloo Island. There is also a small parcel controlled by the United States Government. No project facilities or improvements will be located on this parcel.

4) The isolated and remote location and lack of public docking facilities on the island has severely limited use of the publicly owned portion of the island. In recent years the public has used Galloo Island as a location for safe harbor for boats during severe storms and for shore dinners during charter fishing trips. During project operation, DEC does not expect that the project will impair these uses or that there will be additional impacts on regional land use.

b. Discussion and Findings.

1) Following the completion of construction, areas temporarily impacted by construction will be restored to the extent practicable. This will include returning land to preconstruction contours and reseeded, resulting in 141 acres of temporarily impacted land returned to pre-construction conditions.

2) The change in the visual setting to inventoried visual and cultural resources along the Lake Ontario shoreline as a result of the introduction of WTGs into the visual landscape will be offset by mitigation measures designed to enhance the public's enjoyment of these resources at one or more of these locations. These offset projects, which are proposed to enhance the visitor experience at nearby cultural sites, are discussed more fully in Section 13 below.

3) A *Management Plan for the Lake Ontario Islands Wildlife Management Areas*, developed by DEC Region 6 Fish and Wildlife staff in 2002, states that limited habitat management actions have been considered for DEC lands on Galloo Island. On these sites, the agency has considered establishment of perennial wildlife food and cover along with minor clearing and dressing to accommodate wildlife related use. DEC will revise this management plan to reference management activities conducted as part of the wind energy project to improve habitat, such as invasive species control and grassland habitat management.

4) Upstate Power has agreed to allow Gill Harbor, the North Pond area and, if available, the permanent slip, to be utilized as locations of safe harbor for boats during severe weather events.

4. Agricultural Resources

a. Potential Impacts.

1) The majority of land on the island is not classified as prime farmland and is not suitable for agricultural production. However, the project development area contains approximately 164 acres of active agricultural lands located on the northeast portion of the island. Production includes

alfalfa, grains and hay which are used solely to support the abundant deer population on the island. Short-term construction related impacts to agricultural lands will include soil compaction due to vehicular traffic, clearing, grading, trenching and excavation.

2) Long-term impacts include the cessation of agricultural production to support the deer population which, if not actively maintained as grassland, would allow for succession to other cover types. Project components, primarily the re-located substation, will convert approximately 15.15 acres of active agricultural land to built uses.

b. Discussion and Findings.

1) Impacts to agricultural soils from construction activities will be minimized by restricting project equipment and access to designated construction boundaries. Soil erosion will be minimized through the implementation of erosion control measures detailed in the SWPPP referenced above. Topsoil within the designated construction boundaries will be stripped and segregated. Stripped topsoil will be stockpiled immediately adjacent to the work area and separated from other excavated materials to avoid mixing. Following construction, all disturbed agricultural areas will be de-compacted to a depth of 18 inches with a deep ripper or chisel plow. In areas where the topsoil is stripped, soil decompaction shall be conducted prior to topsoil replacement. Stones and rocks larger than 4 inches in diameter will be removed from the surface of the subsoil prior to replacement of topsoil. The topsoil will be restored to the original depth and contours to the maximum extent practicable. Any rock excavated for the burial of electrical connection lines or other uses in the agricultural fields will be removed from these areas or reused on site for foundation aggregate or road bed material.

2) Agricultural land that will not be permanently converted to built uses will be left fallow and may be available for future use either for agriculture or managed as wildlife habitat. The existing deer population on Galloo Island will be reduced to a more sustainable population level once intensive management is ended. Methods to control the deer population will be conducted in accordance with guidance from the DEC Region 6 Division of Fish & Wildlife.

5. Freshwater Wetlands and Protected Surface Waters

a. Potential Impacts.

1) The project will have impacts on New York State regulated wetlands and wetland buffers, however the revised project layout presented in the FEIS has reduced the area of impacts from the original project layout presented in the DEIS. Total impacts to regulated wetlands from directly filling wetlands, or permanent cover type conversion from forested wetland to closely maintained, mowed habitat will total approximately 0.219 acres (this is a reduction of 0.381 acres from the DEIS layout). This includes the clearing and permanent conversion of 0.007 acres of emergent wetland and 0.047 acres of deciduous forested wetland, and the direct filling of 0.078 acres of emergent wetland and 0.087 acres of deciduous forested wetland. In addition, the project will also impact DEC-regulated wetland adjacent areas, including 1.130 acres of forested adjacent area (due to permanent clearing through these forest areas to build access roads and maintain electrical collection lines) and 0.695 acres of non-forested adjacent area. Adjacent area impacts will total 1.85 acres (this is a reduction of 2.007 acres from the DEIS layout). The Project Sponsor has agreed to provide acceptable compensatory mitigation for permanent impacts to freshwater wetlands. A

Conceptual Wetlands Mitigation Plan is included as Appendix E in the FEIS. Construction activities that will impact wetlands require permit authorization from the U.S. Army Corps of Engineers (USACE) and DEC under Article 24 of the Environmental Conservation Law— Freshwater Wetlands, and a Water Quality Certification under Section 401 of the federal Clean Water Act.

2) One stream on Galloo Island will be crossed by a road through the installation of a culvert. The stream carries a DEC “C” classification, indicating that it is not protected under ECL Article 15. The stream will be permanently impacted by the placement of three culverts at one location for development of an access road, resulting in a temporary impact of 26.6 linear feet (0.011 acre) and a permanent impact of 105.8 linear feet (0.037 acre). The current proposal for the three culverts includes burying one culvert below grade at the stream’s thalweg (the lowest point in the stream channel) to provide unrestricted flow at low water conditions. This activity requires permit authorization from the U.S. Army Corps of Engineers (USACE) and DEC under the Freshwater Wetlands Act, and a Water Quality Certification under Section 401 of the federal Clean Water Act.

b. Discussion and Findings.

1) In developing its facility design and site plan, the Project Sponsor has almost completely avoided wetland and stream impacts within the project footprint. The locations of project components were selected to avoid or minimize wetland and stream disturbance. The Project Sponsor has achieved such avoidance by locating WTGs away from wetlands, including forested wetlands, and crossing wetlands at the narrowest points wherever possible. The wetland delineation report prepared for the DEIS identified 361 acres of freshwater wetlands within the 1,966 acre area of Galloo Island, or approximately 18% of the surface area of the island. The proposed project footprint has avoided these areas entirely except for approximately 1/5 acre of wetland fill and forest conversion impacts, and less than 2 acres of wetland adjacent area impact. To further minimize the effects of construction activities on wetlands, the Project Sponsor will install sediment and erosion control measures as part of their construction activities (also see discussion under section on Water Resources - Surface Water Quality and Storm Water Management). The freshwater wetlands permits that are being issued require that these measures be implemented, inspected and maintained during construction. Permanent vegetation must be established on all disturbed areas once construction activities are completed. Compliance with these permit conditions will ensure that impacts to wetlands will be minimized to the maximum extent practicable. To mitigate permanent unavoidable impacts to wetlands that will result from project construction, the applicant will create 0.558 acres of wetland (a 1:2.5 ratio of loss to creation), and 3.65 acres of protected forested adjacent area (a 1:2 ratio of loss to creation). The mitigation as proposed will allow the project to meet requirements of the Freshwater Wetlands Act (Article 24 of the ECL) and 6NYCRR Part 663.

2) To protect stream water quality, perimeter erosion and sediment control measures will be installed around any area to be disturbed. This will include upslope diversion fences, downslope silt fences, or stake-less measures (where limited overburden soils are present) and construction of temporary sediment traps or permanent ponds where required. Burying one of the three culverts at the stream’s thalweg will benefit invertebrates and herpetofauna by allowing unrestricted passage during low water conditions.

6. Water Resources - Surface Water Quality and Storm Water Management

a. Potential Impacts

1) The Project Sponsor has proposed an offloading facility on the south side of the island, which will include a temporary offloading facility (ramp with fill, and associated dolphin piers), a permanent offloading facility (slip), a floating breakwater and three offshore mooring points.

The temporary offloading facility will be used during construction of the permanent facility. It will require 2,250 cubic yards of excavation and 4,300 cubic yards of fill, an articulating ramp, supports for the ramp, hydraulic pistons to raise and lower the ramp, and two free-standing dolphins to guide and secure vessels. The design life of the temporary facility will not exceed three years.

After the permanent offloading facility is completed, the temporary facility will be decommissioned. The fill and dolphins will be removed, and the articulating ramp will be relocated or, if appropriate, incorporated into the permanent offloading facility. The permanent offloading facility will be built to a 14 foot minimum water depth. The total volume of excavation required to create the slip is approximately 80,000 cubic yards, with approximately 70 percent of the excavation onshore (56,000 cubic yards), and 30 percent (24,000 cubic yards) offshore. Three temporary free swinging moorings will be deployed in the open water near the island. A 100 foot wide concrete apron will flank both sides of the slip structure. The apron will be sloped to capture surface water prior to it being discharged into Lake Ontario. A floating breakwater system will be used to inhibit or reduce short-term wave action. Construction of these facilities requires permit authorization from DEC under Article 15 of the ECL – Excavation and Fill in Navigable Waters, USACE, and the NYS Office of General Services (OGS) for operation of the docking facility affecting underwater lands of the State of New York.

2) A water intake pipe will be installed in the lake to provide for fresh water supply to the residential units and operations & maintenance facility. The water intake pipe consists of approximately 575 linear ft of 18-inch diameter ductile iron pipe. The pipe will be buried in an excavated trench approximately three feet below the lake bottom until it reaches a water depth of 15 feet. Beyond this point the pipe will lay on the lake bottom. At the inlet location, the pipe will be buried and terminated at a 6 foot diameter precast concrete pipe section set vertically. The top of the precast section will be set at the 30-foot intake depth (Elevation 213.0 ft).

The concrete batch plant, sewage and wastewater treatment plants will have no point source discharges to the wetlands, small stream or pond on Galloo Island. All sewage and waste water will be collected and treated through a sewage treatment plant prior to discharge to Lake Ontario. The Project Sponsor has designed a wastewater treatment system to accommodate the construction phase, when much more sewage will be generated, and transition to the long term operation and maintenance (“O&M”) phase, when the maximum number of people on site at any one time is estimated to be 50 people. The system will consist of a septic tank and intermittent sand filter and is depicted in Appendix B of the DEIS. The final design of the system will be reviewed by DEC as a permit condition under Article 17 of the ECL - SPDES permit for Private, Commercial or Institutional (P/C/I) Facilities. A conventional sewer pipe and manhole system will convey the discharge from the treatment area to a drop manhole near the cliff at the shoreline. From the drop manhole, buried underwater piping will continue out to the discharge point in the lake. Due to the relatively low flow rate for this system, the pipe will terminate with a single outlet point. The outlet

will consist of a 90-degree ductile iron elbow and a length of vertical pipe to terminate at Elevation 228.0 ft (15 ft of depth at low water level).

Construction of the on-land portions of the water intake and wastewater discharge lines will be by conventional methods, with the exception that much of the trench excavation will likely be in rock. Depending upon the degree of weathering of the rock, various methods may be required, but it is not expected that blasting will be required for the pipe trenches. Weathered rock will most likely be removed with a backhoe and standard excavation bucket. If necessary, a ripping tooth and/or a hoe ram will be used. In extreme situations, a rotary rock cutting head may be required on the backhoe. Underwater pipe excavation will be performed from one or more barges equipped with excavation equipment. Excavation will proceed from the shore to the inlet or outfall structure. A single equipment barge with an excavator will be used if a conventional bucket can penetrate the rock. More likely, a second barge with an excavator with a hoe ram will be required to break the rock so it can be removed with the other excavator.

3) Installation of turbine foundations and crane pads, with associated roads, buried interconnect line, and construction staging areas, together with permanent meteorological (met) towers, substation, workers' residences and operations & maintenance facility, will permanently occupy approximately 159 acres of land. In addition, approximately 141 acres of land will be subject to temporary disturbance resulting from construction activities, laydown areas and the concrete batch plant. Soil disturbance from construction activities can create conditions where stormwater runoff increases soil erosion and carries sediment into wetlands and streams. In accordance with the requirements of the SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-10-001), a SWPPP must be developed to address these concerns as well as post-construction stormwater runoff from permanently developed areas. Coverage under GP-0-10-001 must be obtained prior to the commencement of construction activity.

4) A number of activities proposed to be conducted during construction and operation of the project have been determined to be industrial activities as defined in 40 CFR §122.26(b)(14)(i-ix and xi) for purposes of coverage under the SPDES Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activities (GP-0-06-002). All general requirements of GP-0-06-002 are applicable to drainage areas discharging stormwater associated with any covered industrial activity. Sector-specific requirements included in Part VIII of the permit apply to the specific drainage areas in which activities are conducted, and the outfalls discharging stormwater from those drainage areas. The activities identified as meeting the criteria for industrial activities include:

- Maintenance, Cleaning and Fueling at Water Transportation facilities.
- Concrete Batch Plant.
- Land Transportation.

b. Discussion and Findings.

1) Construction of the offloading facility will include measures to minimize adverse impacts to surface water quality and aquatic organisms. Sediment basins will be constructed to allow suspended sediment to settle out of stormwater and water from dewatering operations before being

discharged. A *Conceptual Blasting Plan for Construction of the Galloo Island Offloading Facility* has been developed for implementation during in-water construction. The plan includes turbidity controls consisting of a floating turbidity barrier in Lake Ontario that will surround the excavation area in the lake. The barrier consists of a heavy duty mono-filament filter fabric tensioned, ballasted, and secured with a series of heavy, galvanized steel tension cables, ballast chains, and anchor chains. This system will help reduce any impacts from turbidity and also help, to some extent, to keep fish from the blasting area. Before blasting, the Project Sponsor will conduct an aquatic survey in conjunction with a detailed geotechnical investigation. These surveys and investigations will gather important baseline data as to the current condition (prior to blasting or construction), and this data will be used by the aquatic ecologist performing the monitoring of the blasting and excavation as well as by the Blaster-In-Charge in designing the final detailed blasting plan. The plan will conform to the State of Alaska Department of Fish and Game's *Blasting Standards for the Protection of Fish*⁷ (Alaska Standards) to determine the exclusion zone for aquatic organisms that provides protection from excessive water pressure from blasting. DEC has determined that the method for calculating the exclusion zone contained in the Alaska standards will provide adequate protection from blast pressure to aquatic organisms. The Project Sponsor will submit a final blasting plan based on the aquatic survey and geotechnical investigation to the DEC for review and approval, as a condition of permit authorization. A post construction offshore aquatic survey will also be performed to ascertain the extent to which, if any, the underwater environment will have been altered by the blasting and construction of the offloading facility.

Other Best Management Practices that will reduce impacts from the construction of the slip include the following:

- Only daylight shots will be allowed. Many aquatic species are more mobile during at nighttime. Performing only daylight shots will reduce the potential for negative impacts, especially on species such as Walleye, which tend to feed in shallower water at night. This is also an added safety measure for the persons performing the blasting.
- Use of detonation cords will be limited to reduce the potential for large shock waves in the lake water.
- Blasts will have a 25-millisecond delay interval between decks of the same hole and large separations of holes with sequential separations of 9 milliseconds or greater; sequential timing intervals of less than 9 milliseconds will be avoided. The delay in the timing intervals between detonations of charges is done to reduce the additive effect on compression waves and particle velocities in order to stay within the Alaska Standards, which limit over pressures to 2.7 pounds per square inch (psi) and peak particle velocity to 0.5 inches per second (ips).

2) The water intake line will include a screen cap to prevent debris, fish, and other organisms from entering the intake. The cap will consist of a barrack frame which will support a finer screen with 2 millimeter maximum openings. The proposed configuration will limit through-screen velocity for combined fire protection and potable water maximum flows, to less than 0.5 feet per second. The sanitary system outflow will conform to State established standards, as detailed in the SPDES

⁷ Alaska Department of Fish and Game. *Blasting Standards for the Protection of Fish*. February 15, 1991. http://www.habitat.adfg.alaska.gov/tech_reports/standards_techniques/akdofg%20blasting%20standards.pdf.

permit for a point source discharge. These permits establish criteria for both effluent limits and testing standards following the construction of the wastewater treatment system. Prior to lakebed disturbance associated with construction of the water intake and discharge lines, an aquatic survey will be conducted to gather important baseline data as to the current condition (prior to construction), and this data will be used by the aquatic ecologist performing the monitoring of the excavation. A post construction offshore aquatic survey will also be performed to ascertain the extent to which, if any, the underwater environment has been altered by the construction of the discharge line. Permit conditions will include seasonal restrictions for construction and turbidity limits for all underwater excavation.

3) The Project Sponsor will be utilizing and conforming to the applicable requirements of the State Pollutant Discharge Elimination System (SPDES) General Stormwater Permit for Construction Activities (GP-0-10-001), including development and implementation of a Storm Water Pollution Prevention Plan (SWPPP). The SWPPP will include erosion and sediment controls and post-construction stormwater management practices. The requirements include submission of a Notice of Intent (NOI) form for the general permits. The submission of the NOI forms will obligate the Project Sponsor to comply with the terms and the conditions of the general permit.

4) To obtain coverage under MSGP, a complete Notice of Intent (NOI) must be submitted to the Department at least 30 days prior to commencement of industrial activities. Coverage may be modified to include activities/outfalls as they commence, and eliminate requirements when associated activities cease by submitting a Notice of Intent or Termination (NOI/T).

7. Groundwater

a. Potential Impacts.

The project will add only small areas of impervious surface, which will be dispersed throughout the project development area, and will have a negligible effect on groundwater recharge. Construction of the proposed project could result in certain localized impacts to groundwater. Project construction and operation on the island could impact groundwater particularly from accidental spills or releases of petroleum products during construction or operation.

b. Discussion and Findings.

In accordance with best management practices the project will operate under an active Spill Prevention Control, Countermeasures and Containment Plan (SPCC) as per federal requirements for facilities (Appendix B of the FEIS) that store and handle petroleum products. DEC permits issued for project construction will include a condition that the SPCC be submitted to the DEC Region 6 Spills Engineer for review and final approval. All measures and requirements included in the approved plan will be enforceable conditions of DEC permits. Dewatering may be required to facilitate construction of foundations. If this is necessary the groundwater pumped from excavations will be handled in accordance with SPDES GP-0-10-001 requirements and the procedures detailed in the SWPPP (Appendix D of the DEIS).

8. Flora and Fauna

a. Potential Impacts.

The DEIS included reports of studies to identify what types of flora and fauna exist on Galloo Island. An Ecological Resources Survey evaluated the types of habitat on the island and approximate acreage. Agricultural (164 acres), forested (613 acres), open field (783 acres), rocky shoreline (30 acres), wetlands (350 acres) and developed (29 acres) areas were identified. Impacts to wetlands and the rocky shoreline were avoided to the extent practicable. The project will permanently impact the following acres and percentage of island habitats: agricultural (15 acres, 9.3%), forested (66 acres, 10.8%), open field (72 acres, 9.2%), rocky shoreline (0.03 acres, 0.1%), wetlands (0.19 acres, 0.1%) and developed areas (4.7 acres, 16.3%). The permanent impacts from the construction of the project are approximately 159 acres which is approximately 8.08% of the total land area (1,966 acres) of the island.

Plant species were also noted in the various habitat types. Two state-listed threatened species were identified, Rock Cress and Troublesome Sedge. The Rock Cress was found along the cliffs on the north side of the island and will not be affected by the construction or operation of the project. Troublesome Sedge was ubiquitous across the island in most habitat types. Since individual plant locations were not identified it is likely some individuals will be impacted by the project. However, because this species is abundant throughout the island, the potential disturbance to a small number of individuals is not a significant impact.

Two invasive species were also found across the island, Canada thistle and pale swallow-wort. Canada thistle is an invasive species found in many locations in New York State. Pale swallow-wort is an invasive species of particular concern for several reasons. Currently the spread of pale-swallow-wort is fairly limited, although there are certain locations on the mainland that are impacted, including Robert G. Wehle State Park. Construction on the island, if not carefully done, could spread pale swallow-wort to uninvaded sites on the island and mainland.

The study also noted animals that were seen on the island, including deer, coyote, vole and other small mammals. Although some individual animals will be displaced during construction, and perhaps during operation, no significant impacts to other mammals will occur. The existing deer herd on Galloo Island is currently managed to maintain a population above the natural carrying capacity of the island. The Project Sponsor will cull the existing deer herd to prevent overcrowding on the island once active management to maintain the large deer herd ceases.

A number of amphibians and reptiles were noted on the island; however none were rare or unique. Turtle trapping was also done to identify turtles on the island. Following the original survey of limited trapping, DEC requested an additional study focusing on the potential presence of Blanding's turtles (a state-listed threatened species). The survey involved 21 nights of searches for evidence of Blanding's turtles nesting, and deployment of 300 trap-nights in habitat that would be good for Blanding's turtles. No evidence of Blanding's turtle on Galloo Island was found, and DEC has determined that no further surveys for this species are warranted. Other than incidental killing of a small number of individual amphibians or reptiles no significant impacts are expected to occur.

b. Discussion and Findings.

In developing its facility design and site plan, the Project Sponsor has reduced impacts to flora and fauna, and has developed a plan to improve habitat on the island through implementation of a pale swallow-wort control program in open and forest understory areas. Compared to the original proposed layout presented in the DEIS, the revised project layout in the FEIS reduced permanent impacts to forested areas by approximately 13 acres through collocation of certain roads and the electrical connection system. The Project Sponsor has proposed a pale swallow-wort control plan (Appendix F of the FEIS). This goal of this plan is to prevent spread of this invasive species to uninvaded sites on the mainland, and reduce the areal coverage of this species on Galloo Island. The Project Sponsor will implement a mowing protocol to ensure that areas that are currently open field are maintained as grassland habitat to provide opportunity for use by grassland bird species. The currently managed deer herd will be culled in accordance with DEC Region 6 Fish & Wildlife guidance.

9. Avian species

a. Potential Impacts.

The DEIS and FEIS contain extensive surveys of avian species that use the island for breeding, nesting, feeding, or that migrate across the island during spring and fall migration periods, and include almost two full years of survey data, beginning in the Fall of 2007 through the Fall of 2009. Summaries of these reports and potential adverse impacts are discussed below.

Winter Bird Surveys

2007-2008 Winter Bird Survey (DEIS Appendix P.2)

The 2007-2008 Winter Bird Survey was conducted from November 28, 2007 – March 10, 2008. No prior winter bird surveys are known to have been conducted on Galloo Island. This survey identified raptor species, specifically Rough-legged Hawks, Red-tailed Hawks, Bald Eagles, Golden Eagle, Cooper's Hawk, Northern Harrier, Snowy Owl, Northern Strike and Northern Raven. No Short-eared Owls were observed. The 2007-2008 Winter Bird Survey suggests that Galloo Island is involved with winter raptor concentrations that periodically occur in the grasslands proximal to northeastern Lake Ontario. While large numbers of wintering waterfowl were documented in the waters surrounding the island, very little transit of any waterfowl species was observed crossing the island. Very few landbirds were observed on Big Galloo during the winter 2007-2008 surveys. However, the landbirds observed included the Horned Lark and Cooper's Hawk, both listed as species of Special Concern in New York State.

2008-2009 Winter Bird Survey (FEIS Appendix H)

The 2008-2009 winter avian survey was conducted from November 12, 2008 – March 12, 2009. Bald Eagles were found in lower numbers than observed in the winter of 2007-2008. The winter 2008-2009 winter survey found high daily counts of one American Kestrel, two Cooper's Hawks, and two Northern Harriers. Two Snowy Owls were also observed. No Short-eared Owls were observed. Similar to 2007-2008, Northern Raven and Northern Shrike were seen in small numbers throughout this survey. Numbers of waterfowl were significantly lower during this survey than the

2007-2008 survey but the general species pattern seemed to be similar. The second winter bird survey (2008-2009) supports the conclusion reached in the 2007-2008 report that Galloo Island is involved with the winter raptor concentration phenomenon that periodically occurs in the grasslands proximal to northeastern Lake Ontario, but is variable from year to year. The surveys did document Northern Harrier, a New York State listed species, but in lower ratios than other nearby regions. There also appears to be significant annual variation in winter season waterfowl numbers on Galloo Island. Landbirds were relatively scarce in both winter surveys.

Nocturnal Radar Migrant Surveys

Spring 2008 Radar Survey Report (DEIS Appendix P.4)

During spring 2008, nocturnal radar surveys of bird and bat flight activity at the Hounsfield Wind Farm Project area were conducted. Radar surveys are used to count the number of flying migrants passing over the site, and how high they fly, but cannot be used to determine the species of the migrants, or whether they are birds or bats. The overall mean passage rate for the entire survey period was 624 (plus or minus 55) targets per kilometer per hour (t/km/hr). About 19 percent of the targets flew below 125 meters (the maximum turbine height) and varied by night from 4 to 48 percent. The percentage of targets flying below turbine height is very similar to most studies conducted at inland sites during spring mitigation periods. The results of the spring radar surveys fall within the range of other surveys conducted in the Northeast that used the same methods, data analysis procedures and equipment.⁸ Since on all nights the targets were evenly distributed around the radar (within its range) it is likely that there is a broad front migration pattern rather than channeling to any part of the island.

Fall 2008 Radar Survey Report (DEIS Appendix P.5)

Nocturnal radar surveys were also conducted during Fall 2008. Radar efforts were supplemented by ceilometer/night vision visual surveys. The overall mean passage rate for the fall survey period was 281 (plus or minus 10) t/km/hr. Hourly, nightly, and seasonal mean flight heights showed trends similar to other inland studies with varying topography. The results of the fall surveys fall within the range of other surveys conducted in the Northeast that used the same methods, data analysis procedures and equipment.⁹ The fall study, similar to the spring study, indicates a broad front migration rather than channeling to any particular part of the island.

Avian Acoustic Survey

2008 Acoustic Study of Avian Night Migration (DEIS Appendix P.7)

Acoustic monitoring was conducted to determine if there are species on the island that would not be detected during visual observations. The study documented avian flight calls from the lower stratum of the atmosphere (< 700 m) for 10 hours a night beginning around sunset. The data revealed flight calls of two cryptic species that are difficult to detect in diurnal surveys, and which were not detected in other avian surveys on Galloo Island in 2008: Common Moorhen and Least Bittern. The data also suggest that there is gull activity over Big Galloo all night long during the breeding

⁸ New York State Department of Environmental Conservation. *Publicly Available Radar Results for Proposed Wind Sites in New York*. May 29, 2008. http://www.dec.ny.gov/docs/wildlife_pdf/radarwindsum.pdf .

⁹ Ibid.

season, and that it increases substantially toward dusk and dawn. These data along with the altitude and passage rate data from the diurnal movement study indicate that gulls might constitute a significant portion of the targets documented in the spring radar study.

Breeding Bird Surveys

2008 Breeding Bird Study (DEIS Appendix P.3)

A breeding bird study was carried out on Galloo Island during the spring and summer 2008. The breeding birdlife on Galloo Island is dominated by common species such as American Robin, Eurasian Starling, Yellow Warbler and House Wren – generally similar to the composition of common breeding species on the mainland. New York State-listed species detected in this study include three species listed as Threatened (Northern Harrier, Upland Sandpiper, Bald Eagle) and five species listed as Special Concern (Common Loon, American Bittern, Cooper’s Hawk, Common Nighthawk, Whip-poor-will). In addition, the Black-billed Cuckoo, Bobolink, and Canada Warbler are included on the USFWS’s 2002 Birds of Conservation Concern list for the Lower Great Lakes/St. Lawrence Plain region, which includes Big Galloo Island. No Federally listed birds were documented in the 2008 Big Galloo breeding bird survey.

2009 Breeding Bird Study (FEIS Appendix H)

A second year of breeding bird surveys was conducted on Galloo Island in 2009. The following species detected in the 2009 breeding bird study are New York State-listed: Pied-billed Grebe (Threatened), Bald Eagle (Threatened), Northern Harrier (Threatened), Upland Sandpiper (Threatened), Common Loon (Special Concern), American Bittern (Special Concern), Cooper’s Hawk (Special Concern). The additional intensive surveying in the 2009 breeding season produced strong circumstantial evidence that Northern Harrier and Upland Sandpiper were involved with breeding activity on Galloo in 2009. Upland Sandpiper activity consistent with nesting was observed in a native grassland area in the vicinity of WTGs #2 and #3. While no young Upland Sandpipers were noted in summer 2009, the observation of territorial behavior of one adult in this area is strongly suggestive of breeding activity. No federally listed bird species were documented in the 2009 survey and no other New York State-listed grassland birds were documented except for Northern Harrier and Upland Sandpiper. In regard to other breeding birds, the 2009 survey indicated that most species showed very similar patterns of abundance from 2008 to 2009.

Diurnal Bird Movement Surveys

2008 Diurnal Bird Movement Study (DEIS Appendix P.6)

Diurnal bird movement surveys were carried out from late March through mid-November, 2008. The goal was to assess avian flight activity and flight characteristics (e.g., altitude & direction) over the island with particular attention toward the Little Galloo Island colonial waterbirds -- gulls, Caspian Tern, and Double-crested Cormorant. Flight activity of all species above 30 meters above ground level was noted. The 2008 study found that Little Galloo colonial waterbirds made regular feeding flights across Big Galloo Island.

2009 Diurnal Bird Movement Study (FEIS Appendix H)

The 2009 Diurnal Bird Movement Study used a protocol similar to that used in 2008 survey, with five survey points added in accordance with DEC recommendations. The additional data provided by the 2009 Diurnal Bird Movement Study showed passage rates over Big Galloo Island for Caspian Terns, Ring-billed Gulls and Double-crested Cormorants as peaking in early June through early July. The data from the 2009 study of diurnal bird movement over Big Galloo Island confirms the general avian flight patterns documented in the 2008 diurnal bird movement study and supports the idea that these are annual patterns. This includes the passage rates, flight altitudes, and temporal activity patterns of gulls, Double-crested Cormorants, and Caspian Terns that nest on nearby Little Galloo Island.

Ecological Resource Survey - Avian Species Observations (DEIS Appendix N)

Field surveys were conducted during various periods of time from November 2007 to September 2008. During this survey a total of 116 species of birds were observed in various habitat types. Most of the species were common and widespread throughout New York State, except for nine species. These include the Peregrine Falcon, Short-eared Owl, Bald Eagle, Northern Harrier, American Bittern, Sharp-shinned Hawk, Red-headed Woodpecker, and Cerulean Warbler. Bird species observed in the upland forested areas included Wild Turkey, Northern Flicker, Wood Thrush, Gray Catbird, Cedar Waxwing, Black-and-white Warbler, Rose-breasted Grosbeak and American Goldfinch. Avian species in the mixed forest wetland areas were Great Horned Owl, Downy Woodpecker, Eastern Wood-pewee, Blue Jay and House Wren. Most of the northern portion of the island contained these habitat types and avian species.

Summary of potential impacts.

The studies described above were reviewed to assess the potential for adverse impacts to avian species from construction and operation of the Hounsfield Wind Farm. Adverse impacts can include direct mortality from construction activities or from blade strikes during operation; displacement from loss of habitat to built uses; or avoidance of habitat by species sensitive to the change in landscape (particularly the presence of tall structures).

Impact to Shorebirds

Galloo Island has higher shorebird usage than interior areas in New York State (except those proximal to inland shorebird staging areas like Montezuma National Wildlife Refuge) but lower than coastal sites along the eastern Lake Ontario shore. The level of shorebird activity on Galloo Island indicates that risk of shorebird collision with wind turbines is likely to be greater than at mainland wind project sites.

Impact to Waterfowl

The Hounsfield Wind Farm would appear to have lower risk to waterfowl than a nearby site like Wolfe Island, but would have greater risk than an inland wind energy site like Maple Ridge that has less waterfowl feeding flight activity. The latter project does have a local population of Canada Geese and Mallards, and a few of these species have been documented as fatalities there.

Impact to Raptors

Winter bird surveys confirmed that winter raptors aggregate on Galloo Island when food is available. Collision fatalities of raptors have been noted at wind projects in North America and Europe, however in North America most raptor fatalities have been documented in the western half of the continent. Based on periodic winter raptor concentration, collision risk (especially Rough-legged and Red-tailed Hawks) can be expected to be greater in the winter on Galloo Island than at mainland wind farms in New York State. On the other hand, the Hounsfield wind project may have lower overall raptor mortality during the migration periods (especially spring) than other sites in the northeastern coastal region of Lake Ontario. Based on the 2008 data, Galloo may have the highest usage of wintering Bald Eagles of any currently proposed or existing wind project site in New York State. On the basis of these observations, there may be a higher collision risk for Bald Eagles, particularly in February and March, than exists at other New York wind projects.

Impact to Little Galloo Colonial Waterbirds

Diurnal bird movement studies documented that the colonial nesters on Little Galloo Island make regular foraging flights over Galloo Island. Collision fatalities of Ring-billed Gulls might occur at the Hounsfield project if gulls continue to make foraging flights across the Island once the project is built. The potential for Caspian Tern collision fatalities was assessed by reviewing European studies of similar species near wind farms. One study in particular showed that a tern species of similar size to the Caspian Tern (Sandwich Tern) did experience collision mortality, though not at a level that threatened the viability of the nearby colony. The data and analysis provided in the FEIS indicate that the risk to Caspian Tern at this site would likely be less than for those species studied in Europe. Therefore this is not a significant impact. Based on the lower trans-island flight altitude noted for Double-crested Cormorants, it is not expected that collision mortality would be high for this species. The Double-crested Cormorant nesting population on Little Galloo is managed by DEC to be around 1,500 pairs.

NY Threatened & Endangered Species

Golden Eagle (*NY: Endangered*) - In addition to its threatened listing in New York State, this species is federally protected by the Bald & Golden Eagle Protection Act. The species is an uncommon migrant through the region and a rare winter and summer visitor. The Hounsfield wind project would introduce collision risk for the occasional Golden Eagle that may visit Galloo Island.

Short-eared Owl (*NY: Endangered*) - It is possible that in some years Short-eared Owls overwinter on Galloo as there is suitable habitat and, especially in high vole years, there is prey. This species would theoretically be at some risk of collision with wind turbines on Galloo during migration and during the breeding season, if the species did attempt to nest on the island, however wintering birds would be unlikely to be involved in wind turbine collisions because of their low-altitude foraging behavior. Construction of the project may also lead to a decrease potential breeding habitat, and may discourage some nomads from accessing the island, either for foraging or nesting.

Peregrine Falcon (*NY: Endangered*) - One individual was seen on several occasions in late summer and early fall 2008. The species is an uncommon migrant through the region and a rare winter and summer visitor. The Hounsfield wind project would introduce collision risk for the occasional Peregrine Falcon that may visit Galloo Island.

Bald Eagle (*NY: Threatened*) - In addition to its threatened listing in New York State, this species is federally protected by the Bald & Golden Eagle Protection Act. Bald Eagles were present year round on Galloo in 2008. There were no active nests or other evidence of breeding. The closest active nests are east of Sacket's Harbor, New York (> 20 km). The most likely collision risk appears to be during the late winter months when the ice-edge attracts numbers of eagles. The Hounsfield wind project would have a greater risk to wintering Bald Eagles than other currently operating or proposed wind energy projects in New York, but evidence suggests the numbers of eagles at risk would be low. To date there are no confirmed collision fatalities of Bald Eagles at wind projects, although there is one unconfirmed report of a Bald Eagle collision fatality at a wind farm near Lake Erie.

Northern Harrier (*NY: Threatened*) - Surveys conducted on Galloo Island produced evidence that Northern Harrier was involved in breeding activity on the island. The observation of three young Harriers on August 20-21 is evidence of successful 2009 breeding of this species on Galloo. This species would be at some risk of collision with wind turbines on Galloo. Construction of the project may also lead to a decrease potential breeding habitat, and may discourage some nomads from accessing the island, either for foraging or nesting.

Upland Sandpiper (*NY: Threatened*) - The Upland Sandpiper has a small breeding presence on Galloo and is anticipated to be a regular migrant in small numbers. Two individuals, presumed to be a pair attempting to breed, were documented in the grasslands at the southern end of the island during the 2008 breeding bird survey. Calls from a single bird (presumed to be a migrant) were recorded during late September in the acoustic monitoring survey. Additional surveys in 2009 produced evidence that Upland Sandpiper was involved in breeding activity on Galloo. While no young Upland Sandpipers were noted in summer 2009, the observation of territorial behavior of one adult in the southern grassland area is strongly suggestive of breeding activity. The Hounsfield wind project would introduce a new collision hazard in the vicinity of their breeding site. Construction of the project may also lead to a decrease potential breeding habitat, and may discourage some nomads from accessing the island, either for foraging or nesting.

New York State Species of Special Concern

Nine species listed of special concern in NY were documented as migrants, possible breeders, and/or occasional visitors to Galloo: Common Loon, American Bittern, Cooper's Hawk, Sharp-shinned Hawk, Common Nighthawk, Whip-poor-will, Redheaded Woodpecker, Horned Lark, and Cerulean Warbler. None were confirmed breeding on Galloo and only one or two individuals were observed except for Horned Lark (a flock of 10 birds were seen in winter bird study) and Common Nighthawk (6 migrants were seen in late May). These species could be subject to minor collision risk.

Impact to Birds on the Mainland

There is no evidence or theoretical grounds for indicating that the Hounsfield wind energy project will have any impact to bird populations on the mainland, including the Point Peninsula Bird Conservation Area.

b. Discussion and Findings.

DEC has determined that the project layout as proposed in the FEIS would result in a “take” of habitat that supports state-listed threatened or endangered grassland bird species, particularly the Short-eared Owl (*Asio flammeus*), Northern Harrier (*Circus cyaneus*) and Upland Sandpiper (*Bartramia longicauda*). The 2009 Breeding Bird Survey confirmed a 58-acre grassland habitat area at the south end of the island (the “southern grassland area”) is a likely nesting area for the state-listed threatened species Upland Sandpiper and potentially Northern Harrier. The Project Sponsor had originally proposed two turbines, WTG #2 and #3, together with associated access roads and electrical collection lines, within this habitat. The DEIS project layout shows that this would have permanently converted 2.91 acres of the southern grassland area to built uses. A revised layout presented in the FEIS was proposed that would have limited the area of disturbance to approximately 1.03 acres, by relocating access roads and electrical collection lines. DEC determined, however, that any permanent disturbance within this 58-acre southern grassland area would result in a “direct take” of Upland Sandpiper habitat. The Project Sponsor has submitted a revised layout that eliminates all development within the 58-acre southern grassland area, including WTG # 2 and # 3, and associated access roads and electrical collection lines. This revised 82-turbine layout minimizes of the risk for “direct take” of the southern grassland area habitat. DEC has additionally determined that WTGs proposed in close proximity to the southern grassland area would result in an indirect take of a portion of the grassland habitat by virtue of turbines (#1, #4, #7, and #8) placed adjacent to but not within the southern grassland. The Project Sponsor will provide mitigation for this indirect loss of 58 acres of Upland Sandpiper habitat on Galloo Island by providing 250 acres of suitable habitat, through easement or fee title, on the mainland. This mitigation acreage, together with conditions set forth in the Article 11 permit described below, will avoid, minimize or mitigate adverse impacts, and result in a net conservation benefit for the state-listed grassland bird species. Conditions of the Article 11 permit will include:

- If any active threatened or endangered bird species nests are discovered within a construction, ground clearing or grading site, the Regional DEC Natural Resources Supervisor will be notified and the nest site will be avoided until notice to continue construction at that site is granted.
- Seasonal limitations will be placed on construction activities in grassland areas (outside of the 58-acre southern grassland area) unless a DEC-approved biologist/ornithologist is present on site to monitor the presence of threatened or endangered bird species. All grassland habitat temporarily modified during construction will be restored to quality grassland habitat.
- Grasslands on the island will be mowed on a three year rotational cycle, to prevent their succession to shrubland or forest. Mowing will occur only after active nesting season by the state-listed species.
- An Invasive Species Control Program, in particular to curtail pale swallow-wort, will be carried out during the construction and operation of the wind farm. The goal of the plan is to reduce the areal coverage of pale swallow-wort in open areas and forest under-story by 20% per year each year for five years. By removing areas of pale swallow-wort and seeding with appropriate native vegetation the project will make more potential habitat areas available for mammal and avian species.

- If the “incidental take” of state-listed threatened or endangered species exceeds limits established in the Article 11 permit, the permittee will immediately consult with DEC to re-evaluate the conditions of the permit with regard to avoidance and mitigation measures.

In addition to measures identified to address mortality and/or displacement of state-listed species, the Project Sponsor has included a number of Best Management Practices in the design of the project to reduce overall avian collision risks. These Best Management Practices include the following:

- Guy wire supports to met towers are a known source of high collision risk to birds. The permanent met tower at the project will be a free-standing tower without guy wires. Five temporary meteorological (guyed monopole) towers are anticipated to be removed by 2011.
- WTGs and met towers are designed with a single large diameter tubular tower (steel monopole), rather than lattice tower, which reduces the perching opportunities for birds. WTGs will be painted in white, off-white or a pale color to be readily visible to migrating birds.
- To the extent practicable, electrical collection lines will be buried to reduce both habitat impacts and collision risks.
- Overhead lines will comply with Avian Power Line Interaction Committee Guidelines for insulation and spacing to reduce the impact on birds.
- Most species of nocturnal migrant songbirds are attracted (to varying degrees) to artificial lights. Unnecessary lighting will be turned off after evening activity hours of people residing on the island. Any required lighting will be shielded and pointed in the downward direction to minimize bird attraction.
- Fragmentation of habitat has been minimized to the extent practicable through the design and layout of the project features. Fragmentation has been further minimized by the redesigned layout of the project in the FEIS. The layout reduces habitat fragmentation by collocating electrical collection lines and access roads in a number of locations. The substation was also moved to the agricultural area located at the eastern edge of the island, resulting in reduced impacts to forested areas by 12.78 acres.
- The Project Sponsor will cull the existing artificially high deer population on Galloo Island, and maintain a deer herd that does not exceed the natural carrying capacity of the island. Carcasses resulting from culling will be removed so that they do not encourage congregation of raptors.

10. Bats

a. Potential Impacts.

In order to assess the effects of the project on the bat population of Galloo Island, preconstruction field monitoring was conducted in accordance with study protocol reviewed and accepted by DEC, and a bat risk assessment was prepared. The survey of bats on Galloo Island involved collecting data by two methods:

1) Acoustic monitoring.

This method uses monitors to listen for bat calls. Interpretation of calls recorded by these monitors can be used to estimate the level of bat activity and determine generally what types of bats are in the vicinity of the monitor. The study identified a number of bat species that use Galloo Island, including hoary bats and big brown bats. The acoustic monitoring detected 5.3 calls per detector per hour.

2) Mist netting.

This method uses nets to capture bats in flight for direct observation and identification. The mist netting effort found little brown bat and silver-haired bat.

Bat habitat included a colony in a barn on the island and various forested areas of the island. No state or federally listed bats were found on the island. Construction-related impacts to bats are anticipated to be limited to incidental injury and mortality (if any) due to construction activity and vehicular movement, habitat disturbance/loss associated with the clearing of forests and earth-moving activities, and displacement due to increased noise and human activities. None of the construction-related impacts described above will be significant enough to affect local populations of any bat species. There is some collision mortality risk to bats, particularly migratory tree bats, from operation of the project. Migratory bat activity on Galloo Island was found to be similar to other wind development sites in terms of the temporal and altitudinal distribution of bat activity. Most of the bat activity occurs near the ground and was highest during the summer months relative to the migratory season. Based on these studies, it was determined that fatality numbers at the project site are likely to be similar in composition but higher in magnitude (on a per turbine basis) compared to other wind projects sites in the northeastern United States.

b. Discussion and Findings.

1) The FEIS project layout reduced the amount of forest impact through the collocation of roads and ECS, and relocation of the substation from a forested area to the agricultural land on the eastern end of the island. These changes reduced impacts to forest-areas by approximately 13 acres.

2) White Nose Syndrome (WNS) has drastically reduced local and regional populations of many of New York's bat species, particularly *Myotis* spp, and some of these may become candidates for becoming state-listed threatened or endangered species. Because of this decline in bat population, mortality from wind turbines is more of a concern now than what was the case just a few years ago before the presence of WNS. The combined effect of WNS and mortality from wind turbines warrants continued and vigilant monitoring to determine the overall impacts to all bat species in New York.

11. Post-construction monitoring and Operational Management

The Project Sponsor will be required to prepare a Post-Construction Monitoring Plan for Birds and Bats. A draft plan was included as Appendix I of the FEIS. The final plan will be developed in consultation with DEC and the United States Fish and Wildlife Service that meets conditions of DEC permits required for development of the project. The two basic components of the plan are a three-year collision fatality survey and a three year bird habituation and avoidance study. The

fatality study will encompass searches for bird and bat carcasses at turbines to estimate mortality. The habituation and avoidance study will recreate the pre-construction diurnal movement and breeding bird surveys to estimate how the presence of turbines impacts the use of the area by birds. A post-construction winter raptor study will also be done to compare winter raptor use of the island to baseline data collected and included in the DEIS/FEIS. Assessments of impacts related to turbine-caused bat mortalities will also recognize that White-nose Syndrome (WNS) has resulted in a serious decline of certain bat species in New York State. The final plan will include a requirement that any if mortality of any bird or bat species exceeds pre-construction estimates, or if there is mortality to any state- listed threatened or endangered species, the Project Sponsor will consult with DEC to determine if additional study and/or mitigation are required. Such measures may include:

- Research to identify the factors contributing to the mortality (e.g., weather conditions, time of year) and if this was an isolated incident or a pattern of risk.
- Increase survey frequency.
- Increase reporting frequency.
- Additional behavior or movement studies, above what was detailed in the Post Construction Monitoring Plan, depending on the species involved.
- Additional offsite mitigation for grassland bird species or Bald Eagle.
- Consultation with DEC to determine if some of the following operational controls such as, early alert, repellent techniques, blade feathering or turbine shutdown will be required. These operational controls will be considered after exhausting reasonable efforts to determine the cause of mortality and the establishment of a pattern of risk, as determined through discussion with DEC, and determining that other actions cannot sufficiently reduce the magnitude of the impact. In such circumstances, the Project Sponsor may be required to implement technically and economically feasible operational controls to reduce the identified impacts. Such operational controls may include, but would not be limited to, reducing operations at certain times of day, under certain meteorological conditions, or other periods of time identified as high risk; increasing the cut-in speed, or feathering turbine blades during periods of high risk for bats.

12. Fish and Aquatic Species

a. Potential Impacts.

Lake Ontario is an important habitat for a number of fish and aquatic species, and provides sport fishing for walleye, smallmouth bass, largemouth bass, brown trout, Chinook salmon, Coho salmon, Atlantic salmon, northern pike, and a stocked lake trout population. The most significant concerns for impacts to fish and aquatic species from construction of the Hounsfield wind farm would arise during construction of the temporary and permanent boat slips, water intake line and wastewater discharge line. Details regarding construction of these project components are described in Section 6 of these findings.

Located near Galloo Island are several Significant Coastal Fish and Wildlife Habitats. In particular, the shoals near Stony Island are regionally significant for lake trout and smallmouth bass spawning. These habitats will not be impacted by the construction or operation of the wind generation project on Galloo Island. Potential impacts associated with the proposed underwater transmission cable route through this area will be assessed in the Public Service Law Article VII process before the Public Service Commission.

b. Discussion and Findings.

Potential impacts to fish and other aquatic species will be reduced by construction and operational Best Management Practices described in Section 6 of these findings.

13. Visual, Historic and Cultural Resources

a. Potential Impacts.

1) The DEIS and FEIS provided analyses of the potential for change in the visual setting according to the DEC visual policy. The most significant visual impacts anticipated resulting from construction and operation of the project are the foreground views from the island itself or near island views from Lake Ontario. Turbines that are close to the viewer (i.e., less than 1.5 miles), will heighten a project's contrast with the landscape in color, line, texture, form, and especially scale. Persons observing Galloo Island from coastal vantage points will view the project from far background distance (5.6 miles and greater). Turbine structures will decrease in visibility, clarity and perceived importance with increasing distance away from the turbines. The viewshed analysis demonstrates that views of the project will be substantially limited at shoreline locations. Nonetheless, this project will result in a change to the visual setting on the horizon from vantage points along the Lake Ontario shore, including scenic and historic resources of statewide significance.

In the assessment of visual impacts to inventoried resources, DEC relied primarily upon comments from the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), the SHPO, the New York State Department of Public Service (DPS), the Town of Hounsfield and the Village of Sackets Harbor. OPRHP identified concerns for potential impacts on six state park facilities. These were identified as Wehle State Park, Chaumont Boat Launch, Westcott Beach, Sackets Harbor Battlefield, Stony Creek Boat Launch, and Southwick Beach State Park. Of the six park locations identified, the visual analysis in the DEIS identified only five as having potential views of the wind farm (Stony Creek Boat Launch was determined to not have visibility to the proposed project).

In making an assessment regarding visual impacts, DEC policy requires staff to verify the potential significance by comparing the “qualities of the resource” and “the juxtaposition...of the proposal as the guide for the determination.” The example used in the policy is that of a cooling tower plume interfering with the view from a state park overlook.¹⁰ Using this criterion, the visibility of the project to the Chaumont Boat Launch would not be considered an adverse impact because the main function of this facility is boat access not necessarily related to the quality of the visual experience at that location. The other four park resources identified by OPRHP (Wehle State Park, Westcott

¹⁰ Ibid.

Beach, Southwick Beach, and Sackets Harbor Battlefield) all have one or more features where the visual environment is an important element of the visitors' experience. Westcott Beach (12.4 miles) and Southwick Beach (13.3 miles) provide for visual overlook and interpretation (though it should be noted that at Southwick Beach, the overlook already provides a direct view to the Nine Mile Point Nuclear Power Plant). Robert Wehle Park includes two overlook locations with a relatively close mainland view (5.6 miles) to Galloo Island. Sackets Harbor Battlefield State Historic Site includes a view to Galloo Island, although from a far background distance of more than 12 miles. In addition to the resources identified by OPRHP, the SHPO, the Town of Hounsfield and the Village of Sackets Harbor also identified the historic Madison Barracks complex as an inventoried visual resource with a direct, albeit distant, view to Galloo Island (13.4 miles).

DEC concurs that, at the inventoried resources identified above with visibility to the project, the change in the visual setting created by the project may detract from public enjoyment of those features where the view to the horizon on Lake Ontario is an important component (overlooks and historic settings). This impact is most pronounced at the Sackets Harbor Battlefield Historic Site and Madison Barracks. These sites use the existing vista looking out to Galloo Island as part of their historic museum programs. The visible turbine field will be an additional modern visual element in the background of this existing vista. Although this feature will alter the landscape on the horizon, it is not the first, and would not be the only, modern alteration that has occurred at these historic settings. The view from these locations includes other modern elements such as modern watercraft on the lake, residential development across Black River Bay in the Town of Brownfield, with both daytime and nighttime visibility, new residential development contiguous to the battlefield site including nighttime street lighting and modern transportation features within the battlefield.

DEC also recognizes that the proposed wind power project development differs from other development activity in that the turbines are required to be removed, and the resulting views to Galloo Island will revert to its prior condition, if and when the project is decommissioned. In this sense, the change in visual setting may be considered long-term – possibly twenty to forty years, but temporary when considered against the full sweep of time that this historical viewshed has existed.

The Galloo Island Lighthouse was also identified as a listed historic resource which will experience a direct foreground view to the project. While it is clear that the viewshed at the lighthouse site will be dramatically altered, the site is currently in private ownership, does not have approved public access, and is not located on any designated scenic transportation routes, other than recreational boat traffic on the lake. Therefore, although the magnitude of the change in visual setting is large at this location, the impact to the public is very small, especially when compared to the number of visitors to mainland resources such as the Sackets Harbor Battlefield and the Madison Barracks sites.

2) Impacts to historic resources are closely related to the visual impact assessment, since properties listed or eligible for listing in the State and National Registers of Historic Places are included on the list of "inventoried" visual resources in the DEC visual policy. The June 23, 2009 SHPO letter (FEIS Appendix Q) determined that approximately 238 resources listed or eligible for listing on the State or National Registers of Historic Places are located within the area surveyed in accordance

with that agency's guidelines.¹¹ Within the survey area, SHPO identified several key receptors where visual impacts should be carefully assessed. These include the Galloo Island Lighthouse Complex, the Sackets Harbor Battlefield, the Madison Barracks Complex, and the Sackets Harbor Village Historic District. The SHPO indicated that the visual assessment provided in the DEIS sufficiently assessed these resources. The SHPO's assessment concluded that, although the full extent of potential impacts for the proposed undertaking cannot be assessed absent the as of yet unsubmitted survey data for the transmission line portion of the project, sufficient information does exist to determine that under 36CFR Part 800.5(v) the undertaking will have an adverse effect on cultural resources.

3) A Phase IB Cultural Resources Investigation involved surface inspection and shovel testing in selected portions of the project area designed to meet the requirements of the SHPO for surveys of archeological resources. No prehistoric artifacts were found on Galloo Island. Four historic sites were identified and all were associated with the discovery of partial structures or foundations. The proposed project layout avoids three of these sites. One of the sites is at the site of the proposed permanent boat slip; therefore this site cannot be avoided by project re-design.

b. Discussion and Findings.

1) The Project Sponsor has explored means to minimize visual impacts including assessing potential options for camouflage or disguise including a review of different colors for the WTGs, and minimizing FAA-required lighting. However, direct mitigation of visual impacts from the project is difficult, particularly at this project site which, as the SHPO has pointed out, is unlike previously evaluated wind farm projects, being sited on an island in the midst of open water, with a much higher visibility potential than previously reviewed mainland based projects. DEC's Visual Policy states that after all traditional mitigation strategies have been employed staff should pursue offsets and decommissioning to help achieve the balancing required by SEQR. Correction of an existing aesthetic problem identified within the viewshed of a proposed project or enhancing the setting may qualify as an offset or compensation for residual project impacts, after traditional mitigation measures have been applied. The notion here is to improve the experience of visitors at these sites by enhancing their visual and interpretive elements.

Since practicable means to further mitigate these distant views have not been identified, DEC has evaluated potential visual offset mitigation proposals provided by OPRHP and the Town of Hounsfield/Village of Sackets Harbor. These are included in Appendix Q of the FEIS. DEC has determined that the following proposed offset measures will create a net visual improvement, will add to the visitors' experience and appreciation of the resources, and are therefore the preferred mitigation offsets.

- Sackets Harbor Battlefield State Historic Site. OPRHP recently acquired 40 waterfront acres of the original War of 1812 Battle of Sackets Harbor battlefield site. Plans are underway to open the new property to visitors and to provide improved access and interpretation. A new interpretive plan to incorporate the new acquisition into the existing Battlefield storyline and define appropriate interpretive media will be developed. New walking trails, with design and fabrication of new directional and interpretive signage, will be required. A new, permanent

¹¹ New York State Historic Preservation Office. *New York State Historic Preservation Office Guidelines for Wind Farm Development Cultural Resources Survey Work*. March 8, 2006. <http://www.nysparks.com/shpo/environmental-review/documents/CulturalResourceSurveyGuideWindProjects.pdf>.

archaeology exhibit will be developed in the Historic Site's farmhouse to chronicle the archaeology work that has been conducted at this archaeologically rich property over the past decades. Visitors to the Sackets Harbor Battlefield State Historic Site will be able to enjoy an improved experience at the battlefield notwithstanding the far distant view of the turbine field on Galloo Island.

- **Pickering Beach Museum.** Located adjacent to the Sackets Harbor State Historic Site near Lake Ontario, the Museum is in the Village Core National Register Historic District, Sackets Harbor Heritage Area and Sackets Harbor Local Waterfront Revitalization Program area. With the assistance of New York State and the Sackets Harbor Historical Society, the Village completed a major restoration of the house. However, there was not sufficient funding to complete renovation of the cottage and much needed work on the extensive collection. Completion of this project would improve the visual setting at the Battlefield site by restoring a deteriorated historic structure and enhance the interpretive experience for visitors.
- **Robert G. Wehle State Park.** Project work would include improvements to picnic areas and amenities along the scenic bluffs on Lake Ontario, trail improvements, attention to ADA requirements, and directional and interpretive signage. New interpretive themes to be addressed and interpreted include the extensive military history of the park, geology, natural history, and resource management (in particular invasive species such as swallow-wort). Here again, visitors to Robert G. Wehle State Park will be able to enjoy an improved visitor experience along the shoreline of the park notwithstanding the far distant view of the turbine field on Galloo Island.
- **Stone Hospital at Madison Barracks.** Located overlooking Lake Ontario (with a direct line-of-sight to Galloo Island), the Stone Hospital is in the Madison Barracks National Register Historic District, Sackets Harbor Heritage Area and Sackets Harbor Local Waterfront Revitalization Program area. With funding from New York State and private foundations, significant progress has been made to restore the exterior masonry structure and the imminent threat of collapse of this historic building has been averted. But substantial work still remains, including replacement of the roof and complete renovation of the interior. When completed, the Stone Hospital will house a Military Heritage Center which will provide an enhanced interpretive experience at this historic structure within the viewshed.
- **Westcott Beach State Park.** The park's scenic overlook provides a commanding and sweeping view of Lake Ontario. The existing panoramic interpretive signage that interprets this view is proposed to be re-done to include the Hounsfield Wind Farm as a new feature in this viewscape. Upgrades to the landscape and hardscape at this site, plus continuing maintenance such as tree trimming, will improve and preserve public access to this scenic overlook, thereby improving the net visual and interpretive experience at the site.

DEC will require, as a condition of permits issued for construction of the wind generation project, that the Project Sponsor develop a visual impact offset mitigation plan that includes the offset mitigation activities identified above, or an alternative of greater or equal significance that meets DEC Visual Policy qualifications for visual offsets.

2) Because the project requires permits from the U.S. Army Corps of Engineers (USACE), the project is subject to review under Section 106 of the National Historic Preservation Act. As stated

above, the June 23, 2009 SHPO letter (FEIS Appendix Q) determined the undertaking will have an adverse effect on cultural resources. Based on SHPO's determination that the project may result in an adverse effect, the Project Sponsor will enter into a Memorandum of Agreement ("MOA") with SHPO and the USACE as part of the Section 106 process. With respect to visual impacts to historic structures/properties, as stated in the SHPO letter, direct impact mitigation of impacts to these resources is not feasible. Therefore, alternative offset mitigation is proposed. The Project Sponsor is proposing to provide funding for one or more of the following projects suggested by the Town (Included in Appendix Q of the FEIS) to be included in the MOA prepared pursuant to the Section 106 process:

- Renovation and restoration of National Register of Historic Places Listed ("NRL") District Schoolhouse #19 located in the Sulphur Springs Cemetery, Hounsfield, New York.
- Repair and restoration of the NRL Sulphur Springs Cemetery, Hounsfield, New York.
- Repair and restoration of the Lakeside Cemetery, Hounsfield, New York.
- Repair and restoration of the Military Cemetery, Village of Sackets Harbor, New York.
- Upgrades to historic exhibits at the East Hounsfield Library, Hounsfield, New York.
- Production and installation of historic markers at historic locations in the Village of Sackets Harbor and Town of Hounsfield, New York.
- Renovation and preservation of the Pickering Beach Cottage Museum, Hounsfield, New York.
- Restoration and preservation of historically significant exhibits for the Pickering Beach Cottage Museum, Hounsfield, New York.
- Repair of the Sackets Harbor Bank Building, Sackets Harbor, New York.
- Rehabilitation and restoration of Stone Hospital, Sackets Harbor, New York.

DEC notes that this discussion of mitigation related to Section 106 above is appropriate under SEQR only for the limited portion of the project subject to SEQR review, and does not result from a full analysis of impacts associated with the entire undertaking, i.e., the transmission line. Any further discussion of avoidance or reduction of adverse effects can only be undertaken after the full survey information for the proposed transmission portion of the undertaking is submitted to the parties involved in the Section 106 process and the full scope of the affects on historic/cultural resources is assessed for the entire undertaking.

3) A letter from SHPO, dated April 8, 2009 (FEIS Appendix Q), recommended that each of four identified archeological sites be avoided, as they may contribute to the ability to interpret the history of the island, but if at any of these sites avoidance is not feasible, the SHPO recommended that a Phase II investigation be conducted. Three of the four sites have been avoided. DEC will require a Phase II investigation be conducted at the proposed boat slip location prior to construction as a condition in DEC permits for the project. In addition to providing the basis for historical off-set

projects, the MOA will contain an Avoidance Plan which will include a number of measures to ensure protection of archeologically sensitive resources such as:

- Temporary fencing will be installed demarking a 50-foot buffer from the archeological sites and marked with signs indicating “Sensitive Area/No Access”.
- Final construction plans will include a notation regarding the avoidance measures for the archeological areas.
- The preconstruction meeting will include a discussion regarding the avoidance measures for the archeological areas.
- The SHPO Human Remains Discovery Protocol will be included in the construction plans for the Engineer-in-Charge in the unlikely event that human remains are encountered during construction.
- The SHPO Plan for Unanticipated Discoveries will be included in the construction plans for the Engineer-in-Charge.

14. Decommissioning

a. Potential Impacts.

In its findings for this project, dated January 6, 2010, the Town of Hounsfield Planning Board determined that the potential for adverse impacts exists if the project is not completed, is abandoned, or reaches the end of its useful life. The Project Sponsor has provided a decommissioning plan that is set out in Appendix U of the DEIS. No changes were made to it in the FEIS. DEC finds that decommissioning plan presented in the DEIS is adequate to restore the site at the end of the useful life of the project.

15. Mandated FAA Lighting

a. Potential Impacts.

While aviation obstruction lights on communications towers are common visible nighttime elements, the high concentration of red flashing lights over a relatively large area is somewhat unique to wind farms. Aviation obstruction lighting is relatively low intensity and does not create atmospheric illumination (sky glow); however a number of red lights flashing in unison will be conspicuous and discordant with the current dark nighttime conditions at this point on the horizon. The magnitude of this impact will depend on how many lighted turbines are visible and existing ambient lighting conditions present within any particular view. According to the DEIS, twenty-three of the WTG for the project will be constructed with the FAA mandatory lighting. This represents turbines along the outer perimeter of the island which are proposed to be spaced no more than a half mile apart. The FAA mandated lighting will have a 2,000 candela intensity, the minimum intensity allowed by the FAA. All FAA lighting will be red and will flash simultaneously to minimize disturbance to the night landscape. Visual simulations provided in the FEIS demonstrated that the FAA lighting will be visible along much of the coastline depending on the season and meteorological conditions, though the lights will be distant and a background feature.

The FAA lighting would also be visible from certain locations within the five New York State Parks in the region.

b. Discussion and Findings.

All lighting (including turbines and the helipad location) will be kept to the minimum recommended by the FAA. New FAA guidelines do not require daytime lighting for turbines painted “bright white”, and allow for nighttime lighting of perimeter turbines only, at a maximum spacing of 0.5 mile. Medium or low intensity pulsing red lights will be used at night, rather than white or red strobes, or steady burning red lights. Lighting at the substation will be kept to a minimum. In comparison to existing wind power projects, it should be noted that nighttime visibility/visual impacts by the project may be reduced due to new FAA guidelines (issued on February 1, 2007) that result in fewer aviation warning lights than required on earlier projects.

16. Air Resources

a. Potential Impacts.

Temporary impacts to air quality could occur during project construction as a result of both emissions from temporary generators, the concrete batch plant and from the generation of fugitive dust during earth moving activities and travel on unpaved roads. These impacts are anticipated to be minor, temporary, and localized.

b. Discussion and Findings.

A dust control plan will be implemented to minimize the amount of dust generated by construction activities. In addition, the Project Sponsor will be obtaining the requisite air permit from the DEC for operation of the temporary diesel generators to be used as the electrical power supply on the island during construction. These will remain on the island as an emergency back-up power supply. The Project Sponsor will obtain generators manufactured after 2007 with modern emissions controls which meet current air quality emissions standards.

17. Noise

a. Potential Impacts.

The proposed project area is located approximately 3.5 miles from Stony Island, to the east of Galloo Island in Lake Ontario, and 5.6 miles from the nearest mainland shoreline, Point Peninsula in the Town of Lyme. In response to comments on the DEIS, a noise propagation study was conducted to assess potential noise impacts at the nearest shoreline locations including South Shore Road Extension in Lyme, Beach Road in Lyme, Flanders Road in Lyme, Fox Island Road on Fox Island, Pillar Point in Brownsville, the shoreline of Stony Island, and the on-island Worker Housing area. The study is included as Appendix N of the FEIS. The modeling results indicated that the maximum noise level resulting from operation of the wind turbines would be 32.5 dBA at the closest shoreline location (South Shore Road Extension), 40.6 dBA at the shore of Stony Island, and 58.1 dBA at the location of the proposed worker housing complex.

Because the study did not include field measurements of ambient noise levels at these locations, DEC agreed that ambient noise levels developed by field measurements at a similar offshore wind project (the Cape Wind Project) could be used to estimate ambient sound levels at the five shoreline receptors. The ambient Leq sound level selected for this analysis was 50.7 dBA. Using this ambient noise level as the basis for analysis, the study concluded that at the closest shoreline location (South Shore Road Extension), the additive effect of the 32.5 dBA noise level generated by the wind turbines on Galloo Island would result in a noise level of 50.8 dBA, or an increase of 0.1 dBA. Similarly, at the shore of Stony Island, the additive effect of the 40.6 dBA noise level generated by the wind turbines on Galloo Island would result in a noise level of 51.1 dBA, or an increase of 0.4 dBA. The predicted maximum outdoor sound level at the worker housing area on Galloo Island is 58.1 dBA, which is in compliance with the OSHA action level of 85 dBA. An outdoor sound level of 58 dBA is typical for an urban area and does not interfere with outdoor activities at the worker residential buildings.

The study also modeled the levels of low-frequency noise expected from the project and determined that at the Stony Island and shoreline locations, there will be no perceptible infrasound (20 Hz and below) resulting from operation of the Hounsfield wind farm.

b. Discussion and Findings.

DEC has received comments disagreeing with the use of the 50.7 dBA ambient noise level from the Cape Wind project at the shoreline locations chosen for this study. In particular, commentators have pointed out that under certain atmospheric conditions, the wind speed at turbine blade height may be fast enough to operate the turbines (thus generating turbine noise) while surface winds may be slight or nonexistent, resulting in a lower ambient noise level. It has been suggested that under these conditions, 25 dBA may be more representative of night-time ambient noise levels. In fact, Table 1, *Common Indoor and Outdoor Sound Levels*, included in this study, shows 25 dBA as what one would experience in a quiet rural area – nighttime, or an empty concert hall. Using a standard noise combination calculator,¹² if a theoretical ambient sound level of 25dBA were chosen for this analysis, the combined effect of the wind turbine noise level (32.5 dBA) that would be heard at the closest shoreline location (South Shore Road Extension), together with an ambient of 25 dBA, would be a noise level of 33.2 dBA, or an increase of 8.2 dBA above the ambient. Despite the theoretical 8.2 dBA increase under this scenario, it should be noted that the resulting sound level of 33.2 dBA is shown in the table as somewhere between a quiet bedroom at night and quiet suburb – nighttime (also note that in the DEC noise guidelines, this level is equivalent to “library (soft whisper)” and “very quiet.”¹³) Furthermore, DEC noise policy does not state, contrary to common interpretation, that an increase of 6 dBA above the ambient sound level is an absolute threshold for determination of adverse impact. In the discussion of the increase in dBA in a non-industrial setting, the policy states, “In non-industrial settings the SPL (the “sound pressure level” or noise level resulting from combination of all noise sources) should probably not exceed ambient noise by more than 6 dBA at the receptor. An increase of 6 dBA may cause complaints. There may be occasions where an increase in SPLs of greater than 6 dBA might be acceptable. The addition of

¹² Spirax Sarco Inc., Blythewood, SC. *Combined Noise Source & Distance Calculator*. http://www.snapfour.com/CombinedNoise_Calculations.aspx.

¹³ New York State Department of Environmental Conservation. *Assessing and Mitigating Noise Impacts- Program Policy # DEP-00-1*. February 2, 2001. <http://www.dec.ny.gov/permits/6224.html>.

any noise source, in a nonindustrial setting, should not raise the ambient noise level above a maximum of 65 dB(A).”¹⁴

Wolfe Island Wind Farm, which has been in operation since June 2009, employs a noise complaint management protocol to investigate and mitigate noise-related complaints related to operation of the wind farm. This protocol includes an interview with the affected individuals, recording of related weather data at the time of the complaint, and mechanical evaluation of the turbines likely to be the cause of the noise complaint. If the problem persists, sound measurements are taken to compare noise levels at the receptor site to the Ontario action level for wind-generator noise at receptor locations (40 dBA). Since the time this facility commenced operation, two noise complaints have been received by the project operator, both from residents in close proximity to wind turbines. The wind farm operator has not received noise-related complaints from the mainland in Kingston, Ontario, or from the American side of the St. Lawrence River. These mainland locations are 4-7 kilometers from the operating windfield, with mostly water surface in between.¹⁵

On the basis of modeling projections prepared for this project, and current experience with a similarly-sited wind project in the region, DEC finds that the potential for a significant increase in noise levels at the receptor locations on the mainland, even assuming a theoretical “worst case” scenario that might occur for limited periods of time under a specific set of atmospheric conditions, is not significant and does not warrant further evaluation or mitigation at this time.

18. Alternatives

The purpose of an alternatives assessment is to explore project alternatives that either avoid or reduce identified environmental impacts. For the Hounsfield wind project, the primary impacts of concern are visual and potential mortality to avian and bat resources. The DEIS/FEIS included a description and evaluation of the “no action” alternative, alternative project design/layout, alternate project scale and magnitude, and alternative technologies. An additional alternative has resulted from the DEC requirement, described in the FEIS, for the Project Sponsor to obtain an Article 11 incidental take permit for state-listed threatened and endangered species on Galloo Island.

No Action.

A “No Action” alternative was reviewed to assess the effect of the project not being built. The DEIS stated that if the project were not built, there would be no impacts to wetlands, no excavation of soils or blasting, no mortality to avian or bat resources, and there would be no new visual impacts.

If the project were not built, the State would lose the opportunity for adding a significant source of clean, renewable energy to New York’s energy mix that would lessen the State’s dependence on imported fossil fuels. There would also be a lost opportunity to reduce the emissions of greenhouse gases, SO₂ and NO_x. Finally, the no action alternative would be contrary to the State’s goals in the RPS program, since the project site represents one of the best wind resources in the State. There would also be no benefits to the town, county and school district from PILOT payments. Also, the

¹⁴ Ibid.

¹⁵ Personal Communication, Mr. Garry Perfect, Canadian Renewable Energy Corp., Wolfe Island, Ontario, January 27, 2010.

approximately 200 temporary and 24 permanent jobs would be lost. On balance, the ‘No Action’ alternative is not a reasonable alternative.

98-turbine project.

The Project Sponsor also assessed a “maximum build-out” on the island which would allow for the construction of 98 wind turbines. While the maximum build-out would result in the creation of more renewable energy and contribute more in PILOT revenues than the DEIS project layout, the impacts to wetlands and forest land would increase dramatically, and potential for mortality to avian and bat resources, including impact to state-listed threatened and endangered species, would be increased. The net increase of renewable energy and PILOT revenues do not justify the loss of approximately 25 acres of wetlands and the increased potential for mortality to avian and bat species. On balance, the 98-turbine alternative is not a reasonable alternative.

51-turbine project.

This alternative would only provide incremental reductions in visibility of the project and impacts to avian and bat resources. The wind turbines would be visible almost to the same degree as the selected 82-turbine layout. From the mainland, especially, there would be no appreciable visual difference between having 51 or 82 turbines on the horizon. As to other impacts, they have been adequately avoided or minimized. There is no real environmental gain in reducing the number of turbines at Galloo Island. A decrease in the number of turbines would come at a cost of 93 MW of renewable energy that could theoretically be produced as well as a loss of significant local economic benefits. The 51-turbine alternative does not significantly reduce impacts sufficient to balance the loss of renewable energy and the public policies that favor the development of such energy resources.

8-turbine project.

This alternative would avoid all impacts to wetlands and other sensitive habitat on the island. Under this alternative the Project Sponsor would erect 8 turbines. Like the No Action alternative, this alternative was rejected as the State would lose the benefits of renewable energy and the proportionate decrease in local economic benefits. This alternative would result in a decrease of 228 installed MW capacity (representing 90.5% of the potential capacity). Given the embedded costs of constructing the project, and the loss of renewable energy, the 8-turbine alternative is neither reasonable nor practicable. It is also, on balance, not a desirable alternative from the perspective of public need.

Lower turbine height.

A lower turbine height was assessed in the DEIS. This alternative was assessed primarily to determine if lowering turbine heights would have any effect on the potential visual impact of the project. DEC has concluded that a lower turbine height would not significantly reduce the visual impacts of the project. The DEIS project layout proposed maximum tip height of 125 m (410 feet), while the smallest GE 1.5 MW wind turbine has a maximum tip height of 103.5 m (339.5 feet). Because of the clear line of site from water based or shoreline views the shorter turbine would not result in a significant reduction to visual impacts. As shown in Figures 3.6-1 and 3.6-2 of the DEIS, the reduction of 21.5 m (approximately 70.5 feet) in the tip height (a change of 17.2%) would not

significantly alter the views that would be most impacted (within 5 miles of the island). Additionally, due to the distance from land the turbines as proposed are minimally visible and therefore the impact is extremely low as noted in Section 2.6 of the DEIS. Therefore requiring the Project Sponsor to use a turbine with a lower height would not significantly reduce the visual impacts of the project. A reduction in the turbine height would result in a significant loss in power output. The total installed capacity of the 82 3.0 MW turbines in the preferred project layout is 246 MW. If a 1.5 MW turbine is used, the efficiency of the project in producing energy would be halved to 123 MW of installed capacity. This would result in an inefficient use of the site's unique wind resource while not significantly reducing impacts. On balance, the benefit of this alternative does not outweigh its shortcomings in terms of the amount of renewable electricity that could be produced.

84-turbine alternative layout.

An alternative to the DEIS project layout was evaluated as part of the FEIS based on agency comments on the DEIS. The FEIS project layout focused on a redesigned layout of the project components, particularly the WTG layout, the substation location, and co-location of the electrical collection lines with roads. The result of this layout was to further avoid or minimize impacts by:

- Reducing impacts to forested land by moving the substation from a forested area to an area currently in agricultural fields.
- Protecting NYS owned land by relocating WTG 1 and associated improvements to property owned by Galloo Island Corporation.
- Avoiding a potential archeologically significant area by relocating WTG 3.
- Meeting the 1.5 tip height setback from any aboveground transmission line components or the substation by shifting 4 WTGs.
- Allowing for a 1.5 tip height setback from the back-up power generation facilities by shifting 2 WTGs.
- Reducing impacts to forested areas (by 6,780.9 linear feet and 12.78 acres) by relocating 22,000 linear feet of electrical collection lines to co-locate with roads.
- Avoiding a potential archeologically significant location by making minor adjustments to the footprint of the temporary off-loading facility.

Although this alternative layout did reduce impacts identified in the FEIS, it was deemed less desirable than the 82 –turbine layout which resulted in a further reduction in the potential for impact to the Upland Sandpiper, which is a state-listed threatened species.

82-turbine project.

This selection of the 82-turbine project is based on the following information: Results of the 2009 Breeding Bird Survey, included as an additional study in the FEIS, confirmed the presence and likely breeding activity of a state-listed threatened species, the Upland Sandpiper, within a native

grassland area at the south end of the island. The FEIS project layout proposed to limit permanent disturbance to this grassland habitat to approximately 1.03 acres by relocating access roads to WTG # 2 and # 3. This was a reduction of 1.88 acres from the 2.91 acres of proposed disturbance in the DEIS project layout. Upon further analysis, DEC determined that the proposed 1.03 acre of disturbance within this native grassland area constitutes a “direct take” of the state-listed species. In addition to direct loss of habitat, the presence of proposed project elements, particularly tall turbine structures, may result in future avoidance of this nesting habitat by this and other grassland bird species. Identification of these impacts resulted in a DEC determination that the project sponsor must obtain a permit under ECL Article 11 to address potential impacts of the project to state-listed threatened and endangered species. DEC further determined that in order to demonstrate avoidance of a “direct take” of this state-listed species, WTGs # 2 and # 3, and all associated access roads, must be removed from the project layout, and furthermore that no future permanent disturbance be conducted in this area (the “No Build”) area. The Project Sponsor has submitted an application under Article 11 that includes the following changes to the 84-turbine alternative:

- 1) WTG # 2 and # 3, with associated access roads and electrical connection lines, are eliminated from the “No-Build” zone.
- 2) The location of several turbines in close proximity to the “No Build” zone to reduce impacts to this area.
- 3) 250 acres of offset mitigation is provided through acquisition and management of Upland Sandpiper habitat on the mainland.

DEC has determined that this revised 82-turbine layout is the alternative that avoids or minimizes adverse environmental impacts to the maximum extent practicable and is consistent with social, economic and other essential considerations.

19. Coastal Zone Consistency

The project is located within the “coastal area” of New York State. *See* 19 NYCRR 600.2(h). The project is subject to a final EIS. Therefore, DEC, as lead agency in the review of the project, must make a written finding that the project is consistent with the applicable policies set forth in 19 NYCRR 600.5 (Coastal Policies).

The Coastal Policies include 44 policies divided into 11 categories as follows: Development; Fish and Wildlife; Flooding and Erosion Hazards; General Safeguards; Public Access; Recreation; Historic and Scenic Resources; Agriculture; Energy and Ice Management; Water and Air Resources; and Wetlands. The project’s consistency with the policies is assessed in Section 2.17 of the FEIS and in Appendix O of the FEIS (which contains the Consistency Assessment Form or “CAF” and a complete statement of the Coastal Policies).

DEC concurs with the findings of consistency and discussion for coastal policies 1-5, 11, 12, 14, 15, 17, 18-22 for the reasons set out in the coastal assessment contained in the FEIS. With regard to Policies 1-5, DEC further notes that the essence of these policies is to encourage dynamic and working waterfronts. The project is consistent with the policies as it will create economic activity, particularly during the construction phase, to the Port of Oswego, and, to a less extent, Henderson Harbor, as staging areas for construction.

A number of coastal policies have parallels in DEC's core jurisdictions and hence are also the subject of extensive discussion in these findings. These are the following policies: Fish and Wildlife policies 7 and 8; Water and Air Resources policies 30, 32-39, and 43; and Wetlands policy 44. DEC incorporates the discussion of these resource areas and potential impacts of the project by reference. DEC finds that the project is consistent with such policies.

The discussion of policies 23 and 25 in the FEIS (relating to historic and scenic resources) and policy 26 (agriculture) is supplemented with the discussion of impacts to those areas in these findings. DEC finds the project is consistent with those policies.

Coastal Policies 6, 9, 10, 13, 16, 24, 28, 29, 40 through 42 are not applicable. Policy No. 2 is most probably irrelevant as the project uses the shoreline incidentally only for purposes of access to the island where the wind turbines will be located.

Policies 27 and 29 relating to energy deserves special mention. For the DEC and perhaps other agencies, consistency review with respect to development of wind power along the coastlines is a relatively new area of environmental assessment. As a result, DEC looks to the general coastal policies of the Federal government which appear to foster wind development.

The United States Department of Commerce, National Oceanic and Atmospheric Administration, which administers the Coastal Zone Management Act at the Federal level, has made the judgment that the development of wind and other energy resources in the coastal areas being a high national priority consistent with the protection of other coastal resource.¹⁶

At the State level, the closest analogy would be the State's coastal policies for Long Island Sound (19 NYCRR 600), albeit relating to a different water body. They provide the following policy with respect to the development of wind power in Long Island Sound:

- (2) Promote alternative energy sources that are self-sustaining, including solar and wind powered energy generation.
 - (i) In siting such facilities, avoid interference with coastal resources, including migratory birds, and coastal processes.

Alternative energy and wind power in particular are therefore recognized by the Federal and State coastal agencies as beneficial uses of the State's coastal areas. Coastal policies, however, recognize that development of coastal wind resources may come at a price in terms of impacts to other coastal resources such as migratory birds. DEC, through the FEIS and these findings, has paid very close attention to avian impacts. In DEC's judgment, as set out earlier in these findings, avian impacts have been mitigated or avoided to the maximum extent practicable, as set out earlier in these findings. The same applies to impacts to other coastal resources such as scenic qualities. Accordingly, DEC finds that the project is consistent with the State's coastal policies.

¹⁶ U.S. Department of Commerce, National Oceanic and Atmospheric Administration, *Energy and Government Facility Siting*, October 12, 2007. http://coastalmanagement.noaa.gov/ene_gov.html.

20. Growth Inducing Aspects

The Project Sponsor evaluated the potential for the project to cause secondary (residential or commercial) growth in the project area. During project construction the work force will mostly stay on Galloo Island and will be transported to the Island from Sackets Harbor. With the exception of shift changes and time-off, there will be little impact associated with the construction crew on the mainland. Secondary effects may accrue to service businesses that provide commodities used by workers such as food, clothing, household items and personal need items etc. However, it is not anticipated that new businesses will be developed solely to support construction of the project. A permanent increase of up to 50 people (workers and families) will represent an approximate 1.5% increase in population. The increase from the permanent workforce is anticipated to be absorbed locally. Therefore, the project as currently proposed will not create demand for significant growth and therefore, mitigation is not necessary.

21. Cumulative Impacts

Cumulative impacts occur when multiple actions affect the same resource(s).¹⁷ DEC reviewed cumulative impacts with respect to avian and bat species and visual impacts as only those two resources were likely to be the subject of cumulative impacts.

a. Avian and Bat Impacts.

Cumulative impacts to avian and bat populations were reviewed by DEC using study results from this project as well as publicly available data and studies from the proposed Cape Vincent Wind Farm, the proposed St. Lawrence Wind Power Project, the proposed Horse Creek-Clayton Wind Project, the proposed Roaring Brook Wind Project, and the operational Maple Ridge and Wolfe Island Wind Power Projects.

The project in combination with other wind farms may introduce cumulative risk to migrating avian and bat species as individuals move across Northern New York and Southwestern Ontario or migrate northward from Lake Ontario to northern Ontario. Migration through this area would expose avian and bat species to hazards from each wind farm they encounter along their route.

Based on post-construction study results from the Maple Ridge Wind Farm, potential for cumulative impacts may exist for Red-Tail Hawks and Sharp-shinned Hawks as they migrate throughout the region. In addition, cumulative impacts would occur to Caspian Terns if the Cape Vincent Wind Farm projects are built in addition to the Hounsfield Wind Farm. These impacts have the potential to become cumulative but would not significantly threaten the viability of the species in the region. Wind farm projects located near water have the likelihood of cumulatively impacting Ring-billed Gull populations. However, the population of Ring-billed Gulls is currently increasing and the overall viability of this species will not be significantly impacted. While impacts may occur to waterbirds, these species are populous in nature. Thus, any impact that may occur is not expected to affect species viability.

¹⁷ Department of Environmental Conservation, SEQR Handbook, Determining Significance, <http://www.dec.ny.gov/permits/47716.html>

Relatively low displacement impacts will be experienced by breeding birds on Galloo Island with the potential exception of the Upland Sandpiper. This impact will be minimized by removal of two turbines in the revised 82-turbine layout and mitigated through acquisition and management of 250 acres of Upland Sandpiper habitat on the mainland, as described earlier. These actions can be expected to result in a net conservation benefit to grassland bird species such as the Upland Sandpiper.

DEC anticipates that impacts to bat species from the construction and operation of the project are likely to be similar in composition to other wind farms in New York State. Collision mortality risk to bat species observed in the project development area may be additive, particularly for the three migratory species that move throughout the region. Given the recent development of White Nose Syndrome (WNS) which has drastically reduced local and regional populations of many of New York's bat species, mortality from wind turbines is more of a concern now than what was the case just a few years ago before the presence of WNS. The combined effect of WNS and mortality from wind turbines dictates that DEC require vigilant post construction monitoring at all wind energy sites in order to track any changes in bat abundance and mortality. Should higher levels of mortality be disclosed than predicted DEC will require adaptive operational management measures to be implemented.

b. Visual Impacts

DEC considered the potential cumulative visual impacts that may arise from interactions between the impacts of the project and nearby projects of Maple Ridge and Roaring Brook from the perspective of the Seaway Trail Scenic Byway (Route 3) in the Town of Henderson, New York. No cumulative visual impacts are expected from the three projects as their viewsheds do not overlap. Visual simulations from the Seaway Trail toward the Maple Ridge and Roaring Brook Wind Farms have not been conducted; however these projects are located approximately 28 miles from the Seaway Trail Scenic Byway at their closest points in the Town of Henderson, New York.

Cumulative visibility of the project and the Upstate Power Transmission Line was reviewed in the FEIS. There is a portion of views from the lake that have potential visibility of both the transmission line and the project. However, it is very unlikely that a viewer from these in-water locations would see both the major transmission line and the WTG simultaneously, as one view would be to the northwest and the other to the southeast of a viewer located between Robert G. Wehle State Park and Stony Island. Very little area on the mainland will have views of both the transmission line and wind farm. There is the possibility from some locations of a simultaneous view of the transmission line and project. These areas of cumulative visibility are generally along Henderson Harbor. Two of these locations are along the Seaway Trail at the intersection of Route 3 and Route 178 and along Route 3 north of this intersection. However, at these locations the wind farm would be nearly 10 miles away and partially screened by Stony Island. Neither of these locations is visible from the Seaway Trail Scenic Byway Overlook.

In the FEIS, DEC described the potential cumulative visual impact of the build-out of all existing and formally proposed wind projects in the Lake Ontario/St. Lawrence River region (Hounsfield Wind Farm, St. Lawrence Windpower, Cape Vincent Wind Farm, Horse Creek Wind Farm, and Wolfe Island Wind Farm). If all projects formally proposed at this time were to be built, it would result in approximately 350 utility-scale wind generating turbines spread throughout the region, each likely exceeding 390 feet in height. While not continuously visible, wind-generating turbines

would be a dominant and widespread visual feature from local roadways, homes and various places of interest. Turbines would also be visible on the horizon from vantage points on Lake Ontario and the St. Lawrence River along approximately 50 miles of waterway, from Clayton west and south to Southwick Beach State Park in Jefferson County. At this time only the Wolfe Island project has been completed and applications for permits have been received by DEC for 53-turbine St. Lawrence Windpower project in the Town of Cape Vincent.

It should also be noted that in the context of cumulative analysis, the proposed wind turbines on the mainland present a larger foreground visual impact than those proposed on Galloo Island, therefore the scale of the visual impact from the Galloo Island project will be different than for a mainland-based wind project. Nonetheless the Galloo Island turbines, although distant, would represent a change to the visual setting on the horizon at vantage points along the Lake Ontario shore. These changes have been identified in the DEIS and FEIS, and DEC has determined that mitigation identified in these findings would provide reasonable offsets for the anticipated change in visual setting that will result from this project. Furthermore, in these findings, DEC must balance such visual changes against the benefits of bringing additional renewable energy into the State's electric grid.

DEC is aware that the New York Power Authority (NYPA) has issued a request for proposals (RFP) for the development of offshore wind power projects in the New York State waters of Lake Erie and/or Lake Ontario.¹⁸ However, at this time, no details are available regarding any specific proposals for wind power projects in the Great Lakes; therefore any discussion of these would be purely speculative in the context of this cumulative review. Specific project proposals that are developed in response to the RFP would be subject to the SEQR process, including consideration of cumulative impacts.

Transmission Line

DEC has included a discussion of DEC's regulatory jurisdiction regarding the transmission line in the summary description of the action in these findings. As set out on page 2, the transmission line is excluded from SEQR as it is subject to review under Article VII of the Public Service Law and is therefore considered a Type II action under 6 NYCRR 617.5(c)(35) (actions requiring a certificate of environmental compatibility and public need under articles VII, VIII or X of the Public Service Law and the consideration of, granting or denial of any such certificate). Nonetheless, Department of Public Service staff have actively participated in the SEQR review and DEC is a statutory party to the transmission line proceeding. The Department of Public Service has commenced a proceeding wherein the impacts of the transmission line are being reviewed as well as alternative routes. The information provided in the DEIS/FEIS was provided for informational purposes only. Therefore, no findings can or will be made regarding impacts from the transmission line in this record.

¹⁸ New York Power Authority. *NYPA President Kessel Calls for Proposals to Develop the First Fresh Water Wind Energy Initiative in the Nation: Increasing Emissions-Free Wind Power Will Contribute to Cleaner Air and Job Growth*. December 1, 2009. <http://www.nyopa.gov/press/2009/091201.htm>.

CERTIFICATION OF FINDINGS TO APPROVE/FUND/UNDERTAKE

Name of Action: Hounsfield Wind Farm
Upstate NY Power Corporation
Project Number: 6-2238-00193

Having considered the Draft and Final EIS, and having considered the preceding written facts and conclusions relied upon to meet the requirements of 6 NYCRR 617.9, this Statement of Findings certifies that:

1. The requirements of 6NYCRR Part 617 have been met;
2. Consistent with the social, economic and other essential considerations from among the reasonable alternatives thereto, the action approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable; including effects disclosed in the environmental impact statement, and;
3. Consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures which were identified as practicable.
4. Consistent with the applicable policies of Article 42 of the Executive Law, as implemented by 19 NYCRR 600.5, this action will achieve a balance between the protection of the environment and the need to accommodate social and economic considerations.

New York State Department of Environmental Conservation
625 Broadway, Albany, New York 12233-1750

_____/s/_____
Signature of Responsible Official

Jack A. Nasca
Name of Responsible Official

Chief, Energy Projects & Management
Title of Responsible Official

March 3, 2010
Date

cc: Other Involved agencies, interested parties, and the applicant: Refer to project service lists

Materials Supporting Presentation
On
Public Service Law Article 10
And The
State Environmental Quality Review Act
Concerning Proposed Generation Facilities

New York State Bar Association
Environmental Law Section Meeting
January 31, 2014
New York City

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DPS STAFF GUIDANCE ON PREPARING A PUBLIC INVOLVEMENT PLAN

Article 10 of the Public Service Law empowers the State of New York Board on Electric Generation Siting and the Environment (Siting Board) to issue Certificates of Environmental Compatibility and Public Need (Certificate) authorizing the construction of major electric generating facilities. On July 17, 2012, the Siting Board adopted regulations to implement Article 10. The regulations include requirements that are intended to “ensure that the Board is aware of the concerns of stakeholders” and to encourage stakeholder participation throughout the certification process.

One of the key element of the regulations is the requirement that applicants develop and implement a Public Involvement Program (PIP). Section 1000.4 of the regulations specifies that the program must include:

- (1) consultation with the affected agencies and other stakeholders;
- (2) pre-application activities to encourage stakeholders to participate at the earliest opportunity;
- (3) activities designed to educate the public as to the specific proposal and the Article 10 review process, including the availability of funding for municipal and local parties;
- (4) the establishment of a website to disseminate information to the public;
- (5) notifications; and
- (6) activities designed to encourage participation by stakeholders in the certification and compliance process.

Potential applicants should note that a PIP should be designed to facilitate public participation at all phases of the Article 10 process, from pre-application through certification and compliance.

The regulations require an applicant to submit a written plan describing its proposed program to DPS for review at least 150 days prior to submission of a preliminary scoping statement. DPS Staff will provide specific comments to the applicant if it finds the proposed plan is inadequate. This guidance memorandum offers suggestions that potential applicants should consider in developing PIP plans. Every project and every community will have its own characteristics and public information needs, and DPS encourages potential applicants to tailor their proposals accordingly.

A fundamental first step in designing a Public Involvement Program is determining who are the stakeholders who may be affected by the proposed project. Governmental agencies, such as local planning boards, are among the stakeholders that a PIP plan should identify. Attachment 1 to this document is a generic list of the kinds of agencies that may be affected by a project; applicants should identify the specific agencies that they propose to include in their program. Attachment 2 is a generic sample plan for an applicant's outreach to a host municipality that may be useful when developing a Public Involvement Program plan.

Broader outreach activities should also be included in the Public Involvement Program plan to show that the requirements of Section 1000.4 will be met.

IDENTIFICATION OF STAKEHOLDERS

No. Recommendation:

1. In order to identify the communities and groups that may be affected by the proposed project, the Public Involvement Program plan (Plan) should provide:
 - (a) a general description of the proposed project including: size, location, fuel source, and major related facilities;
 - (b) the location of interconnections, including the identification of municipalities crossed by any interconnections;
 - (c) the location of reasonable alternative sites, where applicable; and
 - (d) a preliminary Study Area and description of major routes of transportation for construction and operation (including transport of fuel for facility, if applicable).

If the proposed project is a variant of another project that was previously presented to the public in the same geographic area, the project description should identify the differences between the two projects in order to facilitate the identification of stakeholders.

2. The Plan should list the stakeholders that the applicant has already identified as likely to be affected by the project and describe the applicant's prior outreach to those parties.
3. The Plan should also describe the methodology to be used for identifying additional stakeholders, such as:
 - (a) affected agencies;
 - (b) other stakeholders that may be affected by the construction and operation of the facility including:
 - (i) host landowners; and
 - (ii) adjacent landowners; and
 - (iii) other affected individuals, groups and organizations; and
 - (c) whether environmental justice communities will be affected by the proposal.

LANGUAGE ACCESS

No. Recommendation:

4. The Plan should identify language(s) other than English spoken:
 - (a) according to United States Census data by 5,000 or more persons residing in any 5-digit zip code postal zone in which any portion of such zone is located within the preliminary Study Area for the proposed facility, giving the source of data used; and
 - (b) by a significant population of persons residing in close proximity to the proposed facility, alternative locations and interconnections not captured above.
5. If languages other than English are identified above, the Plan should identify:
 - (a) how documents will be translated into languages other than English; and
 - (b) what provision will be made for communicating with those members of the public at public meetings.

IDENTIFICATION OF GOALS & METHODS FOR SPECIFIC CONSULTATIONS**No. Recommendation:**

6. The PIP must provide for consultations with affected agencies and other stakeholders. An applicant's Plan should describe the consultations that the applicant will undertake, what the goals of those consultations are, and the points in the process at which the applicant will engage in those consultations.
7. The Plan should describe the applicant's approach to communicating with affected agencies and other stakeholders. For each affected agency and other stakeholder specific consultation identified above, the Plan should:
 - (a) identify the methods of outreach to be used;
 - (b) contain an outreach schedule with approximate dates, times and locations;
 - (c) identify who will be doing the outreach along with their contact information; and
 - (d) provide a methodology to measure the success of the outreach.
8. If an environmental justice community will be affected by the proposal, the Plan should provide specific measures to address environmental justice outreach issues throughout all phases of the Article 10 process.

TRACKING OF PUBLIC INVOLVEMENT PROGRAM ACTIVITIES**No. Recommendation:**

9. The Plan should include provisions for tracking the Public Involvement Program activities to be conducted over the course of the Article 10 process and the applicant's response to any feedback that it receives from stakeholders. This may be accomplished by preparing summaries of stakeholder interactions, comments, and questions. The Plan should also provide for recording any actions taken by the applicant in response to stakeholder feedback. The program should be fashioned so that it is easy to track the applicant's progress towards achieving its public involvement goals. The reports should be posted on the Applicant's website and filed with the Siting Board Secretary for posting in the case file.

WEBSITE

No. Recommendation:

10. The Plan should include:
 - (a) a description of:
 - (i) an established project website including website address; or
 - (ii) a schedule for developing a website to disseminate information to the public;
 - (b) a schedule or outline for updating the website;
 - (c) a statement of the lead time that will be provided for the posting of notices of future outreach events; and
 - (d) a description of the content that will be provided on the website.

11. The Plan should provide that the website will:
 - (a) be written in plain language and when appropriate, translated into other languages for comprehension by non-English speaking stakeholders identified under Recommendation No.4 above;
 - (b) be easily navigated;
 - (c) contain contact information for the Applicant (e-mail, telephone number and mailing address);
 - (d) provide links to:
 - (i) the Siting Board Article 10 Public Information Coordinator;
 - (ii) the Siting Board home page; and
 - (iii) case-specific documents;
 - (e) include information on the Article 10 process;
 - (f) explain the Intervenor Funding process (including stating the specific dollar amounts of funding that will be available for each phase of the project);
 - (g) contain project-specific information;
 - (h) contain a map of the proposed facility and alternate facility locations and interconnections; and
 - (i) provide a schedule that lists:
 - (i) dates/times/locations for in-person outreach events; and
 - (ii) key milestone dates, such as date when the application will be filed.

PUBLIC CONSULTATIONS AND OUTREACH

No. Recommendation:

12. The Plan should:
 - (a) identify general outreach activities that will take place prior to submittal of the application, which may include mailings, open houses, meetings, seminars/webinars, etc., to inform, engage, and solicit input from the agencies, local community, general public, and other stakeholders;
 - (b) identify how information relative to events open to the public will be disseminated;
 - (c) include material to educate the public as to the specific proposal, including project technology, location of facilities, proposed study area, outline of the scope of studies to be provided in the application, etc.;

- (d) include educational material relative to the Article 10 review process and the goals of the Public Involvement Program;
 - (e) include material to educate the public on how it may become involved in each step of the Article 10 review process;
 - (f) include educational material on Intervenor Funding (including stating the specific dollar amounts of funding that will be available for each phase of the project); and
 - (g) explain how this information will be disseminated to the local community, general public, and other stakeholders.
13. Aspects of a project's design or the technology to be used may change over the course of the Article 10 process. A PIP Plan should explain how the applicant will inform and engage agencies and other stakeholders when such changes occur.

NOTIFICATIONS

No. **Recommendation:**

14. The Plan should describe how the applicant will notify stakeholders of events and activities and of changes or additions to the public outreach program. Notification processes should be designed to ensure all stakeholders receive the information through means that are appropriate to their communities and likely to be effective. The Plan should also ensure that notifications are made in time to allow stakeholders to participate in public outreach and education activities.

ACTIVITIES TO ENCOURAGE PARTICIPATION

No. **Recommendation:**

15. The Plan should identify:
- (a) pre-application activities designed to encourage stakeholder participation early in the process, with special attention paid to potential environmental justice areas;
 - (b) activities designed to encourage participation by stakeholders in the certification and compliance phases;
 - (c) the goals of these activities;
 - (d) methodologies for measuring the success of such activities;
 - (e) a schedule of such activities indicating when and where they will be conducted; and
 - (f) how information relative to events open to the public will be disseminated.

REQUIRED AGENCY/MUNICIPAL PRE-APPLICATION CONSULTATIONS

No. Recommendation:

16. The Article 10 Regulations require a number of specific consultations with affected agencies and municipalities. The Plan should include a schedule of the required consultations with approximate dates, times and locations and identifying who will be doing the outreach along with their contact information. If a consultation is not applicable to the proposed facility, the schedule should so indicate.
17. The schedule of required consultations should include, if applicable:
- (a) consultation with DPS, NYISO and the local transmission owners to identify applicable requirements to be used to demonstrate the degree of compliance with all relevant applicable reliability criteria of the Northeast Power Coordinating Council Inc., New York State Reliability Council, and the local interconnecting transmission utility, including any criteria regarding blackstart and fuel switching capabilities [16 NYCRR 1001.5(n)];
 - (b) consultation with DPS and the Department of Environmental Conservation (DEC) to develop an acceptable input data set, including modeling for the Applicant's proposed facility and inputs for the emissions analysis, to be used in the simulation analyses [16 NYCRR 1001.8];
 - (c) consultation with the Department of Health (DOH) and DEC to determine a set of non-criteria (i.e. toxic) pollutants to be emitted from the proposed facility [16 NYCRR 1001.17(c)(9)];
 - (d) consultation with DOH and DEC to determine appropriate pollutants for an estimation of the maximum potential air concentrations (short and long term) [16 NYCRR 1001.17(d)(1)];
 - (e) consultation with DOH and DEC to determine appropriate pollutants for a comparison of the maximum predicted air concentrations to ambient air quality standards and guidelines and ambient background concentrations for non-criteria pollutants for both short-term and long-term exposures [16 NYCRR 1001.17(d)(2)];
 - (f) consultation with DOH and DEC to determine if cumulative source impact analyses for any appropriate pollutant in accordance with air permitting requirements and 6 NYCRR Part 487 are warranted [16 NYCRR 1001.17(d)(3)];
 - (g) consultation with the Office of Parks, Recreation and Historic Preservation (OPRHP) to determine if a Phase IB cultural resources study is required [16 NYCRR 1001.20(a)(3)];
 - (h) consultation with OPRHP to determine if a Phase II study based on intensive archaeological field investigations shall be conducted to assess the boundaries, integrity and significance of cultural resources identified in Phase I studies [16 NYCRR 1001.20(a)(4)];
 - (i) consultation with OPRHP and DPS to determine the need for and scope of work for any required Phase II cultural resources study [16 NYCRR 1001.20(a)(4)];
 - (j) consultation with local historic preservation groups to identify sites or structures listed or eligible for listing on the State or National Register of Historic Places within the viewshed of the facility and within the study area [16 NYCRR 1001.20(b)];

- (k) consultation with DEC, DPS, OPRHP, and the Adirondack Park Agency (APA) where appropriate to establish representative viewpoints for the photographic simulations of the facility and interconnections [16 NYCRR 1001.24(b)(4)];
- (l) consultation with the affected school districts to inform the Applicant's estimate of incremental school district operating and infrastructure costs due to the construction and operation of the facility [16 NYCRR 1001.27(f)];
- (m) consultation with the affected municipalities, public authorities, and utilities to inform the Applicant's estimate of incremental municipal, public authority, or utility operating and infrastructure costs that will be incurred for police, fire, emergency, water, sewer, solid waste disposal, highway maintenance and other municipal, public authority, or utility services during the construction and operation phases of the facility [16 NYCRR 1001.27(g)];
- (n) consultation with the affected local emergency response organizations to inform the Applicant's analysis of whether all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident can be fulfilled by existing local emergency response capacity, and in that regard identifying any specific equipment or training deficiencies in local emergency response capacity [16 NYCRR 1001.27(k)];
- (o) consultation with the municipalities or other local agencies whose requirements are the subject of the local laws exhibit to determine whether the Applicant has correctly identified all such requirements and to determine whether any potential request by the Applicant that the Board elect to not apply any such local requirement could be obviated by design changes to the proposed facility, or otherwise [16 NYCRR 1001.31]; and
- (p) consultation with the state agencies and authorities whose requirements are the subject of the State Laws and Regulations exhibit to determine whether the Applicant has correctly identified all such requirements [16 NYCRR 1001.32].

REQUIRED AIRPORT/HELIPORT PRE-APPLICATION CONSULTATIONS

No. Recommendation:

- 18. The Article 10 Regulations require a number of specific consultations related to air transportation impacts. The Public Involvement Plan should include a schedule of the required consultations with approximate dates, times and locations and identifying who will be doing the outreach along with their contact information. If a consultation is not applicable to the proposed facility, the schedule should so indicate.
- 19. The Plan should also, as applicable to project location and design:
 - (a) identify the necessity of consultations with the operators of airports or heliports [16 NYCRR 1000.4(f) & 1001.25(e)&(f)];
 - (b) provide the methodology used to identify the operators;
 - (c) include outreach to inform such operators of the proposed facility and its location prior to the submission of the preliminary scoping statement [16 NYCRR 1000.4(f)];
 - (d) include an informal Department of Defense review of the proposed construction or alteration, in accordance with 32 Code of Federal Regulations, Section 211.7; or a formal Department of Defense review of the proposed construction or alteration in

- accordance with 32 Code of Federal Regulations, Section 211.6 [16 NYCRR 1001.25(f)(1)]; and
- (e) include consultations with operators of airports and heliports that are non-military facilities, including providing a detailed map and description of such construction or alteration to such operators, and a request for review of and comment on such construction or alteration by such operators [16 NYCRR 1001.25(f)(2)].

APPLICANT RESPONSE TRACKING TABLE

No. **Recommendation:**

20. The Plan should include a table listing by rows each separate DPS staff recommendation set forth in this attachment in one column, and in a second column a statement for each row that either:
- (a) the Applicant has revised the Public Involvement Program plan to incorporate the DPS recommendation (giving the section or page number of the Plan where the revision appears); or
- (b) providing a written explanation as to why the Applicant decided not to incorporate the recommendations.

ATTACHMENT 1

**GENERIC LIST OF AGENCY STAKEHOLDERS FOR
PUBLIC INVOLVEMENT PLANS AND OUTREACH**

MUNICIPALITIES WITHIN PROJECT STUDY AREA

County, Town, City, Village officials – chief executive officer(s), planning offices, etc.

PUBLIC AIRPORT and HELIPOINTS – owners/operators within required distances

NEW YORK STATE AGENCIES

NYS Dept of Agriculture and Markets – agricultural lands, agricultural districts, impact avoidance and mitigation measures

NYS Dept of Environmental Conservation – environmental justice rules, air emissions, natural resources, ecologic resources, bird and bat studies, stormwater planning, open space conservation planning, etc.

NYS Dept of State – coastal resources, coastal zones and inland waterways, local waterfront revitalization plans, south shore estuary reserve office

NYS Office of Parks, Recreation and Historic Preservation – State Historic Preservation Officer, state historic sites, state parks, recreation resources, open space conservation planning, etc.

NYS Division of Homeland Security and Emergency Services – emergency preparedness plans, critical infrastructure impacts, etc.

NYS Dept of Public Service – Public Information Officer, Office of Gas, Electric & Water, Office of Energy Efficiency & Environment, Office of Consumer Policy, as appropriate

NYS Department of Transportation – NYS highway work and occupancy permit requirements, oversize deliveries

NYS Dept of Health – public health issues

Empire State Development Corporation – economic development, Empire Zones

State Legislature -- members of the State Senate and State Assembly representing locations within project study area (depending on timing of the filing of the preliminary Scoping Statement, the identification may need to consider both the current districts and the newly revised districts that take effect in January, 2013).

REGIONAL or LOCATIONAL AGENCIES

Adirondack Park Agency for projects within or adjoining Adirondack Park “blue line”

Central Pine Barrens Joint Planning and Policy Commission – for projects in Pine Barrens Preserve areas

Heritage Areas: e.g., Mohawk Valley Heritage Corridor Commission

Hudson River Valley Greenway for projects in Greenway community locations

NYS Office of General Services – for NYS-owned underwater lands

South Shore Reserve Office – for the Long Island South Shore Estuary Reserve area

Thruway Commission/Canal Corporation for projects within transportation corridors

Tug Hill Commission for projects within or adjoining Tug Hill Communities

FEDERAL AGENCIES

Dept of Defense Clearinghouse for Energy Development – hazards to military aviation, RADAR/LORAN and communications

Federal Aviation Administration – hazards to aviation, airport

US Army Corps of Engineers – wetlands and navigable waterways

US Fish & Wildlife Service – federally listed endangered species, migratory birds

NOAA –National Marine Fisheries Service – fisheries resources, federally listed endangered marine species

ATTACHMENT 2

EXAMPLE
PUBLIC INVOLVEMENT PROGRAM
PLAN COMPONENT
FOR OUTREACH TO HOST TOWN

In developing a Public Involvement Program plan component for outreach to the host municipality (Town), an applicant should consider its objectives for the outreach to the Town and what type of information it should convey and gather in advancing the application process. An applicant should also be mindful of the objectives and information a Town would want to gain from outreach from an applicant about the project and anticipate them to the best of its ability.

Initial Outreach to Host Town

- a. Describe the goals of consultation:
 - Meet town representatives;
 - Disseminate Information;
 - Request Information that will help advance the PIP process and preparation of the Application; and,
 - Schedule follow up meeting(s) and consultation (s).
- b. Describe the measure of success for the consultation:
 - Consultation would be deemed successful if the information described below in “Disseminate Information” was provided to Town representatives, information was gathered to help advance the PIP process and preparation of the application, and follow up meetings or consultations were either scheduled or will be scheduled (provide more detail).

Disseminate Information

- Project
 - Describe the project and location.
- Describe Article 10 of the Public Service Law.
 - Explain the phases of the Article 10 process.
 - Explain why the project is going through the Article 10 process.
 - Explain the Public Involvement Plan and why the applicant is conducting the outreach.
 - Explain how the Town can participate in each step of the Article 10 process.
 - Describe the available Intervenor Funding – why it is available, how much will be available, when the funds will be available, who is eligible for funding, what the process is for obtaining funding.
- Describe additional consultations and outreach the applicant is conducting, including plans for outreach with Town residents.
- Advise of outreach or activities to encourage participation of the Town and its residents and provide a schedule of any planned activities. Describe the goal of the outreach.
- Provide information to the Town regarding where residents can get additional information on the project and Article 10 and provide the website information.

- If any language other than English is spoken, advise the Town of where information about the project, Article 10 process, and outreach opportunities is available in the other language(s) and describe any specialized outreach opportunities for this group.
- Environmental Justice – advise of any communities identified and specific outreach targeting those Environmental Justice communities.
- Next Steps – describe the next steps in the process, when the Preliminary Scoping will commence and how the Town can Participate.

Request Information

- Request contact information for discussion of:
 - Payment in lieu of taxes agreement
 - Highway work agreements
 - Local Laws
 - Follow up activity: consult with representative of the municipality and other local agencies whose requirements are the subject of the local laws exhibit to determine whether the applicant has correctly identified all such requirements and to determine whether the applicant has correctly identified all such requirements and to determine whether any potential request by the applicant that the Board elect to not apply any such local requirements could be obviated by design changes to the proposed facility, or otherwise.
 - Emergency Response Organizations
 - Follow up activity: consult with affected local emergency response organizations to inform the applicant's analysis of whether all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident can be fulfilled by existing local emergency response capacity, and identify any specific equipment or training deficiencies in local emergency response capacity.
 - Environmental Impact Review
 - Follow up activity:
 - Disclose potentially significant adverse environmental and health impact resulting from the construction and operation of the proposed facility including an identification of particular aspects of the environmental setting that may affect the Town.
 - Request the Town to advise of any additional material environmental impacts or effects of the project on the Town based on the description provided.
 - Chief Executive or Chief Financial Officer
 - Follow up activity: Inform the Town of the applicant's estimated incremental municipal operating and infrastructure costs incurred for police, fire, emergency, water, sewer, solid waste disposal, highway maintenance and other municipal services during the construction and operation phases of the facility.
- Request contact information for interest groups or community leaders.
- Inquire which news sources are used by the Town for official notices and whether any specific rules apply for notice for town meetings.

ARTICLE 10 [Enacted August 4, 2011]

SITING OF MAJOR ELECTRIC GENERATING FACILITIES

SECTION 160. DEFINITIONS.

SECTION 161. GENERAL PROVISIONS RELATING TO THE BOARD.

SECTION 162. BOARD CERTIFICATE.

SECTION 163. PRE-APPLICATION PROCEDURES.

SECTION 164. APPLICATION FOR A CERTIFICATE.

SECTION 165. HEARING SCHEDULE.

SECTION 166. PARTIES TO A CERTIFICATION PROCEEDING.

SECTION 167. CONDUCT OF HEARING.

SECTION 168. BOARD DECISIONS.

SECTION 169. OPINION TO BE ISSUED WITH DECISION.

SECTION 170. REHEARING AND JUDICIAL REVIEW.

SECTION 171. JURISDICTION OF COURTS.

SECTION 172. POWERS OF MUNICIPALITIES AND STATE AGENCIES.

SECTION 173. APPLICABILITY TO PUBLIC AUTHORITIES.

SECTION 160. Definitions.

Where used in this article, the following terms, unless the context otherwise requires, shall have the following meanings:

1. "MUNICIPALITY" MEANS A COUNTY, CITY, TOWN OR VILLAGE LOCATED IN THIS STATE.
2. "MAJOR ELECTRIC GENERATING FACILITY" MEANS AN ELECTRIC GENERATING FACILITY WITH A NAMEPLATE GENERATING CAPACITY OF TWENTY-FIVE THOUSAND KILOWATTS OR MORE, INCLUDING INTERCONNECTION ELECTRIC TRANSMISSION LINES AND FUEL GAS TRANSMISSION LINES THAT ARE NOT SUBJECT TO REVIEW UNDER ARTICLE SEVEN OF THIS CHAPTER.
3. "Person" means any individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate.
4. "Board" means the new york state board on electric generation siting and the environment, which shall be in the department and consist of seven persons: the chair of the department, who shall serve as chair of the board; the commissioner of environmental conservation; the commissioner of health; the chair of the new york state energy research and development authority; the commissioner of economic development and two ad hoc public members, both of whom shall reside within the municipality in which the facility is proposed to be located, except if such facility is proposed to be located within the city of new york, then all ad hoc members shall reside within the community district in which the facility is proposed to be located. One ad hoc member shall be appointed by the president pro tem of the senate and one ad hoc member shall be appointed by the speaker of the assembly, in accordance with subdivision two of section one hundred sixty-one of this article. The term of the ad hoc public members shall continue until a final determination is made in the particular proceeding for which they were appointed.
5. "Certificate" means a certificate of environmental compatibility and public need authorizing the construction of a major electric generating facility issued by the board pursuant to this article.
6. "Fuel waste byproduct" shall mean waste or combination of wastes produced as a byproduct of generating electricity from a major electric generating facility in an amount which requires storage or disposal and, because of its quantity, concentration, or physical, chemical or other characteristics, may pose a substantial present or potential hazard to human health or the environment.
7. "Nameplate" means a manufacturer's designation, generally as affixed to the generator unit, which states the total output of such generating facility as originally designed according to the manufacturer's original design specifications.
8. "Public information coordinator" means an office created within the department which shall assist and advise interested parties and members of the public in participating in the siting and certification of major electric generating facilities. The duties of the public information officer shall include, but not be limited to: (a) implementing measures that assure full and adequate public participation in matters before the board; (b) responding to inquiries from the public for information on how to participate in matters before the board; (c) assisting the public in requesting records relating to matters before the board; (d) ensuring all interested persons are provided with a reasonable opportunity to participate at public meetings relating to

matters before the board; (e) ensuring that all necessary or required documents are available for public access on the department's website within any time periods specified within this article; and (f) any other duties as may be prescribed by the board, after consultation with the department.

9. "Local parties" shall mean persons residing in a community who may be affected by the proposed major electric generating facility who individually or collectively seek intervenor funding pursuant to sections one hundred sixty-three and one hundred sixty-four of this article.

SECTION 161. GENERAL PROVISIONS RELATING TO THE BOARD.

1. The board, exclusive of the ad hoc members, shall have the power to adopt the rules and regulations relating to the procedures to be used in certifying facilities under the provisions of this article, including the suspension or revocation thereof, and shall further have the power to seek delegation from the federal government pursuant to federal regulatory programs applicable to the siting of major electric facilities. The chairperson, after consultation with the other members of the board exclusive of the ad hoc members, shall have exclusive jurisdiction to issue declaratory rulings regarding the applicability of, or any other question under, this article and rules and regulations adopted hereunder and to grant requests for extensions or amendments to or transfers of certificate terms and conditions, provided that no party to the proceeding opposes such request for extensions or amendments within thirty days of the filing of such request. Regulations adopted by the board may provide for renewal applications for pollutant control permits to be submitted to and acted upon by the department of environmental conservation following commercial operation of a certified facility. The board shall not accept any pre-application preliminary scoping statement or application for a certificate, or exercise any powers or functions until the department of environmental conservation has promulgated rules and regulations required by paragraphs (f) and (g) of subdivision one of section one hundred sixty-four of this article and section 19-0312 of the environmental conservation law; provided however that the board shall be authorized to adopt rules and regulations required by this article.

2. Upon receipt of a pre-application preliminary scoping statement under this article, the chair shall promptly notify the governor, the president pro tem of the senate, the speaker of the assembly, the chief executive officers representing the municipality and the county in which the facility is proposed to be located, and, if such facility is proposed to be located within the city of new york, the mayor of the city of new york, as well as the chairperson of the community board and the borough president representing the area in which the facility is proposed to be located. One ad hoc member shall be appointed by the president pro tem of the senate and one ad hoc member shall be appointed by the speaker of the assembly from a list of candidates submitted to them, in the following manner. If such facility is proposed to be located outside of the city of new york, the chief executive officer representing the municipality shall nominate four candidates and the chief executive officer representing the county shall nominate four candidates for consideration. If such facility is proposed to be located outside of the city of new york and in a village located within a town, the chief executive officer representing the town shall nominate four candidates, the chief executive officer representing the county shall nominate four candidates, and the chief executive officer representing the village shall nominate four candidates for consideration. If such facility is proposed to be located in the city of new york, the chair person of the community board, the borough president, and the mayor of the city of new york shall each nominate four candidates for consideration. Nominations shall be submitted to the president pro tem of the senate and the speaker of the assembly within

fifteen days of receipt of notification of the pre-application preliminary scoping statement. In the event that the president pro tem of the senate does not appoint one of the candidates within thirty days of such nominations, the governor shall appoint the ad hoc member from the list of candidates. In the event that the speaker of the assembly does not appoint one of the candidates within thirty days of such nominations, the governor shall appoint the ad hoc member from the list of candidates. In the event that one or both of the ad hoc public members have not been appointed within forty-five days, a majority of persons named to the board shall constitute a quorum.

3. In addition to the requirements of the public officers law, no person shall be eligible to be an appointee to the board who holds another state or local office. No member of the board may retain or hold any official relation to, or any securities of an electric utility corporation operating in the state or proposed for operation in the state, any affiliate thereof or any other company, firm, partnership, corporation, association or joint-stock association that may appear before the board, nor shall either of the appointees have been a director, officer or, within the previous ten years, an employee thereof. The ad hoc appointees shall receive the sum of two hundred dollars for each day in which they are actually engaged in the performance of their duties pursuant to this article plus actual and necessary expenses incurred by them in the performance of such duties. The chairperson shall provide such personnel, hearing examiners, subordinates and employees and such legal, technological, scientific, engineering and other services and such meeting rooms, hearing rooms and other facilities as may be required in proceedings under this article. The board under the direction of the chairperson, may provide for its own representation and appearance in all actions and proceedings involving any question under this article. The department of environmental conservation shall provide associate hearing examiners. Each member of the board other than the ad hoc appointees may designate an alternate to serve instead of the member with respect to all proceedings pursuant to this article. Such designation shall be in writing and filed with the chairperson.

SECTION 162. BOARD CERTIFICATE.

1. Following the promulgation of rules and regulations pursuant to paragraphs (f) and (g) of subdivision one of section one hundred sixty-four of this article, and section 19-0312 of the environmental conservation law, no person shall commence the preparation of a site for, or begin the construction of a major electric generating facility in the state, or increase the capacity of an existing electric generating facility by more than twenty-five thousand kilowatts without having first obtained a certificate issued with respect to such facility by the board. Any such facility with respect to which a certificate is issued shall not thereafter be built, maintained or operated except in conformity with such certificate and any terms, limitations or conditions contained therein, provided that nothing herein shall exempt such facility from compliance with federal, state and local laws and regulations except as otherwise provided in this article. A certificate for a major electric generating facility, or an increase in the capacity of an existing electric generating facility by more than twenty-five thousand kilowatts, may be issued only pursuant to this article.

2. A certificate may be transferred, subject to the approval of the board, to a person who agrees to comply with the terms, limitations and conditions contained therein.

3. A certificate issued under this article may be amended pursuant to this section.

4. This article shall not apply:

- (a) to a major electric generating facility over which any agency or department of the federal government has exclusive siting jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction to the exclusion of regulation of the facility by the state;
- (b) to normal repairs, replacements, modifications and improvements of a major electric generating facility, whenever built, which do not constitute a violation of any certificate issued under this article and which do not result in an increase in capacity of the facility of more than twenty-five thousand kilowatts;
- (c) to a major electric generating facility
 - (i) constructed on lands dedicated to industrial uses,

- (ii) the output of which shall be used solely for industrial purposes, on the premises, and
- (iii) the generating capacity of which does not exceed two hundred thousand kilowatts; or
- (d) to a major electric generating facility if, on or before the effective date of the rules and regulations promulgated pursuant to this article and section 19-0312 of the environmental conservation law, an application has been made for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major electric generating facility has been designated by the applicant; or if the facility is under construction at such time.

5. Any person intending to construct a major electric generating facility excluded from this article pursuant to paragraph (b), (c), or (d) of subdivision four of this section may elect to become subject to the provisions of this article by delivering notice of such election to the chair of the board. This article shall thereafter apply to each electric generating facility identified in such notice from the date of its receipt by the chair of the board. For the purposes of this article, each such facility shall be treated in the same manner as a major electric generating facility as defined in this article.

SECTION 163. PRE-APPLICATION PROCEDURES.

1. Any person proposing to submit an application for a certificate shall file with the board a preliminary scoping statement containing a brief discussion, on the basis of available information, of the following items:

- (a) description of the proposed facility and its environmental setting;
- (b) potential environmental and health impacts resulting from the construction and operation of the proposed facility;
- (c) proposed studies or program of studies designed to evaluate potential environmental and health impacts, including, for proposed wind-powered facilities, proposed studies during pre-construction activities and a proposed period of post-construction operations monitoring for potential impacts to avian and bat species;
- (d) measures proposed to minimize environmental impacts; and
- (e) where the proposed facility intends to use petroleum or other back-up fuel for generating electricity, a discussion and/or study of the sufficiency of the proposed on-site fuel storage capacity and supply; and
- (f) reasonable alternatives to the facility that may be required by paragraph (i) of subdivision one of section one hundred sixty-four of this article;
- (g) identification of all other state and federal permits, certifications, or other authorizations needed for construction, operation or maintenance of the proposed facility; and
- (h) any other information that may be relevant or that the board may require.

2. Such person shall serve copies of the preliminary scoping statement on persons enumerated in paragraph (a) of subdivision two of section one hundred sixty-four of this article and provide notice of such statement as provided in paragraph (b) of such subdivision in plain language, in english and in any other language spoken as determined by the board by a significant portion of the population in the community, that describes the proposed facility and its location, the range of potential environmental and health impacts of each pollutant, the application and review process, and a contact person, with phone number and address, from whom information will be available as the application proceeds.

3. To facilitate the pre-application and application processes and enable citizens to participate in decisions that affect their health and safety and the environment, the department and such person shall provide opportunities

for citizen involvement. Such opportunities shall encourage consultation with the public early in the pre-application and application processes, especially before any parties enter a stipulation pursuant to subdivision five of this section. The primary goals of the citizen participation process shall be to facilitate communication between the applicant and interested or affected persons. The process shall foster the active involvement of the interested or affected persons.

4. (a) Each pre-application preliminary scoping statement shall be accompanied by a fee in an amount equal to three hundred fifty dollars for each thousand kilowatts of generating capacity of the subject facility, but no more than two hundred thousand dollars, to be deposited in the intervenor account established pursuant to section ninety-seven-~~kkkk~~ of the state finance law, to be disbursed at the hearing examiner's direction to defray pre-application expenses incurred by municipal and local parties (except for a municipality submitting the pre-application scoping statement) for expert witness, consultant, administrative and legal fees. If at any time subsequent to the filing of the pre-application the pre-application is substantially modified or revised, the board may require an additional pre-application intervenor fee in an amount not to exceed twenty-five thousand dollars. No fees made available under this paragraph shall be used for judicial review or litigation. Any moneys remaining in the intervenor account upon the submission of an application for a certificate shall be made available to intervenors according to paragraph (a) of subdivision six of section one hundred sixty-four of this article.
- (b) pre-application disbursements from the intervenor account shall be made in accordance with rules and regulations established pursuant to paragraph (b) of subdivision six of section one hundred sixty-four of this article which rules shall provide for an expedited pre-application disbursement schedule to assure early and meaningful public involvement, with at least one-half of pre-application intervenor funds becoming available through an application process to commence within sixty days of the filing of a pre-application preliminary scoping statement.

5. After meeting the requirements of subdivisions one through three of this section, and after pre-application intervenor funds have been allocated by the pre-hearing examiner pursuant to paragraph (b) of subdivision four of this section, such person may consult and seek agreement with any interested person, including, but not limited to, the staff of the department, the department of environmental conservation and the department of health, as appropriate, as to any aspect of the preliminary scoping statement and any study or program of studies made or to be made to support such application. The staff of the department, the department of environmental conservation, the department of health, the person proposing to file an application, and any other interested person may enter into a stipulation setting forth an agreement on any aspect of the preliminary scoping statement and the studies or program of studies to be conducted. Any such person proposing to submit an application for a certificate shall serve a copy of the proposed stipulation upon all persons enumerated in paragraph (a) of subdivision two of section one hundred sixty-four of this article, provide notice of such stipulation to those persons identified in paragraph (b) of such subdivision, and afford the public a reasonable opportunity to submit comments on the stipulation before it is executed by the interested parties. Nothing in this section, however, shall bar any party to a hearing on an application, other than any party to a pre-application stipulation, from timely raising objections to any aspect of the preliminary scoping statement and the methodology and scope of any stipulated studies or program of studies in any such agreement. In order to attempt to resolve any questions that may arise as a result of such consultation, the department shall designate a hearing examiner who shall oversee the pre-application process and mediate any issue relating to any aspect of the preliminary scoping statement and the methodology and scope of any such studies or programs of study. Upon completion of the notice provisions provided in this section, such hearing examiner shall, within sixty days of the filing of a preliminary scoping statement, convene a meeting of interested parties in order to initiate the stipulation process.

SECTION 164. APPLICATION FOR A CERTIFICATE.

1. An applicant for a certificate shall file with the board an application, in such form as the board may prescribe containing the following information and materials:

- (a) a description of the site and a description of the facility to be built thereon; including available site information, maps and descriptions, present and proposed development, source and volume of water required for plant operation and cooling, anticipated emissions to air, including but not limited to federal criteria pollutants and mercury, anticipated discharges to water and groundwater, pollution control equipment, and, as appropriate, geological, visual or other aesthetic, ecological, tsunami, seismic, biological, water supply, population and load center data;
- (b) an evaluation of the expected environmental and health impacts and safety implications of the facility, both during its construction and its operation, including any studies, identifying the author and date thereof, used in the evaluation, which identifies
 - (i) the anticipated gaseous, liquid and solid wastes to be produced at the facility including their source, anticipated volumes, composition and temperature, and such other attributes as the board may specify and the probable level of noise during construction and operation of the facility;
 - (ii) the treatment processes to reduce wastes to be released to the environment, the manner of disposal for wastes retained and measures for noise abatement;
 - (iii) the anticipated volumes of wastes to be released to the environment under any operating condition of the facility, including such meteorological, hydrological and other information needed to support such estimates;
 - (iv) conceptual architectural and engineering plans indicating compatibility of the facility with the environment;
 - (v) how the construction and operation of the facility, including transportation and disposal of wastes would comply with environmental health and safety standards, requirements, regulations and rules under state and municipal laws, and a statement why any variances or exceptions should be granted;
 - (vi) water withdrawals from and discharges to the watershed;
 - (vii) a description of the fuel interconnection and supply for the project; and

- (viii) an electric interconnection study, consisting generally of a design study and a system reliability impact study;
- (c) such evidence as will enable the board and the commissioner of environmental conservation to evaluate the facility's pollution control systems and to reach a determination to issue therefor, subject to appropriate conditions and limitations, permits pursuant to federal recognition of state authority in accordance with the federal clean water act, the federal clean air act and the federal resource conservation and recovery act, and permits pursuant to section 15-1503 and article nineteen of the environmental conservation law;
- (d) where the proposed facility intends to use petroleum or other back-up fuel for generating electricity, evidence and an evaluation on the adequacy of the facility's on-site back-up fuel storage and supply;
- (e) a plan for security of the proposed facility during construction and operation of such facility and the measures to be taken to ensure the safety and security of the local community, including contingency, emergency response and evacuation control, to be reviewed by the board in consultation with the new york state division of homeland security and emergency services and in cities with a population over one million, such plan shall also be reviewed by the local office of emergency management;
- (f) in accordance with rules and regulations that shall be promulgated by the department of environmental conservation for the analysis of environmental justice issues, including the requirements of paragraphs (g) and (h) of subdivision one of this section, an evaluation of significant and adverse disproportionate environmental impacts of the proposed facility, if any, resulting from its construction and operation, including any studies identifying the author and dates thereof, which were used in the evaluation;
- (g) a cumulative impact analysis of air quality within a half-mile of the facility, or other radius as determined by standards established by department of environmental conservation regulations, that considers available data associated with projected emissions of air pollutants, including but not limited to federal criteria pollutants and mercury, from sources, including, but not limited to, the facility, facilities that have been proposed under this article and have submitted an application determined to be in compliance by the board, existing sources, and sources permitted but not yet constructed that were permitted sixty or more days prior to the filing of the application under title v of the clean air act, provided that such analysis and standards shall be in accordance with rules and regulations that shall

be promulgated by the department of environmental conservation pursuant to this paragraph;

- (h) a comprehensive demographic, economic and physical description of the community within which the facility is located, within a half-mile radius of the location of the proposed facility, compared and contrasted with the county in which the facility is proposed and with adjacent communities within such county, including reasonably available data on population, racial and ethnic characteristics, income levels, open space, and public health data, including available department of public health data on incidents of asthma and cancer provided that such description and comparison shall be in accordance with rules and regulations promulgated pursuant to paragraph (f) of this subdivision;
- (i) a description and evaluation of reasonable and available alternate locations to the proposed facility, if any; a description of the comparative advantages and disadvantages as appropriate; and a statement of the reasons why the primary proposed location and source, as appropriate, is best suited, among the alternatives considered, to promote public health and welfare, including the recreational and other concurrent uses which the site may serve, provided that the information required pursuant to this paragraph shall be no more extensive than required under article eight of the environmental conservation law;
- (j) for proposed wind-powered facilities, the expected environmental impacts of the facility on avian and bat species based on pre-construction studies conducted pursuant to paragraph (c) of subdivision one of section one hundred sixty-three of this article; and a proposed plan to avoid or, where unavoidable, minimize and mitigate any such impacts during construction and operation of the facility based on existing information and results of post-construction monitoring proposed in the plan;
- (k) an analysis of the potential impact that the proposed facility will have on the wholesale generation markets, both generally and for the location-based market in which the facility is proposed, as well as the potential impact of the proposed facility on fuel costs;
- (l) a statement demonstrating that the facility is reasonably consistent with the most recent state energy plan, including, but not limited to, impacts on fuel diversity, regional requirements for capacity, electric transmission and fuel delivery constraints and other issues as appropriate, including the comparative advantages and disadvantages of reasonable and available alternate locations or properties identified for power plant construction, and a statement of the reasons why the

proposed location and source is best suited, among the alternatives identified, to promote public health and welfare;

- (m) such other information as the applicant may consider relevant or as may be required by the board.

Copies of the application, including the required information, shall be filed with the board and shall be available for public inspection; and

2. Each application shall be accompanied by proof of service, in such manner as the board shall prescribe, of:

(a) a copy of such application on

(i) each municipality in which any portion of such facility is to be located as proposed or in any alternative location listed. Such copy to a municipality shall be addressed to the chief executive officer thereof and shall specify the date on or about which the application is to be filed;

(ii) each member of the board;

(iii) the department of agriculture and markets;

(iv) the secretary of state;

(v) the attorney general;

(vi) the department of transportation;

(vii) the office of parks, recreation and historic preservation;

(viii) a library serving the district of each member of the state legislature in whose district any portion of the facility is to be located as proposed or in any alternative location listed;

(ix) in the event that such facility or any portion thereof as proposed or in any alternative location listed is located within the adirondack park, as defined in subdivision one of section 9-0101 of the environmental conservation law, the adirondack park agency; and

(x) the public information coordinator for placement on the website of the department; and

(b) a notice of such application on

(i) persons residing in municipalities entitled to receive a copy of the application under subparagraph (i) of paragraph (a) of this subdivision. Such notice shall be given by the publication of a summary of the application and the date on or about which it will be filed, to be published under regulations to be promulgated by the board, in such form and in such newspaper or newspapers, including local community and general circulation newspapers, as

will serve substantially to inform the public of such application, in plain language, in english and in any other language spoken as determined by the board by a significant portion of the population in the community, that describes the proposed facility and its location, the range of potential environmental and health impacts of each pollutant, the application and review process, and a contact person, with phone number and address, from whom information will be available as the application proceeds;

- (ii) each member of the state legislature in whose district any portion of the facility is to be located as proposed or in any alternative location listed; and
- (iii) persons who have filed a statement with the secretary within the past twelve months that they wish to receive all such notices concerning facilities in the area in which the facility is to be located as proposed or in any alternative location listed.

3. Inadvertent failure of service on any of the municipalities, persons, agencies, bodies or commissions named in subdivision two of this section shall not be jurisdictional and may be cured pursuant to regulations of the board designed to afford such persons adequate notice to enable them to participate effectively in the proceeding. In addition, the board may, after filing, require the applicant to serve notice of the application or copies thereof or both upon such other persons and file proof thereof as the board may deem appropriate.

4. The board shall prescribe the form and content of an application for an amendment of a certificate to be issued pursuant to this article. Notice of such an application shall be given as set forth in subdivision two of this section.

5. If a reasonable and available alternate location not listed in the application is proposed in the certification proceeding, notice of such proposed alternative shall be given as set forth in subdivision two of this section.

6. (a) Each application shall be accompanied by a fee in an amount
- (i) equal to one thousand dollars for each thousand kilowatts of capacity, but no more than four hundred thousand dollars,
 - (ii) and for facilities that will require storage or disposal of fuel waste byproduct, an additional fee of five hundred dollars

for each thousand kilowatt of capacity, but no more than fifty thousand dollars shall be deposited in the intervenor account, established pursuant to section ninety-seven-kkkk of the state finance law, to be disbursed at the board's direction, to defray expenses incurred by municipal and other local parties to the proceeding (except a municipality which is the applicant) for expert witness, consultant, administrative and legal fees, provided, however, such expenses shall not be available for judicial review or litigation.

If at any time subsequent to the filing of the application, the application is amended in a manner that warrants substantial additional scrutiny, the board may require an additional intervenor fee in an amount not to exceed seventy-five thousand dollars. The board shall provide for notices, for municipal and other local parties, in all appropriate languages. Any moneys remaining in the intervenor account after the board's jurisdiction over an application has ceased shall be returned to the applicant.

(b) notwithstanding any other provision of law to the contrary, the board shall provide by rules and regulations for the management of the intervenor account and for disbursements from the account, which rules and regulations shall be consistent with the purpose of this section to make available to municipal parties at least one-half of the amount of the intervenor account and for uses specified in paragraph (a) of this subdivision. In addition, the board shall provide other local parties up to one-half of the amount of the intervenor account, provided, however, that the board shall assure that the purposes for which moneys in the intervenor account will be expended will contribute to an informed decision as to the appropriateness of the site and facility and are made available on an equitable basis in a manner which facilitates broad public participation.

SECTION 165. HEARING SCHEDULE.

1. After the receipt of an application filed pursuant to section one hundred sixty-four of this article, the chair of the board shall, within sixty days of such receipt, determine whether the application complies with such section and upon finding that the application so complies, fix a date for the commencement of a public hearing. The department of environmental conservation shall advise the board within said sixty day period whether an application filed pursuant to paragraph (b) of subdivision four of this section contains sufficient information meeting the requirements specified under subparagraphs (i) through (iv) of such paragraph to qualify for the expedited procedure provided for in such paragraph. No later than the date of the determination that an application complies with section one hundred sixty-four of this article, the department of environmental conservation shall initiate its review pursuant to federally delegated or approved environmental permitting authority. The chair of the board may require the filing of any additional information needed to supplement an application before or during the hearings.

2. Within a reasonable time after the date has been fixed by the chair for commencement of a public hearing, the presiding examiner shall hold a prehearing conference to expedite the orderly conduct and disposition of the hearing, to specify the issues, to obtain stipulations as to matters not disputed, and to deal with such other matters as the presiding examiner may deem proper. Thereafter, the presiding examiner shall issue an order identifying the issues to be addressed by the parties provided, however, that no such order shall preclude consideration of additional issues or requests for additional submissions, documentation or testimony at a hearing which warrant consideration in order to develop an adequate record as determined by an order of the board. The presiding examiner shall be permitted a reasonable time to respond to any and all interlocutory motions and appeals, but in no case shall such time extend beyond forty-five days.

3. All parties shall be prepared to proceed in an expeditious manner at the hearing so that it may proceed regularly until completion, except that hearings shall be of sufficient duration to provide adequate opportunity to hear direct evidence and rebuttal evidence from residents of the area affected by the proposed major electric generating facility. To the extent practicable, the place of the hearing shall be designated by the presiding examiner at a location within two miles of the proposed location of the facility.

4. (a) except as provided in paragraph (b) of this subdivision, proceedings on an application shall be completed in all respects in a manner consistent with federally delegated or approved environmental permitting authority, including a final decision by the board, within twelve months from the date of a determination by the chair that an application complies with section one hundred sixty-four of this article; provided, however, the board may extend the deadline in extraordinary circumstances by no more than six months in order to give consideration to specific issues necessary to develop an adequate record. The board must render a final decision on the application by the aforementioned deadlines unless such deadlines are waived by the applicant. If, at any time subsequent to the commencement of the hearing, there is a material and substantial amendment to the application, the deadlines may be extended by no more than six months, unless such deadline is waived by the applicant, to consider such amendment.

(b) proceedings on an application by an owner of an existing major electric generating facility to modify such existing facility or site a new major electric generating facility adjacent or contiguous to such existing facility, shall be completed in all respects in a manner consistent with federally delegated or approved environmental permitting authority, including a final decision by the board, within six months from the date of a determination by the chair that such application complies with section one hundred sixty-four of this article, whenever such application demonstrates that the operation of the modified facility, or of the existing facility and new facility in combination, would result in:

(i) a decrease in the rate of emission of each of the relevant siting air contaminants. For facilities that are partially replaced or modified, the percentage decrease shall be calculated by comparing the potential to emit of each such contaminant of the existing unit that is to be modified or replaced as of the date of application under this article to the future potential to emit each such contaminant of the modified or replacement unit as proposed in the application. For facilities that are sited physically adjacent or contiguous to an existing facility, the percentage decrease shall be calculated by comparing the potential to emit of each such contaminant of the existing facility as of the date of application under this article, to the

- future potential to emit each such contaminant of the existing and new facility combined as proposed in the application;
- (ii) a reduction of the total annual emissions of each of the relevant siting air contaminants emitted by the existing facility. The percent age reduction shall be calculated by comparing (on a pounds-per-year basis) the past actual emissions of each of the relevant siting air contaminants emitted by the existing facility averaged over the three years preceding the date of application under this article, to the annualized potential to emit each such contaminant of the modified facility or of the combined existing and new facility as proposed in the application;
 - (iii) introduction of a new cooling water intake structure where such structure withdraws water at a rate equal to or less than closed-cycle cooling; and
 - (iv) a lower heat rate than the heat rate of the existing facility.

The applicant shall supply the details of the analysis in the application and such supporting information, as may be requested by the board or, in the exercise of federally delegated or approved environmental permitting authority, the department of environmental conservation, necessary to show compliance with the requirements of subparagraphs (i) through (iv) of this paragraph. The board may extend the deadline in extraordinary circumstances by no more than three months in order to give consideration to specific issues necessary to develop an adequate record. The board shall render a final decision on the application by the aforementioned deadlines unless such deadlines are waived by the applicant. If, at any time subsequent to the commencement of the hearing, there is a material and substantial amendment to the application, the deadlines may be extended by no more than three months, unless such deadline is waived by the applicant, to consider such amendment.

5. If an application for an amendment of a certificate proposing a change in the facility is likely to result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility, a hearing shall be held in the same manner as a hearing on an application for a certificate. The board shall promulgate rules, regulations and standards under which it shall determine whether hearings are required under this subdivision and shall make such determinations.

SECTION 166. PARTIES TO A CERTIFICATION PROCEEDING.

1. The parties to the certification proceedings shall include:
 - (a) the applicant;
 - (b) the department of environmental conservation;
 - (c) the department of economic development;
 - (d) the department of health;
 - (e) the department of agriculture and markets;
 - (f) the new york state energy research and development authority;
 - (g) the department of state;
 - (h) the office of parks, recreation and historic preservation;
 - (i) where the facility or any portion thereof or of any alternate is to be located within the adirondack park, as defined in subdivision one of section 9-0101 of the environmental conservation law, the adirondack park agency;
 - (j) a municipality entitled to receive a copy of the application under paragraph (a) of subdivision two of section one hundred sixty-four of this article, if it has filed with the board a notice of intent to be a party, within forty-five days after the date given in the published notice as the date for the filing of the application; any municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof;
 - (k) any individual resident in a municipality entitled to receive a copy of the application under paragraph (a) of subdivision two of section one hundred sixty-four of this article if he or she has filed with the board a notice of intent to be a party, within forty-five days after the date given in the published notice as the date for filing of the application;
 - (l) any non-profit corporation or association, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups or to promote the orderly development of any area in which the facility is to be located, if it has filed with the board a notice of intent to become a party, within forty-five days after the date given in the published notice as the date for filing of the application;
 - (m) any other municipality or resident of such municipality located within a five mile radius of such proposed facility, if it or the resident has

filed with the board a notice of intent to become a party, within forty-five days after the date given in the published notice as the date for filing of the application;

- (n) any other municipality or resident of such municipality which the board in its discretion finds to have an interest in the proceeding because of the potential environmental effects on such municipality or person, if the municipality or person has filed with the board a notice of intent to become a party, within forty-five days after the date given in the published notice as the date for filing of the application, together with an explanation of the potential environmental effects on such municipality or person; and
- (o) such other persons or entities as the board may at any time deem appropriate, who may participate in all subsequent stages of the proceeding.

2. The department shall designate members of its staff who shall participate as a party in proceedings under this article.

3. Any person may make a limited appearance in the proceeding by filing a statement of his or her intent to limit his or her appearance in writing at any time prior to the commencement of the hearing. All papers and matters filed by a person making a limited appearance shall become part of the record. No person making a limited appearance shall be a party or shall have the right to present testimony or cross-examine witnesses or parties.

4. The presiding officer may for good cause shown, permit a municipality or other person entitled to become a party under subdivision one of this section, but which has failed to file the requisite notice of intent within the time required, to become a party, and to participate in all subsequent stages of the proceeding.

SECTION 167. CONDUCT OF HEARING.

1. (a) The hearing shall be conducted in an expeditious manner by a presiding examiner appointed by the department. An associate hearing examiner shall be appointed by the department of environmental conservation prior to the date set for commencement of the public hearing. The associate examiner shall attend all hearings as scheduled by the presiding examiner and shall assist the presiding examiner in inquiring into and calling for testimony concerning relevant and material matters. The conclusions and recommendations of the associate examiner shall be incorporated in the recommended decision of the presiding examiner, unless the associate examiner prefers to submit a separate report of dissenting or concurring conclusions and recommendations. In the event that the commissioner of environmental conservation issues permits pursuant to federally delegated or approved authority under the federal clean water act, the federal clean air act and the federal resource conservation and recovery act, or section 15-1503 and article nineteen of the environmental conservation law, the record in the proceeding and the associate examiner's conclusions and recommendations shall, insofar as is consistent with federally delegated or approved environmental permitting authority, provide the basis for the decision of the commissioner of environmental conservation whether or not to issue such permits.

(b) the testimony presented at a hearing may be presented in writing. Oral testimony may be presented at any public statement hearing conducted by the board for the taking of unsworn statements. The board may require any state agency to provide expert testimony on specific subjects where its personnel have the requisite expertise and such testimony is considered necessary to the development of an adequate record. All testimony and information presented by the applicant, any state agency or other party shall be subject to discovery and cross-examination. A record shall be made of the hearing and of all testimony taken and the cross-examinations thereon. The rules of evidence applicable to proceedings before a court shall not apply. The presiding examiner may provide for the consolidation of the representation of parties, other than governmental bodies or agencies, having similar interests. In the case of such a consolidation, the right to counsel of its own choosing shall be preserved to each party to the proceeding provided that the consolidated group may be required to be heard through such reasonable number of counsel as the presiding examiner shall determine. Appropriate regulations shall be issued by the board to provide for prehearing discovery procedures by parties to a proceeding, consolidation of the representation of parties, the exclusion of irrelevant, repetitive, redundant or immaterial evidence, and the review of rulings by presiding examiners.

2. A copy of the record including, but not limited to, testimony, briefs and hearing testimony shall be made available by the board within thirty days of the close of the evidentiary record for examination by the public, and shall be made available on the department's website.

3. The chair of the board may enter into an agreement with an agency or department of the united states having concurrent jurisdiction over all or part of the location, construction, or operation of a major electric generating facility subject to this article with respect to providing for joint procedures and a joint hearing of common issues on a combined record, provided that such agreement shall not diminish the rights accorded to any party under this article.

4. The presiding examiner shall allow testimony to be received on reasonable and available alternate locations for the proposed facility, alternate energy supply sources and demand-reducing measures, provided notice of the intent to submit such testimony shall be given within such period as the board shall prescribe by regulation, which period shall be not less than thirty nor more than sixty days after the commencement of the hearing. Nevertheless, in its discretion, the board may thereafter cause to be considered other reasonable and available locations for the proposed facility, alternate energy supply sources and, where appropriate, demand-reducing measures.

5. Notwithstanding the provisions of subdivision four of this section, the board may make a prompt determination on the sufficiency of the applicant's consideration and evaluation of reasonable alternatives to its proposed type of major electric generating facility and its proposed location for that facility, as required pursuant to paragraph (i) of subdivision one of section one hundred sixty-four of this article, before resolution of other issues pertinent to a final determination on the application; provided, however, that all interested parties have reasonable opportunity to question and present evidence in support of or against the merits of the applicant's consideration and evaluation of such alternatives, as required pursuant to paragraph (i) of subdivision one of section one hundred sixty-four of this article, so that the board is able to decide, in the first instance, whether the applicant's proposal is preferable to alternatives.

SECTION 168. BOARD DECISIONS.

1. The board shall make the final decision on an application under this article for a certificate or amendment thereof, upon the record made before the presiding examiner, including any briefs or exceptions to any recommended decision of such examiner or to any report of the associate examiner, and after hearing such oral argument as the board shall determine. Except for good cause shown to the satisfaction of the board, a determination under subdivision five of section one hundred sixty-seven of this article that the applicant's proposal is preferable to alternatives shall be final. Such a determination shall be subject to rehearing and review only after the final decision on an application is rendered.

2. The board shall not grant a certificate or amendment thereof for the construction or operation of a facility, either as proposed or as modified by the board, without making explicit findings regarding the nature of the probable environmental impacts of the construction and operation of the facility, including the cumulative environmental impacts of the construction and operation of related facilities such as electric lines, gas lines, water supply lines, waste water or other sewage treatment facilities, communications and relay facilities, access roads, rail facilities, or steam lines, including impacts on:

- (a) ecology, air, ground and surface water, wildlife, and habitat;
- (b) public health and safety;
- (c) cultural, historic, and recreational resources, including aesthetics and scenic values; and
- (d) transportation, communication, utilities and other infrastructure.

Such findings shall include the cumulative impact of emissions on the local community including whether the construction and operation of the facility results in a significant and adverse disproportionate environmental impact, in accordance with regulations promulgated pursuant to paragraph (f) of subdivision one of section one hundred sixty-four of this article by the department of environmental conservation regarding environmental justice issues.

3. The board may not grant a certificate for the construction or operation of a major electric generating facility, either as proposed or as modified by the board, unless the board determines that:

- (a) the facility is a beneficial addition to or substitution for the electric generation capacity of the state; and

- (b) the construction and operation of the facility will serve the public interest; and
- (c) the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable; and
- (d) if the board finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community for the duration that the certificate is issued to the maximum extent practicable using verifiable measures; and
- (e) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement, including, but not limited to, those relating to the interconnection to and use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way, which would be otherwise applicable if it finds that, as applied to the proposed facility, such is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder.

4. In making the determinations required in subdivision three of this section, the board shall consider:

- (a) the state of available technology;
- (b) the nature and economics of reasonable alternatives;
- (c) environmental impacts found pursuant to subdivision two of this section;
- (d) the impact of construction and operation of related facilities, such as electric lines, gas lines, water supply lines, waste water or other sewage treatment facilities, communications and relay facilities, access roads, rail facilities, or steam lines;
- (e) the consistency of the construction and operation of the facility with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan;

- (f) the impact on community character and whether the facility would affect communities that are disproportionately impacted by cumulative levels of pollutants; and
- (g) such additional social, economic, visual or other aesthetic, environmental and other considerations deemed pertinent by the board.

5. The department or the commission shall monitor, enforce and administer compliance with any terms and conditions set forth in the board's order.

6. A copy of the board's decision and opinion shall be served on each party electronically or by mail.

7. Following any rehearing and any judicial review of the board's decision, the board's jurisdiction over an application shall cease, provided, however, that the permanent board shall retain jurisdiction with respect to the amendment, suspension or revocation of a certificate.

SECTION 169. OPINION TO BE ISSUED WITH DECISION.

In rendering a decision on an application for a certificate, the board shall issue an opinion stating its reasons for the action taken. If the board has found that any local ordinance, law, resolution, regulation or other action issued thereunder or any other local standard or requirement which would be otherwise applicable is unreasonably burdensome pursuant to paragraph (e) of subdivision three of section one hundred sixty-eight of this article, it shall state in its opinion the reasons therefor.

SECTION 170. REHEARING AND JUDICIAL REVIEW.

1. Any party aggrieved by the board's decision denying or granting a certificate may apply to the board for a rehearing within thirty days after issuance of the aggrieving decision. Any such application shall be considered and decided by the board and any rehearing shall be completed and a decision rendered thereon within ninety days of the expiration of the period for filing rehearing petitions, provided however that the board may extend the deadline by no more than ninety days where a rehearing is required if necessary to develop an adequate record. The applicant may waive such deadline. Thereafter such a party may obtain judicial review of such decision as provided in this section. A judicial proceeding shall be brought in the appellate division of the supreme court of the state of new york in the judicial department embracing the county wherein the facility is to be located or, if the application is denied, the county wherein the applicant has proposed to locate the facility. Such proceeding shall be initiated by the filing of a petition in such court within thirty days after the issuance of a final decision by the board upon the application for rehearing together with proof of service of a demand on the board to file with said court a copy of a written transcript of the record of the proceeding and a copy of the board's decision and opinion. The board's copy of said transcript, decision and opinion, shall be available at all reasonable times to all parties for examination without cost. Upon receipt of such petition and demand the board shall forthwith deliver to the court a copy of the record and a copy of the board's decision and opinion. Thereupon, the court shall have jurisdiction of the proceeding and shall have the power to grant such relief as it deems just and proper, and to make and enter an order enforcing, modifying and enforcing as so modified, remanding for further specific evidence or findings or setting aside in whole or in part such decision. The appeal shall be heard on the record, without requirement of reproduction, and upon briefs to the court. No objection that has not been urged by the party in his or her application for rehearing before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact on which such decision is based shall be conclusive if supported by substantial evidence on the record considered as a whole and matters of judicial notice set forth in the opinion. The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court

and by the court of appeals as expeditiously as possible and with lawful precedence over all other matters.

2. The grounds for and scope of review of the court shall be limited to whether the decision and opinion of the board are:

- (a) in conformity with the constitution, laws and regulations of the state and the united states;
- (b) supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion;
- (c) within the board's statutory jurisdiction or authority;
- (d) made in accordance with procedures set forth in this article or established by rule or regulation pursuant to this article;
- (e) arbitrary, capricious or an abuse of discretion; or
- (f) made pursuant to a process that afforded meaningful involvement of citizens affected by the facility regardless of age, race, color, national origin and income.

3. Except as herein provided article seventy-eight of the civil practice law and rules shall apply to appeals taken hereunder.

SECTION 171. JURISDICTION OF COURTS.

Except as expressly set forth in section one hundred seventy of this article and except for review by the court of appeals of a decision of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear or determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article or to stop or delay the construction or operation of a major electric generating facility except to enforce compliance with this article or the terms and conditions issued thereunder.

SECTION 172. POWERS OF MUNICIPALITIES AND STATE AGENCIES.

1. Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may, except as expressly authorized under this article by the board, require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility with respect to which an application for a certificate hereunder has been filed, including pursuant to paragraph (e) of subdivision three of section one hundred sixty-eight of this article, any such approval, consent, permit, certificate or condition relating to the interconnection to or use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way, provided that this article shall not impair or abrogate any federal, state or local labor laws or any otherwise applicable state law for the protection of employees engaged in the construction and operation of such facility; provided, however, that in the case of a municipality or an agency thereof, such municipality has received notice of the filing of the application there for;

and provided further, however, that the department of environmental conservation shall be the permitting agency for permits issued pursuant to federally delegated or approved authority under the federal clean water act, the federal clean air act and the federal resource conservation and recovery act. In issuing such permits, the commissioner of environmental conservation shall follow procedures established in this article to the extent that they are consistent with federally delegated or approved environmental permitting authority. The commissioner of environmental conservation shall provide such permits to the board prior to its determination whether or not to issue a certificate. The issuance by the department of environmental conservation of such permits shall in no way interfere with the required review by the board of the anticipated environmental and health impacts relating to the construction and operation of the facility as proposed, or its authority to deny an application for certification pursuant to section one hundred sixty-eight of this article, and, in the event of such a denial, any such permits shall be deemed null and void.

2. The adirondack park agency shall not hold public hearings for a major electric generating facility with respect to which an application hereunder is filed, provided that such agency has received notice of the filing of such application.

SECTION 173. APPLICABILITY TO PUBLIC AUTHORITIES.

The power authority of the state of new york, the green island power authority and the long island power authority shall be subject to all provisions of this article for major electric generating facilities which any such authority builds or causes to be built. For generating facilities which are not major electric generating facilities, none of the above named authorities shall be permitted to serve as lead agency for purposes of environmental review pursuant to the provisions of the environmental conservation law.

OTHER PARTS OF THE ENABLING LEGISLATION

S 13. The opening paragraph and paragraph (b) of subdivision 5 of section 8-0111 of the environmental conservation law, as added by chapter 612 of the laws of 1975, are amended to read as follows:

The requirements of this article shall not apply to:

(b) Actions subject to the provisions requiring a certificate of environmental compatibility and public need in articles seven, ten and the former article eight of the public service law; or

S 14. Section 17-0823 of the environmental conservation law, as added by chapter 801 of the laws of 1973, is amended to read as follows:

S 17-0823. Power plant siting.

In the case of a major steam electric generating facility, as defined in section one hundred forty of the public service law, for the construction or operation of which a certificate is required under the former article eight of the public service law, or a major electric generating facility as defined in section one hundred sixty of the public service law, for the construction or operation of which a certificate is required under article ten of the public service law, such certificate shall be deemed a permit under this section if issued by the state board on electric generation siting and the environment pursuant to federally delegated or approved environmental permit authority. Nothing herein shall limit the authority of the department of health and the department to monitor the environmental and health impacts resulting from the operation of such major steam electric generating facility or major electric generating facility and to enforce applicable provisions of the public health law and this article and the terms and conditions of the certificate governing the environmental and health impacts resulting from such operation. In such case all powers, duties, obligations and privileges conferred upon the department by this article shall devolve upon the new york state board on electric generation siting and the environment. In considering the granting of permits, such board shall apply the provisions of this article and the act.

S 15. Paragraph j of subdivision 2 of section 19-0305 of the environmental conservation law, as amended by chapter 525 of the laws of 1981, is amended to read as follows:

j. Consider for approval or disapproval applications for permits and certificates including plans or specifications for air contamination sources and air cleaning installations or any part thereof submitted consistent with the rules of the department, and inspect the installation for compliance with the plans or specifications; provided that in the case of a major steam electric generating facility, as defined in former section one hundred forty of the public service law, for which a certificate is required pursuant to the former article eight of the public service law, or a major electric generating facility as defined in section one hundred sixty of the public service law, for which a certificate is required pursuant to article ten of the public service law, such approval functions may be performed by the state board on electric generation siting and the environment, as defined in the public service law, pursuant to federally delegated or approved environmental permitting authority, and such inspection functions shall be performed by the department. Nothing herein shall limit the authority of the department of health and the department to monitor the environmental and health impacts resulting from the operation of such major steam electric generating facility and to enforce applicable provisions of the public health law and this chapter and the terms and conditions of the certificate governing the environmental and health impacts resulting from such operation.

S 16. Paragraph (e) of subdivision 3 of section 49-0307 of the environmental conservation law, as added by chapter 292 of the laws of 1984, is amended to read as follows:

(e) where land subject to a conservation easement or an interest in such land is required for a major utility transmission facility which has received a certificate of environmental compatibility and public need pursuant to article seven of the public service law or is required for a major steam electric generating facility which has received a certificate of environmental compatibility and public need pursuant to the former article eight of the public service law, or a major electric generating facility or repowering project which has received a certificate of environmental compatibility and public need pursuant to article ten of the public service law, upon the filing of such certificate in a manner prescribed for recording a conveyance of real property pursuant to section two hundred ninety-one of the real property law or any other applicable provision of law, provided that such certificate contains a finding that the public interest in the

conservation and protection of the natural resources, open spaces and scenic beauty of the adirondack or catskill parks has been considered.

S 17. Section 1014 of the public authorities law, as amended by chapter 446 of the laws of 1972, is amended to read as follows:

S 1014. Public service law not applicable to authority; inconsistent provisions in other acts superseded. The rates, services and practices relating to the generation, transmission, distribution and sale by the authority, of power to be generated from the projects authorized by this title shall not be subject to the provisions of the public service law nor to regulation by, nor the jurisdiction of the department of public service. except to the extent article seven of the public service law applies to the siting and operation of a major utility transmission facility as defined therein, and article ten of the public service law applies to the siting of a major electric generating facility as defined therein, and except to the extent section eighteen-a of the public service law provides for assessment of the authority for certain costs relating thereto, the provisions of the public service law and of the environmental conservation law and every other law relating to the department of public service or the public service commission or to the environmental conservation department or to the functions, powers or duties assigned to the division of water power and control by chapter six hundred nineteen of the laws of nineteen hundred twenty-six, shall so far as is necessary to make this title effective in accordance with its terms and purposes be deemed to be superseded, and wherever any provision of law shall be found in conflict with the provisions of this title or inconsistent with the purposes thereof, it shall be deemed to be superseded, modified or repealed as the case may require.

S 18. Paragraph c of subdivision 8 of section 1020-c of the public authorities law, as amended by chapter 7 of the laws of 1987, is amended to read as follows:

c. Article seven of the public service law shall apply to the authority's siting and operation of a major transmission facility as therein defined and article ten of the public service law shall apply to the authority's siting and operation of a major electric generating facility as therein defined.

S 19. Section 1020-s of the public authorities law, as added by chapter 517 of the laws of 1986, is amended to read as follows:

S 1020-s. Public service law generally not applicable to authority; inconsistent provisions in certain other acts superseded.

1. The rates, services and practices relating to the electricity generated by facilities owned or operated by the authority shall not be subject to the provisions of the public service law or to regulation by, or the jurisdiction of, the public service commission, except to the extent (a) article seven of the public service law applies to the siting and operation of a major utility transmission facility as defined therein, (b) article ten of such law applies to the siting of a generating facility as defined therein, and (c) section eighteen-a of such law provides for assessment for certain costs, property or operations.

2. The issuance by the authority of its obligations to acquire the securities or assets of LIILCO shall be deemed not to be "state action" within the meaning of the state environmental quality review act, and such act shall not be applicable in any respect to such acquisition or any action of the authority to effect such acquisition.

S 20. The state finance law is amended by adding a new section 97-kkkk to read as follows:

S 97-kkkk. Intervenor account.

1. There is hereby established in the joint custody of the state comptroller and the commissioner of taxation and finance an account to be known as the intervenor account.

2. Such account shall consist of all revenues received from siting application fees for electric generating facilities pursuant to sections one hundred sixty-three and one hundred sixty-four of the public service law.

3. Moneys of the account, following appropriation by the legislature, may be expended in accordance with the provisions of sections one hundred sixty-three and one hundred sixty-four of the public service law. Moneys shall be paid out of the account on the audit and warrant of the state comptroller on vouchers certified or approved by the chair of the public service commission.

S 21. The environmental conservation law is amended by adding a new section 19-0312 to read as follows:

S 19-0312. Power plant emissions and performance standards.

1. Definitions.

As used in this section:

a. "mercury" means elemental, oxidized, and particle-bound mercury in source emissions.

b. "major electric generating facility" means any electricity generating facility with a nameplate capacity of twenty-five thousand kilowatts or more.

2. Any major electric generating facility shall demonstrate compliance with all applicable emission requirements established by the department for the purpose of complying with all state and federal air quality requirements, including requirements for sulfur dioxide, nitrogen oxides, mercury, carbon dioxide and particulate matter of less than 2.5 microns. Such facility must also comply with other applicable department air quality requirements relating to offsetting of emissions.

3. No later than twelve months after the effective date of this section, the commissioner shall promulgate rules and regulations targeting reductions in emissions of carbon dioxide that would apply to major electric generating facilities that commenced construction after the effective date of the regulations.

S 23. Severability.

If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

S 24. This act shall take effect immediately; provided that nothing in this act shall be construed to limit any administrative authority, with respect to matters included in this act, which authority existed prior to the effective date of this act. Within twelve months of the effective date of this act, all rules and regulations required pursuant to this act shall be adopted. Prior to the adoption of such rules and regulations by the New York state board on electric generation siting and the environment and the department of environmental conservation required under this act, nothing in this act shall affect the right to apply for a permit pursuant to the environmental conservation law including article 8 therein, or other applicable laws, to operate an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts or more.

**The Fund for Municipal and Local Parties:
A Guide to Intervenor Funding Pursuant to
Article 10 of the Public Service Law**

Important General Guidance

This guidance document provides information about the availability of intervenor funds in the Article 10 process for the siting of major electric generating facilities in New York State. The siting process is conducted by the New York State Board on Electric Generation Siting and the Environment (Siting Board). As a consequence of the timing requirements discussed below, it is important that parties interested in obtaining intervenor funds work quickly to assemble their requests as soon as the Preliminary Scoping Statement or Application is filed by an applicant. Parties should consider commencing the preparation of their requests as soon as they become aware of the potential that a Preliminary Scoping Statement or Application may be filed. However, funding requests will not be accepted until called for by the Presiding Examiner.

The Fund for Municipal and Local Parties

Article 10 applicants are required to provide funds to be used to defray certain expenses incurred by municipal and local parties as they participate in the pre-application scoping process and in the proceeding before the Siting Board to consider the Article 10 Application. The funds, known as "intervenor" funds, are provided by the assessment of fees on the applicant.

"Intervenor" is a name used to refer to a party that joins an ongoing case or proceeding as a third-party for the protection of an interest. Some intervenors join as a matter of right established in the Article 10 statute; others are permitted to join at the discretion of the Presiding Examiner or the Siting Board.

Not all intervenors are eligible for intervenor funds; only "municipal and local parties" are eligible. Eligible "municipal parties" include any county, city, town or village located in New York State that may be affected by the proposed major electric generating facility. The Presiding Examiner must reserve at least 50% of the funds for potential awards to municipalities. Eligible "local parties" include persons residing in a community who may be affected by the proposed major electric generating facility. Such persons may seek intervenor funding either individually or collectively. Local parties are eligible to receive up to 50% of the funds.

Amount of Funds - Pre-application Stage

An applicant submitting a Preliminary Scoping Statement is assessed an intervenor fee equal to \$350 per megawatt (MW) up to a cap of \$200,000. For example, for a 100-megawatt facility, the pre-application intervenor fee would be \$35,000 (100 x \$350). If the applicant makes a substantial revision to its Preliminary Scoping Statement, the Siting Board may require an additional fee in an amount not to exceed \$25,000.

Amount of Funds - Application Stage

An applicant submitting an Article 10 Application is assessed an intervenor fee equal to \$1,000 per megawatt (MW) up to a cap of \$400,000. For example, for a 100-megawatt facility, the pre-application intervenor fee would be \$100,000 (100 x \$1,000). If the applicant makes a revision to its Application requiring substantial additional scrutiny, the applicant will be assessed an additional intervenor fee equal to \$1,000 per megawatt (MW) of the proposed project, as amended, but no more than \$75,000. The presiding examiner may increase the level of the additional intervenor fee up to the maximum level of \$75,000 if the presiding examiner finds circumstances require a higher level of intervenor funding in order to ensure an adequate record. In addition, for facilities that will require storage or disposal of fuel waste byproduct, an additional intervenor fee will be assessed at the application phase of \$500 per megawatt (MW), but no more than an additional \$50,000.

Use of Funds

Intervenor funds can be used to defray expenses incurred by eligible municipal and local parties in the pre-application scoping process and in the proceeding before the Siting Board to consider the Application. They can be used to pay for expert witnesses, consultants, administrative costs (such as document preparation and duplication) and legal fees. No intervenor funds may be used to pay for appeals of Siting Board decisions or other matters before a court.

During the Pre-application Stage, the Presiding Examiner will award funds on an equitable basis when it is determined that the funds will be used to make an effective contribution to review of the Preliminary Scoping Statement and the development of an adequate scope of the Application to be submitted, and will provide early and effective public involvement. During the Application Phase, the Presiding Examiner will award funds on an equitable basis when it is determined that the funds will be used to contribute to a complete record leading to an informed decision as to the appropriateness of the site and the facility, and will facilitate broad participation in the proceeding.

Notice of Availability of Funds & Deadline for Funding Requests

Upon the payment of intervenor fees by the Article 10 Applicant at various stages, the Presiding Examiner or the Secretary to the Siting Board will issue a notice indicating the availability of intervenor funds and providing a schedule and related information describing how interested municipalities and local parties may make requests for the funds. Subject to the availability of funds, the Presiding Examiner may fix additional dates for submission of fund requests.

Requests for funds must be submitted to the Presiding Examiner no later than 30 days after the issuance of the notice of availability. Eligible municipal and local parties may request funds by filing the requests with the Secretary of the Siting Board and submitting a copy to the Presiding Examiner and to the other parties to the proceeding.

Requests for Intervenor Funds

Parties preparing requests for funds are encouraged to submit their requests using a standard format as may be provided for that purpose either on the Siting Board Website [["http://www.dps.ny.gov/SitingBoard/"\]](http://www.dps.ny.gov/SitingBoard/) or by the Presiding Examiner. A request for intervenor funds must contain:

1. a statement of the number of persons and the nature of the interests the requesting party represents;
2. a statement of the availability of funds (without intervenor funding) from the resources of the requesting party and from other sources and of the efforts that have been made to obtain such funds (from other sources);
3. the amount of funds being sought;
4. to the extent possible, the name and qualifications of each expert to be employed, or at a minimum, a statement of the necessary professional qualifications;
5. if known, the name of any other interested person or entity who may, or is intending to, employ such expert;
6. a detailed statement of the services to be provided by expert witnesses, consultants, attorneys, or others (and the basis for the fees requested), including hourly fee, wage rate, and expenses, specifying how such services and expenses will contribute to the compilation of a complete record as to the appropriateness of the site and facility;¹
7. if a study is to be performed, a description of the purpose, methodology and timing of the study, including a statement of the rationale supporting the methodology and timing proposed, including a detailed justification for any proposed methodology that is new or original explaining why pre-existing methodologies are insufficient or inappropriate;
8. a statement as to the result of any effort made to encourage the Article 10 Applicant to perform any proposed studies or evaluations and the reason it is believed that an independent study is necessary; and
9. a copy of any contract or agreement or proposed contract or agreement with each expert witness, consultant or other person.

The Presiding Examiner is required to examine each request for funds to determine whether the request complies with the above rules. A request for intervenor funds that does not comply fully with each requirement of the rules will not be granted. Providing a complete request for funds in the first instance will abbreviate the process of obtaining a grant of funds and will avoid successive filings and rulings, which otherwise may be necessary and will delay the award of funds. If the party believes a regulatory provision is not applicable to its circumstances, the party should explicitly state this contention in its funding request, and also explain why the provision is not applicable.

¹ [Note: In addressing this provision, a party must provide more than a recitation of the regulatory language in a conclusory statement to the effect that "each person identified above will contribute to a complete record." Instead, the party must specify in what manner, or specifically how, its participation will contribute to a complete record in this proceeding. For example, a party might identify, if applicable, that it has a unique concern or interest, not addressed by other parties, that it intends to study or otherwise address on the record, and specify how the party plans to address the issue. For the pre-application stage, a party might identify the need to hire an expert to better define the scope of appropriate studies that should be included in the application to remedy a deficiency uniquely identified by the party in the scope described in the Preliminary Scoping Statement.]

Conferences to Consider Funding Requests

At the Pre-application Stage, an initial conference to consider fund requests will be convened by the Presiding Examiner between 45 days and 60 days after the filing of a Preliminary Scoping Statement. At the Application Stage, a similar initial conference may be convened. Anyone interested in receiving notices of such conferences may subscribe to the service list established for the case. At any conference held to consider fund requests, intervenors should be prepared to discuss their funding requests and the award of funds. At any pre-hearing conference that may be held to consider fund requests, the parties should be prepared to discuss their funding requests and the award of funds. Parties are encouraged to consider consolidating their requests with similar funding proposals made by other parties.

Award of Funds

After a party submits a funding request, the Presiding Examiner will issue a formal ruling granting or denying the funding request in whole or in part. In making any funding award, the Presiding Examiner is not making any determination on the merits of the issues identified in the award. A party who receives a funding award will then be contacted by the Department of Public Service (DPS) Finance Office and asked to sign Local Assistance Contract documents, which set forth the terms and conditions for providing intervenor funding.

Disbursement of Funds

No funds will be disbursed until after the work has been performed and detailed invoices have been submitted to DPS for review by both the Presiding Examiner and the Finance Office. Any moneys remaining in the intervenor account after the Siting Board's jurisdiction over an Application has ceased shall be returned to the applicant.

Reporting Requirements

Each party receiving an award of funds must use the awarded funds only for the purposes that have been specified in the particular award of intervenor funding. A party receiving an award of funds must also comply with certain reporting requirements. On a quarterly basis, unless otherwise required by the Presiding Examiner, any party receiving an award of funds shall:

1. provide an accounting of the monies that have been spent; and,
2. submit a report to the Presiding Examiner showing:
 - a) the results of any studies and a description of any activities conducted using such funds;
 - b) whether the purpose for which the funds were awarded has been achieved;
 - c) if the purpose for which the funds were awarded has not been achieved, whether reasonable progress toward the goal for which the funds were awarded is being achieved;
 - d) and why further expenditures are warranted.

APPENDIX 1

Relevant Excerpts from Article 10 of the Public Service LawSection 160(1)&(9)[Definitions]:

1. "Municipality" means a county, city, town or village located in this state.

9. "Local parties" shall mean persons residing in a community who may be affected by the proposed major electric generating facility who individually or collectively seek intervenor funding pursuant to sections one hundred sixty-three and one hundred sixty-four of this article.

Section 163(4)[Pre-Application Procedures]:

4. (A) Each pre-application preliminary scoping statement shall be accompanied by a fee in an amount equal to three hundred fifty dollars for each thousand kilowatts of generating capacity of the subject facility, but no more than two hundred thousand dollars, to be deposited in the intervenor account established pursuant to section ninety-seven-kkkk of the state finance law, to be disbursed at the hearing examiner's direction to defray pre-application expenses incurred by municipal and local parties (except for a municipality submitting the pre-application scoping statement) for expert witness, consultant, administrative and legal fees. If at any time subsequent to the filing of the pre-application the pre-application is substantially modified or revised, the board may require an additional pre-application intervenor fee in an amount not to exceed twenty-five thousand dollars. No fees made available under this paragraph shall be used for judicial review or litigation. Any moneys remaining in the intervenor account upon the submission of an application for a certificate shall be made available to intervenors according to paragraph (a) of subdivision six of section one hundred sixty-four of this article.

(b) Pre-application disbursements from the intervenor account shall be made in accordance with rules and regulations established pursuant to paragraph (b) of subdivision six of section one hundred sixty-four of this article which rules shall provide for an expedited pre-application disbursement schedule to assure early and meaningful public involvement, with at least one-half of pre-application intervenor funds becoming available through an application process to commence within sixty days of the filing of a pre-application preliminary scoping statement.

Section 164(6)[Application for a Certificate]:

6. (a) Each application shall be accompanied by a fee in an amount (i) equal to one thousand dollars for each thousand kilowatts of capacity, but no more than four hundred thousand dollars, (ii) and for facilities that will require storage or disposal of fuel waste byproduct an additional fee of five hundred dollars for each thousand kilowatt of capacity, but no more than fifty thousand dollars shall be deposited in the intervenor account, established pursuant to section ninety-seven-kkkk of the state finance law, to be disbursed at the board's direction, to defray expenses incurred by municipal and other local parties to the proceeding (except a municipality which is the applicant) for expert witness, consultant, administrative and legal

fees, provided, however, such expenses shall not be available for judicial review or litigation. If at any time subsequent to the filing of the application, the application is amended in a manner that warrants substantial additional scrutiny, the board may require an additional intervenor fee in an amount not to exceed seventy-five thousand dollars. The board shall provide for notices, for municipal and other local parties, in all appropriate languages. Any moneys remaining in the intervenor account after the board's jurisdiction over an application has ceased shall be returned to the applicant.

(b) Notwithstanding any other provision of law to the contrary, the board shall provide by rules and regulations for the management of the intervenor account and for disbursements from the account, which rules and regulations shall be consistent with the purpose of this section to make available to municipal parties at least one-half of the amount of the intervenor account and for uses specified in paragraph (a) of this subdivision. In addition, the board shall provide other local parties up to one-half of the amount of the intervenor account, provided, however, that the board shall assure that the purposes for which moneys in the intervenor account will be expended will contribute to an informed decision as to the appropriateness of the site and facility and are made available on an equitable basis in a manner which facilitates broad public participation.

APPENDIX 2

Relevant Excerpts from the Article 10 Regulations16 NYCRR, Section 1000.10:

1000.10 Fund for Municipal and Local Parties

(a) Pre-Application Provisions

- (1) Each pre-application preliminary scoping statement shall be accompanied by an intervenor fee in an amount equal to \$350.00 for each 1,000 kilowatts of generating capacity of the subject facility, but no more than \$200,000.00.
- (2) All intervenor fees submitted with each preliminary scoping statement and application, as well as any intervenor fee required to be submitted when a pre-application scoping statement or application is amended, shall be deposited in an intervenor account, established pursuant to Section 97-kkkk of the State Finance Law.
- (3) Following the filing of a preliminary scoping statement, the Presiding Examiner or the Secretary shall issue a notice of availability of pre-application intervenor funds providing a schedule and related information describing how interested members of the public may apply for pre-application funds. Requests for pre-application funds shall be submitted to the presiding examiner not later than 30 days after the issuance of the notice of the availability of pre-application intervenor funds.
- (4) An initial pre-application meeting to consider fund requests shall be convened within no less than 45 days but no more than 60 days of the filing of a preliminary scoping statement. At any pre-application meeting that may be held to consider fund requests, participants should be prepared to discuss their funding applications and the award of funds. Participants are encouraged to consider the consolidation of requests with similar funding proposals of other participants.
- (5) If the pre-application preliminary scoping statement is substantially modified or revised subsequent to its filing, the Board may require an additional pre-application intervenor fee in an amount not to exceed \$25,000.00. In such circumstances, the presiding examiner may make awards of the additional funds, on an equitable basis, in relation to the potential for such awards to make an effective contribution to review of the preliminary scoping statement, thereby providing early and effective public involvement.

- (6) Each request for pre-application funds shall be filed with the Secretary and submitted to the presiding examiner, with copies to other interested persons, as identified by the Secretary or presiding examiner.
- (7) The presiding examiner shall reserve at least 50% of the pre-application funds for potential awards to municipalities.
- (8) Following receipt of initial requests for pre-application funds, the presiding examiner shall expeditiously make an initial award of pre-application funds, and thereafter may make additional awards of pre-application funds, in relation to the potential for such awards to make an effective contribution to review of the preliminary scoping statement, thereby encouraging early and effective public involvement.
- (9) The presiding examiner shall award funds on an equitable basis to participants during the pre-application phase whose requests comply with the provisions of this section, provided use of the funds will make an effective contribution to review of the preliminary scoping statement, and thereby provide early and effective public involvement.
- (10) Subject to the availability of funds, the presiding examiner may fix additional dates for submission of fund requests.
- (11) On a quarterly basis, unless otherwise required by the presiding examiner, any person receiving an award of funds shall submit to the presiding examiner, and file with the Secretary, a report:
 - (i) detailing an accounting of the monies that have been spent; and
 - (ii) showing:
 - (a) the results of any studies and a description of any activities conducted using such funds;
 - (b) whether the purpose for which the funds were awarded has been achieved; or
 - (c) if the purpose for which the funds were awarded has not been achieved, whether reasonable progress toward the goal for which the funds were awarded is being achieved and why further expenditures are warranted.
- (12) All disbursements from the pre-application intervenor account to any person shall be made by the Department of Public Service upon audit and warrant of the Comptroller of the State on vouchers approved by the Chairperson or a designee. All such vouchers must include a description and explanation of all expenses to be reimbursed.

- (13)
- (b) Application Provisions
- (1) Each application shall be accompanied by an intervenor fee in an amount:
 - (i) equal to \$1,000 for each 1,000 kilowatts of capacity, but no more than \$400,000.00, and
 - (ii) for facilities that will require storage or disposal of fuel waste byproduct, an additional intervenor fee of \$500.00 for each 1,000 kilowatts of capacity, but no more than an additional \$50,000.00, shall be deposited in the intervenor account.
 - (2) If an amendment of an application is determined by the Chairperson to be a revision as defined in this Part, the application will require substantial additional scrutiny and the applicant shall submit an additional intervenor fee, in the amount equal to \$1,000 for each 1,000 kilowatts of capacity of the proposed project, as amended, but no more than \$75,000.00. The presiding examiner may, however, increase the level of the additional intervenor fee that shall be submitted, up to the maximum level of \$75,000 if the presiding examiner finds circumstances require a higher level of intervenor funding in order to ensure an adequate record for review of the revision to the application.
 - (3) Following an applicant's publication of notice of filing a PSL Article 10 application, the presiding examiner or secretary shall issue a notice of availability of application intervenor funds providing a schedule and related information describing how municipal and local parties may apply for application funds. Requests for application funds shall be submitted to the presiding examiner within 30 days after the issuance of the notice of the availability of application intervenor funds.
 - (4) The presiding examiner shall award funds during the application phase on an equitable basis to municipal and local parties whose requests comply with the provisions of this section, so long as use of the funds will contribute to a complete record leading to an informed decision as to the appropriateness of the site and the facility and will facilitate broad participation in the proceeding.
 - (5) The presiding examiner shall reserve at least 50% of the intervenor funds for potential awards to municipalities.
 - (6) Any municipality or local party (except an applicant) may request funds from the intervenor account to defray expenses for expert witness, consultant, administrative or legal fees (other than in connection with judicial review).

- (7) Each request for application funds shall be filed with the Secretary and submitted to the presiding examiner, with copies provided to all other parties.
- (8) At any pre-hearing conference that may be held to consider fund requests, the parties should be prepared to discuss their funding applications and the award of funds. Parties are encouraged to consider the consolidation of requests with similar funding proposals of other participants.
- (9) Subject to the availability of funds, the presiding examiner may fix additional dates for submission of fund requests.
- (10) On a quarterly basis, unless otherwise required by the presiding examiner, any party receiving an award of funds shall submit to the presiding examiner and file with the Secretary a report:
 - (i) detailing an accounting of the monies that have been spent; and
 - (ii) showing:
 - (a) the results of any studies and a description of any activities conducted using such funds;
 - (b) whether the purpose for which the funds were awarded has been achieved; if the purpose for which the funds were awarded has not been achieved; whether reasonable progress toward the goal for which the funds were awarded is being achieved; and why further expenditures are warranted.
- (11) Disbursement of Funds
 - (i) All disbursements from the application intervenor account to any party shall be made by the Department of Public Service upon audit and warrant of the Comptroller of the State on vouchers approved by the Chairperson or a designee. All such vouchers must include a description and explanation of all expenses to be reimbursed.
 - (ii) All vouchers must be submitted for payment not later than six months after any withdrawal of an application or the Board's final decision on an application (including a decision on rehearing, if applicable).
 - (iii) Following withdrawal or final Board decision on an application, any funds that have not been disbursed shall be returned to the applicant.

(c) General Provisions

- (1) Each request for funds shall contain:
- (i) a statement of the number of persons and the nature of the interests the requesting party represents;
 - (ii) a statement of the availability of funds from the resources of the requesting party and from other sources and of the efforts that have been made to obtain such funds;
 - (iii) the amount of funds being sought;
 - (iv) to the extent possible, the name and qualifications of each expert to be employed, or at a minimum, a statement of the necessary professional qualifications;
 - (v) if known, the name of any other interested person or entity who may, or is intending to, employ such expert;
 - (vi) a detailed statement of the services to be provided by expert witnesses, consultants, attorneys, or others (and the basis for the fees requested), including hourly fee, wage rate, and expenses, specifying how such services and expenses will contribute to the compilation of a complete record as to the appropriateness of the site and facility;
 - (vii) if a study is to be performed, a description of the purpose, methodology and timing of the study, including a statement of the rationale supporting the methodology and timing proposed, including a detailed justification for any proposed methodology that is new or original explaining why pre-existing methodologies are insufficient or inappropriate;
 - (viii) a statement as to the result of any effort made to encourage the applicant to perform any proposed studies or evaluations and the reason it is believed that an independent study is necessary; and
 - (ix) a copy of any contract or agreement or proposed contract or agreement with each expert witness, consultant or other person.
- (2) If the matter has not been assigned to a presiding examiner, the Secretary shall act as an interim examiner until a presiding examiner has been assigned to the matter.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on February 13, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca
Gregg C. Sayre

CASE 11-E-0593 - Petition of Cricket Valley Energy Center, LLC
for an Original Certificate of Public
Convenience and Necessity and for an Order
Providing for Lightened Regulation.

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY AND ESTABLISHING LIGHTENED RATEMAKING REGULATION

(Issued and Effective February 14, 2013)

BY THE COMMISSION:

INTRODUCTION

In this order, the Commission grants a Certificate of Public Convenience and Necessity (certificate or CPCN) to Cricket Valley Energy Center, LLC (Cricket Valley) for the construction of a combined cycle, natural gas-powered 1,000 megawatt (MW) electric generating facility on an inactive industrial site located in the Town of Dover, Dutchess County, New York (facility or project). The Commission also grants applicant's motion for an expedited proceeding pursuant to 16 NYCRR 21.10 and approves a lightened regulatory regime for the new facility. The new facility is expected to provide cost effective electricity with lower emissions than many existing generation facilities. The facility may also act as a replacement for generation forced to retire due to environmental

or other regulatory factors. Further, the facility is expected to provide black-start services and to rehabilitate an inactive industrial site and provide economic growth for Dutchess County and the Town of Dover.

NOTICE

On November 9, 2011, Cricket Valley published notice of its petition and motion for an expedited proceeding in the Poughkeepsie Journal, a newspaper of general circulation in the vicinity of the project. On December 19, 2011, the Secretary issued a Notice of Procedural Conference which was held before Administrative Law Judge (ALJ) Michelle L. Philips in Albany, New York on January 12, 2012. A Notice of Proposed Rulemaking (Notice) concerning the petition for lightened regulatory regime was published in the State Register on December 21, 2011 [11-E-0593SP1]. The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding that Notice expired on February 2, 2012. Public comments regarding the project are summarized below.

PROCEDURAL CONFERENCE AND RULING

As explained in the December 19, 2011 notice, the purposes of the January 12, 2012 procedural conference were to discuss a schedule for the proceeding, identify major issues and address other pertinent procedural issues. Petitioner and Department of Public Service Staff (Staff) attended the conference. No other parties were present. On August 27, 2012, ALJ Philips issued a ruling indicating that no additional public hearing would take place and that Staff would function in an advisory capacity to the Commission.

THE PETITIONPetitioner

Cricket Valley, a limited liability company and single purpose entity formed in 2009 under the New York Limited Liability Company Law, will construct, own and operate the facility. Cricket Valley is an affiliate of Advanced Power AG (Advanced Power), an energy development company headquartered in Zug, Switzerland, with its central office in London. Marubeni Power International, Inc. (Marubeni) also owns a 20% interest in Cricket Valley.¹ Advanced Power Services (NA) Inc., a subsidiary of Advanced Power, located in Boston, Massachusetts, manages Advanced Power's North American operations. The petition includes a certified copy of Cricket Valley's certificate of formation in New York.

According to the petition, Advanced Power has developed more than 9,400 MW of power generation projects. Through various subsidiaries, Advanced Power developed two 420 MW facilities that went into commercial operation in 2011. Advanced Power also indicates that it has under development a number of projects in Europe (totaling 4,240 MW) and a 350 MW combined-cycle gas-fired generation facility in Massachusetts.

Advanced Power and a subsidiary of General Electric Company, GE Energy LLC (GE) have entered into a Joint Development Agreement for the development of the Cricket Valley facility. GE will supply its latest 7FA gas turbine technology and the steam turbines for the project. GE will manufacture the steam turbine and generators in Schenectady, New York. General Electric will provide maintenance services for facility

¹ Case 11-E-0593, Cricket Valley Energy Center, LLC, Notice Of Purchase of Interest, (March 1, 2012).

the New York State Transmission System and the Connecticut transmission system. The specific reinforcements to enable Cricket Valley to connect to the transmission system will be determined in the NYISO 2011 Class Year study which is now underway and will determine the full cost of interconnection for which Cricket Valley will be responsible.

Natural gas will be the only type of fuel used at the facility, except for blackstart operation and testing and backup fire pump testing, both of which will consume low sulfur diesel fuel. The petition indicates that natural gas will be supplied via a new 500 foot long, 12 inch gas pipeline from the Iroquois Gas Transmission (Iroquois) natural gas pipeline, just north of the facility. The new pipeline will be installed, owned and operated by Iroquois. The maximum daily natural gas requirement at full power output, including duct firing, is approximately 192,971 dekatherms per day. Cricket Valley states that they have not yet entered into a transportation contract for pipeline capacity, but are in negotiations with Iroquois and established holders of firm capacity on Iroquois (both primary firm and secondary firm)³ to meet the full firm capacity needs of the project. The petition indicates that the use of natural gas as the sole fuel source, excluding blackstart, will avoid the environmental impacts and risks associated with the use of

³ It is important to note that secondary firm capacity is not equivalent to primary firm capacity, and while superior to pure interruptible transportation capacity which is the first transportation service to be curtailed, secondary firm is still subject to a reduced allocation or even complete interruption during peak periods. Actual, year round, natural gas availability will be subject to the specific mix of primary and secondary firm capacity established by the contractual agreements between Cricket Valley and established firm holders of capacity on Iroquois.

alternative back-up fuels.⁴

Cricket Valley states that the facility can serve as replacement generation for plant closings related to recent environmental regulations regarding emissions and will act to displace existing less efficient plants. Cricket Valley explains that the proposed facility is consistent with the current State Energy Plan since it will provide more cost-effective electricity with lower emissions than many existing plants - with or without the retirement of the Indian Point nuclear electrical generating facilities.

Cricket Valley states that the project will rehabilitate an inactive industrial site and provide economic growth for Dutchess County and the Town of Dover without a significant burden on municipal services. Cricket Valley estimates that the project will directly create approximately 300 construction jobs and 28 permanent jobs during operation. It also estimates that the project will induce secondary benefits of an additional 2,202 full-time equivalent jobs during construction and upon completion, 56 full-time equivalent jobs. Cricket Valley anticipates providing the Town of Dover significant financial resources through taxes and a building permit fee.

Cricket Valley indicates that the facility is also projected to produce cost production savings of \$241 million statewide from 2015 to 2020. Cricket Valley also expects the facility to provide significant congestion cost benefits.

Proposed Facility Location

Cricket Valley indicates that it chose the site because it is located adjacent to existing electric and gas

⁴ The blackstart generators are limited to 500 hours of operation per year for readiness testing.

transmission facilities; its distance from residential dwellings will limit impacts on those residences; and local zoning and site characteristics provide positive attributes for site redevelopment. The proposed facility will be located on 185 acres, bordered by New York State Route 22 to the east, by industrially zoned property owned by Howlands Lake Partners, LLC to the south; and the Con Edison -Pleasant Valley/Long Mountain electric transmission right-of-way, that also contains the Iroquois natural gas pipeline, will border the facility to the north. The Swamp River and a Metro-North rail line transect the facility parcel north to south.

Cricket Valley holds a long-term option to purchase the property, located within the Town of Dover's Industrial/Manufacturing District. Cricket Valley will use an off-site laydown area on Route 22, north of the project development area at approximately the intersection of Old Route 22 (depicted, for example, on DEIS "FIGURE 6.3-1 TRAFFIC IMPACT ASSESSMENT STUDY CORRIDOR") during construction of the facility in an effort to reduce environmental impacts to wetlands adjacent to the main facility site and to retain a larger tree buffer around the facility after construction.

Public Outreach

In June 2009, Cricket Valley established a web site (www.cricketvalley.com) in order to provide the public with information concerning the project. In January 2010, Cricket Valley established local advisory groups to involve residents, environmental groups and other interested parties in the development process and promote communication between the developer and the community. In response to some of the concerns expressed by the community, Cricket Valley redesigned the project to include a rooftop water collection system and a

zero liquid discharge water system and developed a traffic plan to minimize congestion during construction.

Cricket Valley had two open houses and participated in other public outreach meetings including two in April and May of 2009 hosted by the Town of Dover. The New York State Department of Environmental Conservation (DEC) held two Draft Environmental Impact Statement scoping meetings in June 2010 and related public comment hearings on June 28 and July 9, 2010. DEC issued a Notice of Completion of a Final Environmental Impact Statement on July 25, 2012.⁵

The Lightened Rate Regulation Request

Cricket Valley seeks a lightened regulatory regime similar to that found appropriate for other independent power producers engaged in selling electricity at wholesale. Specifically, Cricket Valley requests that the Commission apply the relevant section of Article 1 and Article 4 of the Public Service Law to its operation with scrutiny and filing requirements consistent with Commission precedent and that the Commission not impose Article 6 requirements except for Public Service Law §119-b.

SUMMARY OF PUBLIC COMMENTS

A number of comments were received from residents within the project vicinity. Mr. Dave Harrison of Patterson, New York supports the project because he believes the state will benefit from the project's proposed black start capabilities and his area will benefit from locally sited generation. Mr. Peter Rusciano opposes the project because he believes the proposed

⁵ Available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/cvnotice.pdf.

exhaust stacks will destroy the value of his home by destroying the view from his residence. Mr. Rusciano also states that emissions from the plant will pollute the local air and that the meteorological data used to predict the project's emission impacts are not representative of local conditions. Mr. Rusciano also states that the plant is not needed and expressed concern about possible future expansion of the project and its possible use of natural gas extracted through high-volume hydraulic fracturing (hydrofracking). Ninety-eight individuals signed a petition opposing the project. The petition states that the project will cause adverse impacts on air quality, soil, water and local real estate values. It also indicates that the meteorological data utilized for emissions modeling was not representative of the topography of the proposed project site and is therefore inaccurate.

DISCUSSION

We are authorized to grant a CPCN to an electric corporation pursuant to PSL §68, after due hearing and upon a determination that the construction of electric plant is necessary or convenient for the public service. Our rules establish evidentiary requirements for a CPCN application.⁶ Specifically, the rules require a description of the plant to be constructed, its estimated cost and the manner in which the cost is to be financed. The rules also required evidence that the proposed project is economically feasible, is in the public interest and that applicant is able to finance the project and render adequate service. We may grant a motion for an expedited proceeding pursuant to 16 NYCRR 21.10 where it appears in the public interest that the public hearings required by PSL §68 be

⁶ 16 NYCRR §21.3.

held on the application, exhibits, prepared testimony and such other information as may be filed by the applicant or other parties and no person, municipality or agency has filed a written objection stating substantive reasons for opposing the motion.

State Environmental Quality Review

The DEC acted as Lead Agency and conducted a coordinated review of the proposed facility pursuant to the State Environmental Quality Review Act (SEQRA) contained in Article 8 of the Environmental Conservation Law. The purpose of SEQRA and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 7) is to incorporate consideration of the environmental factors into existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires agencies to determine whether the actions they are requested to approve may have a significant impact on the environment. Where an action may have significant adverse environmental impacts, an Environmental Impact Statement (EIS) must be prepared by the Lead Agency or the applicant.

Where an EIS is prepared, the Lead Agency and each other Involved Agency must adopt a formal set of written findings based on the Final EIS (FEIS). The SEQRA Findings Statement of each agency must:

- (i) consider the relevant environmental impacts, facts, and conclusions disclosed in the FEIS;
- (ii) weigh and balance relevant environmental impacts with relevant social, economic, and other considerations;
- (iii) provide the rationale for the agency's decision;

- (iv) certify that the requirements of 6 NYCRR Part 617 have been met; and
- (v) certify that, consistent with social, economic, and other essential considerations, and considering among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigation measures identified as practicable.⁷

Once the findings are adopted, the SEQRA process is complete and the Lead Agency and involved agencies may approve, approve with conditions, or disapprove the proposed project.

In April 2010, DEC determined that the project would have a significant adverse impact on the environment and issued a positive declaration of environmental significance. On May 25, 2011, a Draft EIS (DEIS) as well as draft permits for state air source facility (6 NYCRR 201), freshwater wetlands and water quality certification were made available for public comment. On July 25, 2012, DEC published a Notice of Acceptance in the Environmental Notice Bulletin regarding the FEIS. The FEIS, available at Cricket Valley's website and in hard copy at the Dover Town Hall, the Dover Plains Library and the Cricket Valley Energy Community Office, includes responses to comments on the DEIS and project modifications made to avoid, reduce or mitigate potential adverse impacts.

The record in the SEQRA proceeding contains extensive

⁷ 6 NYCRR §§617.11(c) and (d).

information regarding the potential impacts on air quality and climate, geology, soils, topography, water resources, ecological resources, aesthetics, visual resources, noise, traffic and transportation, socioeconomics, environmental justice, land use and zoning, energy use, greenhouse gas emissions, health, public safety, historic, cultural and archeological resources. The FEIS addresses the potential environmental impacts, and provides protective measures tailored to avoid, minimize, and mitigate the environmental impacts.

In its Findings Statement issued September 26, 2012, DEC concluded that the Cricket Valley project is designed to avoid, or where not completely avoided, minimize and mitigate adverse environmental impacts. Upon consideration of the environmental impacts, facts, and conclusions in the FEIS, we also conclude that the project would avoid and minimize adverse environmental impacts to the maximum extent practicable. We base our conclusions on the various factors described below.

In response to comments regarding the DEIS, Cricket Valley will implement long-term pump-testing and water monitoring programs. The pump-test program, approved by NYSDEC and described in detail in Section 5.4.4 of the DEIS, will monitor neighboring wells, adjacent wetlands and the Swamp River to ensure water consumption during development and operation of the project will have no adverse impact on the Town of Dover's drinking water supply. It has been verified by a third party that the plant's water needs can be sustainably met through the exclusive use of on-site wells and no further demands to existing off-site resources would be necessary (DEIS Appendix 5C). Long-term, deep well testing of the aquifer underlying the site indicate no contamination beyond thresholds for total coliform bacteria which would be treated in accordance with Dutchess County Department of Health requirements. Groundwater

monitoring will continue for the life of the project.

The project's greater thermal efficiencies compared with older and less efficient generation would provide significantly more electric output per unit of fuel. The project also minimizes water consumption through air cooling which will also avoid visual impacts from water plumes. Further, a roof-top rainwater capture system would reduce the need for process water and a zero liquid discharge system would eliminate the need to discharge process water.

The FEIS contains air quality modeling that conforms to recently promulgated, more-stringent emission requirements. Moreover, the emission control devices and strategies to be used by the project represent the most stringent limitation achieved in practice or which can reasonably be expected in practice for a natural gas-fired combined cycle electric generating facility considering the air contaminants that must be controlled. Regarding green house gases, natural gas is less carbon intensive than other fossil fuels and natural gas-fired combined cycle combustion turbines are generally considered among the most efficient in converting fossil fuel to energy. In addition, air dispersion models indicate that adverse air quality impacts at or near the project site and emissions in excess of National Ambient Air Quality Standards, State Ambient Air Quality Standards, or Significant Impact Levels will be avoided. Contrary to some of the public comments received, meteorological information used in the modeling was employed specifically for its similarity to the project location and the data represented a wide range of dispersion conditions.

An Economic Dispatch Analysis using General Electric's electric production simulation tool (GEMAPS®) predicts that the project would reduce regional air pollutant emissions by displacing less efficient power plants. Emissions of NO_x and SO₂

would decrease within the New York and the New England and PJM power pool areas and increase slightly in the Ontario power pool area. Carbon dioxide emissions would increase slightly in New York due to an increase of in-state generation but would decrease across the region.

The project also provides additional benefits in that it will utilize a disused former industrial site and extant debris and limited waste associated with the manufacturing operation that once occupied the site (Rasco Industries) will be removed. The project sponsors will also restore and enlarge wetlands on the site while maintaining the integrity of other existing natural resource areas in the project vicinity (e.g. 79 acres of natural area west of the Metro North railroad tracks).

Also, the applicant indicates that there are no known endangered species at the facility site or the off-site laydown area that could be adversely affect by construction and operation. Additionally, Cricket Valley has conducted traffic studies and indicates that the location and utilization of the laydown area will not create traffic problems. It has also conducted archeological studies in the laydown area and did not identify any potential impacts.

The project represents the best alternative among those considered. The "no action" alternative would preclude the benefits associated with the project; the potential improvements to overall generation efficiency, fuel consumption, air emissions would not be achievable. A "demand side management" alternative would not serve the base-load energy demand the project is intended to serve and would also forgo the black start benefits expected from the project. Renewable technologies do not appear to be viable alternatives for this scale of project at this location. Locating the project at the

proposed site will also provide rehabilitation of an inactive industrial site, which would not otherwise be achievable.

On the basis of our consideration of the relevant environmental impacts presented in the FEIS and our review of the documents filed by parties and the submitted comments we conclude that we can make the findings required by ECL §8-0109(8) and 6 NYCRR 617.11(c) and (d).

Historic Preservation Review

On September 25, 2009, the project sponsors received a letter from the NYS Historic Preservation Office with a determination of No Adverse Effect to cultural or historic resources in the project vicinity. The project would revitalize a former industrial site and add additional protections and enhancements to natural resources in the area. There are no known or listed historical and cultural resources currently present at the project site that would require special consideration or additional protections during project construction and operation.

The project sponsors identify two historically sensitive properties within five miles of the project site. The Tabor-Wing House, built in 1810, is 4 miles from the project site and was listed on the National Register of Historic Places in 1982. The Dover Plains Second Baptist Church is over four miles from the project site, was built in the 1830s and was listed on the National Register of Historic Places on August 30, 2010.

Section 6.6, 'Cultural Resources,' of the DEIS and the FEIS chronicles the coordination and consultation undertaken by the project sponsors to determine if the potential exists to adversely affect historic and cultural resources. Potential visual effects have been addressed in Section 6.2 of the DEIS

and FEIS. The terrain character and extensive vegetation in the project vicinity make it unlikely that the construction and operation of the facility would result in significant adverse visual effects to sensitive resources, historic or cultural uses.

The requirements of §14.09 of the Parks, Recreation and Historic Preservation Law (regarding consultation among state agencies) are supplanted where a full evaluation of potential cultural resource impacts is performed in accordance with §106 of the National Historic Preservation Act. The New York District of the US Army Corps of Engineers (ACOE) is conducting a §106 cultural resources impact evaluation for a Visual Area of Potential Effect within a 5-mile radius centered on the project site. At the conclusion of the §106 review and consultation process, any cultural or historic impacts identified will be mitigated through a Memorandum of Understanding among the Petitioner, the SHPO and the ACOE. Upon completion of the §106 review, our responsibilities for consultation with the SHPO and consideration of cultural resources impacts will be satisfied.

Public Convenience and Necessity

PSL §68 requires an electric corporation to obtain a CPCN prior to the construction of gas or electric plant. We are authorized to grant a CPCN to an electric corporation pursuant to PSL §68, after due hearing and upon a determination that construction of the electric plant is necessary and convenient for the public service. In this regard, our rules establish pertinent evidentiary requirements for a CPCN application. They require, among other matters, a description of the manner in which the costs of the plant to be constructed would be financed, evidence that the proposed enterprise is able to

render adequate service and that the facility is in the public interest.

The Cricket Valley project is in the public interest. It would be a modern generation plant and would incorporate various measures to increase efficiency and capacity and avoid or minimize adverse environmental impacts to the greatest extent practical. These measures include: highly efficient combined cycle technology; air-cooled condensers; a zero liquid discharge system; rooftop rainwater capture; and carefully designed storm water management systems. Its construction at the proposed site will have the added benefit of rehabilitating an idle industrial site and the applicant intends to preserve approximately 75 acres of on-site wetland habitat. As an additional source of power generation in the Hudson Valley, the project will help meet long-term electric system capacity needs and may relieve short term reliability concerns due to generation retirement. Moreover, the project is expected to contribute significantly to the local tax base and to create jobs and associated economic activity and development.

Cricket Valley intends to develop, finance, construct and operate the project as a merchant facility without relying upon cost-of-service rates set by either a Federal or State regulatory entity. The applicant intends to sell capacity, electricity and ancillary services exclusively through the wholesale competitive markets administered by the NYISO. Cricket Valley indicates that it will involve a major institutional equity source to provide a substantial equity investment with the remaining financing to take the form of debt from commercial banks or major energy funds. Cricket Valley expects the project to cost approximately \$1.4 billion. Neither Cricket Valley nor any of its affiliates have any retail customer in New York State.

Cricket Valley's parent company, Advanced Power AG, has considerable experience with plant operation and development including developing more than 9,400 MW of power generation worldwide. Also, Advanced Power has entered into a joint development agreement with a subsidiary of General Electric, GE Energy LLC (GE). GE is a well-known, world leader in supplying power generation and energy delivery technologies. GE will supply the project with the manufacturer's latest gas turbine technology and its steam turbines. Thus, Cricket Valley and Advanced Power, together with their association with GE, appear to have the requisite expertise to obtain project financing and to render adequate service.

Cricket Valley has committed to complying with the relevant design, construction and operational requirements of the National Electric Safety Code, and other applicable engineering codes, standards and requirements. Cricket Valley has proposed that operation of the facility will be done per Utility Standards and the requirements of Con Edison and the NYISO including the Class Year 2011 Annual Transmission Reliability Assessment Study (or such later study as may be applicable). The Applicant has proposed appropriate standards and measures for engineering, design, construction, inspection, maintenance and operation of its authorized electric plant, including features for facility security and public safety; utility system protection; plans for quality assurance and control measures for facility design and construction; utility notification and coordination plans for work in close proximity to other utility transmission and distribution facilities; vegetation and facility maintenance standards and practices; emergency response plans for construction and operation; and complaint resolution measures. Based on Cricket Valley's representations and commitments to adopt and enforce reasonable

measures within the proposed areas of operations, the evidence presented in the petition and supplements, we conclude that Cricket Valley will provide safe, reliable and adequate service.

We conclude, based on a thorough review of the record developed here and as part of DEC SEQRA analysis, that the Cricket Valley Project is necessary and convenient for the public service. Accordingly, after holding a hearing on January 12, 2012, as required by PSL §68, we grant Cricket Valley a CPCN along with appropriate conditions to ensure safe, reliable and adequate service.

Expedited Proceeding

Cricket Valley moved for an expedited proceeding under 16 NYCRR §21.10. As noted above, notice of Cricket Valley's petition and motion for an expedited proceeding was published in the Poughkeepsie Journal, a newspaper of general circulation in the vicinity of the project, on November 9, 2011. No public comments regarding the motion for an expedited proceeding⁸ were received within the ten-day comment period prescribed under our regulations. After a hearing having been held in this proceeding on January 12, 2012, we find, as required by PSL §68, that the construction and operation of the Cricket Valley's proposed electrical generating facility for providing wholesale service as described in the applicant's petition is necessary or convenient for the public service. Accordingly, we grant Cricket Valley's motion for an expedited proceeding.

Lightened Ratemaking Regulation

Cricket Valley seeks an order approving a lightened regulatory regime whereby limited provisions of the PSL will be

⁸ One public comment supporting the project was received on November 9, 2011.

applied to it consistent with our previous orders involving Exempt Wholesale Generators (EWGs). Cricket Valley may be lightly regulated in its ownership of the project because it would provide electric service from the facility on a wholesale basis, as a participant in the NYISO competitive markets. The lightened regulatory regime that Cricket Valley requests be applied to its wholesale electrical operation in New York is similar to that afforded to other wholesale generators participating in competitive electrical markets. Its petition is, therefore granted to the extent discussed below.

In the Carr Street and Wallkill Orders,⁹ it was concluded that new forms of electric service providers participating in wholesale electric markets would be lightly regulated. Accordingly, in interpreting the PSL, we have examined what reading best carries out the statutory intent and advances the public interest. Under this approach, PSL Article 1 applies to Cricket Valley because it meets the definition of an electric corporation under PSL §2(13) and is engaged in the manufacture of electricity under PSL §5(1)(b). Cricket Valley, therefore, is subject to provisions such as PSL §§11, 19, 24, 25, and 26, that prevent producers of electricity from taking actions that are contrary to the public interests.¹⁰

All of Article 2 is restricted by its terms to the provision of service to retail residential customers, and so is inapplicable to wholesale generators such as Cricket Valley.

⁹ Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999); Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

¹⁰ The PSL §18-a assessment is applied against gross revenues earned on PSL-jurisdictional intrastate services. As long as Cricket Valley sells exclusively at wholesale in interstate markets, there are no intrastate revenues and no assessment is collected.

Certain provisions of Article 4 are also inapplicable because they are restricted to retail service.¹¹

It was decided in the Carr Street and Wallkill Orders that other provisions of Article 4 would pertain to wholesale generators.¹² Application of these provisions was deemed necessary to protect the public interest. The Article 4 provisions, however, were implemented in a fashion that limited their impact in a competitive market, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest requires. Wholesale generators satisfy the Annual Report filing requirement imposed on them under PSL §66(6) through a format devised for that purpose.¹³ This analysis of Article 4 applies to Cricket Valley.

Regarding PSL §69, prompt regulatory action is possible through reliance on representations concerning proposed financing transactions. Additional scrutiny is not required to protect captive New York ratepayers, who cannot be harmed by the terms arrived at for these financings because lightly-regulated

¹¹ See, e.g., PSL §§66(12), regarding the filing of tariffs required at our option; §66(21), regarding the storm plans submitted by retail service electric corporations; §67 regarding inspection of meters; §72, regarding hearings and rate proceedings; §75, regarding excessive charges; and, §76, regarding rates charged religious bodies and others.

¹² PSL §68 provides for certification of electric plant, but pertains only to construction of new plant (unless such plant is reviewed pursuant to PSL Article VII) or to electricity sales made via direct interconnection with retail customers. PSL §§69, 69-a and 70 provide for the review or securities issuances, reorganizations, and transfers of securities or works or systems, respectively.

¹³ Case 11-M-0295, Lightened Ratemaking Regulation - Annual Reporting Requirements, Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation, (issued January 23, 2013).

participants in competitive markets bear the financial risk associated with their financial arrangements.¹⁴

Regarding PSL §70, it was presumed in the Carr Street and Wallkill Orders that regulation would not "adhere to transfer of ownership interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."¹⁵ Wholesale generators were also advised that the potential for the exercise of market power arising out of an upstream transfer would be sufficient to defeat the presumption and trigger PSL §70 review.¹⁶ Cricket Valley may avail itself of this presumption. Under PSL §§66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid.

Turning to Article 6, several of its provisions adhere to the rendition of retail service. These provisions do not pertain to Cricket Valley because it is engaged solely in the generation of electricity for wholesale.¹⁷ Application of PSL §115, regarding requirements for the competitive bidding of

¹⁴ See, e.g., Case 10-E-0405, NRG Energy, Inc., Order Approving Financing (issued November 18, 2010); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

¹⁵ Carr Street Order, p. 8; Wallkill Order, pp. 9-10.

¹⁶ In this context, under PSL §§66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid.

¹⁷ See, e.g., PSL §§112, regarding enforcement of rate orders; 113, regarding reparations and refunds; 114, regarding temporary rates; 114-a, regarding exclusion of lobbying costs from rates; 116, regarding discontinuance of water service; 117, regarding consumer deposits; 118, regarding payment to an authorized agency; 119-a, regarding use of utility poles and conduits; and, 119-c, regarding recognition of tax reductions in rates.

utility purchases, is discretionary and will not be imposed on wholesale generators. In contrast, PSL §119-b, regarding the protection of underground facilities from damage by excavators, adheres to all persons, including wholesale generators.

The remaining provisions of Article 6 need not be imposed generally on wholesale generators.¹⁸ These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers. However, so long as the wholesale generation market is effectively competitive, or market mitigation measures produce prices aligned with competitive outcomes, as discussed above, wholesale generators cannot raise prices even if their costs rise due to poor management. Moreover, imposing these requirements could interfere with wholesale generators' plans for structuring the financing and ownership of their facilities. This could discourage entry into the wholesale market, or overly constrain its fluid operation, to the detriment of the public interest.

As discussed in the Carr Street Order, however, market power issues may be addressed under PSL §§110(1) and (2), which afford us jurisdiction over affiliated interests. Cricket Valley has not reported any affiliation with a power marketer, foreclosing that avenue to the exercise of market power. Consequently, we impose the requirements of §§ 110(1) and (2) on Cricket Valley only conditionally, to the extent a future inquiry into its relationships with affiliates becomes necessary.

¹⁸ These requirements include approval of: loans under §106; the use of utility revenues for non-utility purposes under §107; corporate merger and dissolution certificates under §108; contracts between affiliated interests under §110(3); and water, gas and electric purchase contracts under §110(4).

Finally, notwithstanding that it is lightly regulated, Cricket Valley is reminded that it and the entities that exercise control over the operations of its generation facility remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed above and in previous orders.¹⁹ Included among these requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,²⁰ to give notice of generation unit retirements,²¹ and to report personal injury accidents pursuant to 16 NYCRR Part 125.

The Commission orders:

1. The motion for an expedited proceeding on the application of Cricket Valley Energy Center, LLC (Cricket Valley) is granted.
2. A Certificate of Public Convenience and Necessity is granted, authorizing Cricket Valley to construct and operate an electric plant within New York as described in the body of this Order.
3. Cricket Valley and its affiliates shall comply with the Public Service Law in conformance with the requirements set forth in the body of this Order.

¹⁹ See, e.g., Case 11-E-0351, Stony Creek Energy LLC, Order Granting Certificate of Public Convenience and Necessity, Providing for Lightened Ratemaking Regulation and Approving Financing (issued December 15, 2011).

²⁰ Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

²¹ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

4. Cricket Valley shall obtain all necessary federal, state, and local permits and approvals, and shall implement appropriate mitigation measures defined in such permits or approvals and file copies of such permits and approvals with the Secretary to the Public Service Commission (Secretary).

5. Cricket Valley shall file with the Secretary final Site Plans and construction drawings for the project including all project components, access roads, and electric lines associated with the Project for review by the Staff of the Department of Public Service (DPS Staff) before the start of construction.

6. Prior to commencing construction of the substation and transmission interconnection, not including minor activities required for testing and development of final engineering and design information, Cricket Valley shall file with the Secretary final design plans and profile drawings of the substation and the transmission interconnection and proof of acceptance of the design by Consolidated Edison Company of New York, Inc. (Con Edison).

7. The authorized electric plant shall be subject to inspection by authorized representatives of DPS Staff pursuant to §66(8) of the Public Service Law.

8. Cricket Valley shall incorporate, and implement as appropriate, the standards and measures for engineering design, construction, inspection, maintenance and operation of its authorized electric plant, including features for facility security and public safety, utility system protection, plans for quality assurance and control measures for facility design and construction, utility notification and coordination plans for work in close proximity to other utility transmission and distribution facilities, vegetation and facility maintenance standards and practices, emergency response plans for

construction and operational phases, and complaint resolution measures, as presented in its Petition, its Environmental Impact Statement and this Order.

9. Cricket Valley shall file with the Secretary, within three days after commencement of commercial operation of the electric plant, an original and three copies of written notice thereof.

10. The Company shall design, install and maintain ground grids coordinating them with the gas transmission pipelines and to be in full conformance with IEEE 80.

11. Cricket Valley shall file with the Secretary a copy of the System Reliability Impact Study (SRIS) performed in accordance with the New York Independent System Operator's (NYISO) Open Access Transmission Tariff (OATT) approved by the Federal Energy Regulatory Commission), and all appendices thereto, reflecting the interconnection of the facility.

12. Cricket Valley shall design, engineer, and construct facilities in support of the authorized electric plant in accordance with the NYISO Class Year 2011 Facilities Study (or such later study as may be applicable), and accordance with applicable and published planning and design standards and best engineering practices of NYISO, the New York State Reliability Council (NYSRC), Northeast Power Coordinating Council (NPCC), North American Electric Reliability Council (NERC) and successor organizations. Specific requirements shall be those required in the SRIS as performed in accordance with the NYISO's OATT and by the Interconnection Agreement (IA) and the facilities agreement with Con Edison.

13. Cricket Valley shall work with Con Edison, and any successor Transmission Owner (as defined in the NYISO Agreement), to ensure that, with the addition of the electric plant (as defined in the IA between the Company and Con Edison),

the system will have power system relay protection and appropriate communication capabilities to ensure that operation of the Con Edison transmission system is adequate under NPCC Bulk Power System Protection Criteria, and meets the protection requirements at all times of the NERC, NPCC, NYSRC, NYISO, and Con Edison, and any successor Transmission Owner (as defined in the NYISO Agreement). Cricket Valley shall ensure compliance with applicable NPCC criteria and shall be responsible for the costs to verify that the relay protection system is in compliance with applicable NPCC, NYISO, NYSRC and Con Edison criteria.

14. Cricket Valley shall operate the electric plant in accordance with the IA, approved tariffs and applicable rules and protocols of Con Edison, NYISO, NYSRC, NPCC, NERC and successor organizations.

15. Cricket Valley shall be in full compliance with the applicable reliability criteria of Con Edison, NYISO, NPCC, NYSRC, NERC and successors. If it fails to meet the reliability criteria at any time, the Company shall notify the NYISO immediately, in accordance with NYISO requirements, and shall simultaneously provide the Commission and Con Edison with a copy of the NYISO notice.

16. Cricket Valley shall file a copy of the following documents with the Secretary:

- (a) All facilities agreements with Con Edison, and successor Transmission Owner throughout the life of the plant (as defined in the NYISO IA);
- (b) the SRIS approved by the NYISO Operating Committee;
- (c) any documents produced as result of the updating of requirements by the NYSRC;

(d) the Relay Coordination Study, which shall be filed not later than six months prior to the projected date for commencement of commercial operation of the facilities; and a copy of the manufacturers' "machine characteristics" of the equipment installed (including test and design data);

(e) a copy of the facilities design studies for the Electric Plant, including all updates (throughout the life of the plant);

(f) a copy of the IA and all updates or revisions (throughout the life of the plant); and

(g) if any equipment or control system with different characteristics is to be installed, the Company shall provide that information to Consolidated Edison and file it with the Secretary at least three months before any such change is made (throughout the life of the plant).

17. Cricket Valley shall obey unit commitment and dispatch instructions issued by NYISO, or its successor, in order to maintain the reliability of the transmission system. In the event that the NYISO System Operator encounters communication difficulties, Cricket Valley shall obey dispatch instructions issued by the Con Edison Control Center, or its successor, in order to maintain the reliability of the transmission system.

18. (a) After commencement of construction of the authorized Electric Plant, Cricket Valley shall file with the Secretary and provide to Con Edison a monthly report on the progress of construction and an update of the construction schedule, and file copies of current construction progress reports during all phases of construction. In the event the Commission determines that construction is not proceeding at a

pace that is consistent with Good Utility Practice, and that a modification, revocation, or suspension of the Certificate of Public Convenience and Necessity (Certificate) may therefore be warranted, the Commission may issue a show cause order requiring Cricket Valley to explain why construction is behind schedule and to describe such measures as are being taken to get back on schedule. The Order to Show Cause will set forth the alleged facts that appear to warrant the intended action. Cricket Valley shall have thirty days after the issuance of such Order to respond and other parties may also file comments within such period. Thereafter, if the Commission is still considering action with respect to the Certificate, a hearing will be held prior to issuance of any final order of the Commission to amend, revoke or suspend the Certificate. It shall be a defense in any proceeding initiated pursuant to this condition if the delay of concern to the Commission:

(1) arises in material part from actions or circumstances beyond the reasonable control of Cricket Valley (including the actions of third parties);

(2) is not in material part caused by the fault of Cricket Valley; or

(3) is not inconsistent with a schedule that constitutes Good Utility Practice.

(b) Cricket Valley shall file with the Secretary, no more than four months after the commencement of construction, a detailed progress report. Should that report indicate that construction will not be completed within twenty-four months, Cricket Valley shall include in the report an explanation of the circumstances contributing to the delay and a demonstration showing why construction should be permitted to proceed. In these circumstances, an order

to show cause will not be issued by the Commission, but a hearing will be held before the Commission takes any action to amend, revoke or suspend the Certificate.

(c) For purposes of this condition, Good Utility Practice shall mean any of the applicable acts, practices or methods engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability and safety. Good Utility Practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region in which the Company is located. Good Utility Practice shall include, but not be limited to, NERC criteria, rules, guidelines and standards, NPCC criteria, rules, guidelines and standards, NYSRC criteria, rules, guidelines and standards, and NYISO criteria, rules, guidelines and standards, where applicable, as they may be amended from time to time (including the rules, guidelines and criteria of any successor organization to the foregoing entities). When applied to the Company, the term Good Utility Practice shall also include standards applicable to an independent power producer connecting to the distribution or transmission facilities or system of a utility.

(d) Except for periods during which the authorized facilities are unable to safely and reliably convey electrical energy to the New York transmission system (e.g., because of problems with the authorized facilities themselves or upstream electrical equipment) Cricket Valley electric plant shall be exclusively connected to the New York transmission system over the facilities authorized herein.

19. Cricket Valley shall work with Con Edison system planning and system protection engineers to discuss the characteristics of the transmission system before purchasing any system protection and control equipment or equipment related to the electrical interconnection of the project to the transmission system, and to ensure that the equipment purchased will be able to withstand most system abnormalities. The technical considerations of interconnecting the electric plant to the transmission facility shall be documented by Cricket Valley and filed with the Secretary and provided to Con Edison prior to the installation of transmission equipment. Updates to the technical information shall be furnished as available (throughout the life of the plant).

20. Cricket Valley shall work with Con Edison engineers and safety personnel on testing and energizing equipment in the authorized substation. A testing protocol shall be developed and provided to Con Edison for review and acceptance. Cricket Valley shall file with the Secretary a copy of the testing design protocol within 30 days of Con Edison's acceptance. Cricket Valley shall make a good faith effort to notify DPS Staff of meetings related to the electrical interconnection of the project to the Con Edison transmission system and provide the opportunity for DPS Staff to attend those meetings.

21. Cricket Valley shall call the Bulk Electric System Section within six hours to report any transmission related incident that affects the operation of the Electric Plant. Cricket Valley shall file with the Secretary a report on any such incident within seven days and provide to Con Edison. The report shall contain, when available, copies of applicable drawings, descriptions of the equipment involved, a description of the incident and a discussion of how future occurrences will be prevented. Cricket Valley shall work cooperatively with Con Edison, NYISO and the NPCC to prevent any future occurrences.

22. Cricket Valley shall make modifications to its Interconnection Facility, if it is found by the NYISO or Con Edison to cause reliability problems to the New York State Transmission System. If Con Edison or the NYISO bring concerns to the Commission, Cricket Valley shall be obligated to address those concerns.

23. If, subsequent to construction of the authorized electric plant, no electric power is generated and transferred out of such plant for a period of more than a year, the Commission may consider the amendment, revocation or suspension of the Certificate.

24. In the event that a malfunction of the authorized electric plant causes a significant reduction in the capability of such plant to deliver power, Cricket Valley shall promptly file with the Secretary and provide to Con Edison copies of all notices, filings, and other substantive written communications with the NYISO as to such reduction, any plans for making repairs to remedy the reduction, and the schedule for any such repairs. Cricket Valley shall provide monthly reports to the Secretary and Con Edison on the progress of any repairs. If such equipment failure is not completely repaired within nine months of its occurrence, Cricket Valley shall provide a detailed

report to the Secretary, within nine months and two weeks after the equipment failure, setting forth the progress on the repairs and indicating whether the repairs will be completed within three months; if the repairs will not be completed within three months, Cricket Valley shall explain the circumstances contributing to the delay and demonstrate why the repairs should continue to be pursued.

25. No less than 60 days prior to the commencement of operation, Cricket Valley shall file with the Secretary, Operation and Maintenance Plan(s) for the Electric Plant. The company shall file with the Secretary complete documentation of its emergency procedures and list of emergency contacts. Cricket Valley shall file annually with the Secretary an updated copy of its emergency procedures and list of emergency contacts and with documentation of any modifications.

26. Cricket Valley shall file a report with the Secretary, regarding implementation of a Special Protection System, if one is required, which is designed to mitigate possible overloads from certain transmission outages, as well as copies of all studies that support the design of such a system. In addition, Cricket Valley shall provide all documentation for the design of special protection system relays, with a complete description of all components and logic diagrams. Prior to commencement of operations, Cricket Valley shall demonstrate through appropriate plans and procedural requirements that the relevant components of the Special Protection System will provide effective protection.

27. If Cricket Valley participates in the NYISO's Black Start program, Cricket Valley shall demonstrate annually that the unit can be black started. Cricket Valley shall schedule with the NYISO and Con Edison the black start test and demonstrate black start procedures. If the black start test

fails, Cricket Valley shall produce a report describing the test and what actions or changes are being made to the black start equipment and/or procedures. A copy of such report, including sign-off from Con Edison shall be filed with the Secretary. Cricket Valley shall provide the opportunity for DPS Staff to observe the black start testing. Cricket Valley shall effectuate a successful black start annually to qualify for the Black Start program.

28. Cricket Valley shall submit all pipeline transportation contracts to the Department of Public Service Information Access Officer. All submissions should be labeled confidential and include this case number prominently in the name of the filing.

29. Prior to supplying any gas for testing or blow downs at the plant the applicant shall provide a safety program and emergency procedures for the initially supplying any amount of gas to the plant. The applicant shall meet with the Department's Gas Safety Section and review the safety program prior supplying any gas.

30. Before installation of fencing, gates or permanent exterior lighting at the substation, switchyard or O&M building may commence, the Company shall provide revised plan and detail pages as follows for review and acceptance by the director of the Office of Energy Efficiency and the Environment, based on relevant economic, engineering or environmental factors:

- (a) provide fencing and gate designs to demonstrate site security provisions;
- (b) add gate at O&M building entry drive; and,
- (c) revise exterior lighting specifications to indicate full-cutoff fixtures with no drop-down optics

(utilize the "flat glass" option for light trespass control.

31. The Secretary is authorized to extend any deadlines set forth in this order.

32. This proceeding is continued, but will be closed following compliance with the directives set forth herein.

By the Commission,

(SIGNED)

JEFFREY C. COHEN
Acting Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 11-E-0593 - Petition of Cricket Valley Energy Center, LLC
for an Original Certificate of Public
Convenience and Necessity and for an Order
Providing for Lightened Regulation.

Statement of Findings

This statement was prepared in accordance with Article 8 of the Environmental Conservation Law, the State Environmental Quality Review Act (SEQRA). The New York State Department of Environmental Conservation (DEC) acted as Lead Agency and the Public Service Commission (Commission) is an Involved Agency. The address of the Lead Agency is:

NYS DEC
Division of Environmental Permits
625 Broadway, 4th Floor
Albany, New York 12233-1750

The address of the Commission is:

Hon. Jeffrey Cohen
Acting Secretary to the Commission
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350

Questions concerning the quality or content of this document can be directed to Vance A. Barr, Utility Analyst II (Environmental) at 518-402-4873, or to the Commission at the address above.

Description of Project

The proposed project consists of a combined cycle, natural gas-powered 1,000 megawatt (MW) electric generating facility on an inactive industrial site located in Dover, Dutchess County, New York (facility or project). The facility will consist of three combined-cycle generation units, each

consisting of a combustion turbine generator, a heat recovery steam generator (HRSG) with supplemental duct firing and a steam turbine generator. Auxiliary equipment will include a low nitrogen oxide (NO_x) natural gas-fired auxiliary boiler and four diesel fired blackstart generators, each with a maximum power rating of 3 MW.

The facility will be equipped with emissions control technology including dry low NO_x burners and selective catalytic reduction technology to control emissions of NO_x and an oxidation catalyst to control carbon monoxide and volatile organic compounds emissions. A continuous emissions monitoring will be utilized to ensure compliance with applicable emissions standards.

The condensers will be air-cooled to minimize water use and process water will be supplied from new, on-site deep bedrock wells which have been tested to provide adequate water supplies for the facility. A roof-top rainwater capture system will be utilized to supplement water needs and a zero liquid discharge system will recycle and reuse water internally, reducing the need for fresh process water and eliminating the need to discharge any process water.

Several storage tanks will be on-site at the facility, including two 30,000 gallon aqueous ammonia storage tanks with a secondary safety containment area, designed to hold 110% of the entire volume of the aqueous ammonia tanks. A small quantity of ultra-low sulfur diesel (ULSD) fuel and lubricating oils will be stored on sight. All tanks, equipment and vessels containing ULSD fuel and/or lubricating oils will be located inside a concrete safety containment, sump or curbed dike area for spill control.

Two 700 foot long, on-site, overhead 345 kilovolt (kV) transmission lines will be built to connect the project to the

existing Consolidated Edison Company of New York, Inc.'s (Con Edison) 345 kV electrical transmission line located adjacent to the northern property line of the project. A new switchyard and substation, incorporating gas-insulated switchgear to minimize the facility footprint will also be built on site.

Natural gas will be the only type of fuel used at the facility, except for blackstart operation when low sulfur diesel fuel would be used. Natural gas will be supplied via a new 500 foot long, 12 inch gas pipeline from the Iroquois Gas Transmission (Iroquois) natural gas pipeline, just north of the facility. A new gas service line will be constructed.

Discussion

A comprehensive environmental review of the project was conducted in conformance with the SEQRA and the DEC acting as Lead Agency. The Commission is an Involved Agency. Following the issuance of a final scoping document on July 16, 2010, a Draft Environmental Impact Statement (DEIS) was made available for public comment on May 25, 2011. Comments on the DEIS were accepted by DEC until August 5, 2011. DEC conducted afternoon and evening public hearings concerning the DEIS on June 28, 2011 and a Saturday hearing on July 9, 2011.

In response to written comments, as well as the comments raised during the public hearings, DEC filed a Final EIS (FEIS) on July 25, 2012. On the same day, a notice of completion was issued and the FEIS was distributed to involved and interested agencies, and to the public.

The record in the SEQRA proceeding contains extensive information regarding the potential impacts on air quality and climate, geology, soils, topography, water resources, ecological resources, aesthetics, visual resources, noise, traffic and transportation, socioeconomics, environmental justice, land use

and zoning, energy use, greenhouse gas emissions, health, public safety, and historic, cultural and archeological resources. The FEIS addresses the potential environmental impacts, and provides protective measures tailored to avoid, minimize and mitigate those impacts. These measures include: highly efficient combined cycle technology; air-cooled condensers; a zero liquid discharge system; rooftop rainwater capture; and carefully designed storm water management systems.

In its Findings Statement, DEC concluded that the Cricket Valley project has been designed, and where necessary, revised, to avoid, minimize, and mitigate adverse environmental impacts. Upon considering the environmental impacts, facts, and conclusions in the FEIS, we also conclude that the project would avoid and minimize adverse environmental impacts to the maximum extent practicable.²² The basis for our conclusion is the project's design would increase thermal efficiencies and provide significantly more electric output per unit of fuel than an older generation plant, while redeveloping an abandoned industrial site and minimizing impacts on water resources through use of on-site, bedrock aquifer wells for process and consumptive water use, and extensive historic and on-going groundwater monitoring and testing.

Although the project will be a major source of air emissions, carbon dioxide production region wide is expected to decrease. Further, the project is expected to result in other air emissions reductions in New York and region-wide including emissions of NO_x and SO₂. Air emissions in general will be

²² Other findings pursuant to SEQRA, as extensively discussed in the Findings Statement adopted by DEC, are reasonable and appropriate. Those findings consider the relevant environmental impacts, facts and conclusions as discussed in the FEIS.

minimized through the use of emission control devices and strategies representing the most stringent limitation achieved in practice or which can reasonably be expected in practice.

Impacts on land use at the remote laydown area are expected to be temporary. Permanent impacts will be avoided and temporary impacts will be avoided or minimized by proper handling of top soil, grading of the site and storm water management systems. Impacts to wetlands will be avoided and minimized through construction practices and protective plantings. Plans also call for the creation, restoration or enhancement of approximately 2 acres of wetlands. Further, although, 2 acres of forest will be cleared temporarily during construction, 79 acres of land west of the Metro-North railroad bordering the Swamp River will be preserved from development in perpetuity. The project is not expected to have significant adverse impacts on wildlife or significant habitat areas.

The project represents the best alternative among those considered. The "no action" alternative would preclude the benefits associated with the project. A demand side management alternative would not serve the base-load energy demand the project is intended to serve. A "demand side management" alternative would also forgo the black start benefits expected from the project. Finally, renewable technologies do not appear to be viable alternatives for this scale of project at this location.

Although some adverse environmental impacts may be expected from the project, when those impacts are weighed against the benefits, we concluded that the Cricket Valley project is in the public interest. It would be a modern generation plant and would incorporate various measures to increase efficiency and capacity and avoid or minimize adverse environmental impacts to the greatest extent practicable. Also,

the project is expected to provide economic benefits by creating 750 construction jobs and 25-30 permanent jobs. As an additional source of power generation in the Hudson Valley, the project will help meet long-term electric system capacity needs and may relieve short term reliability concerns due to generation retirement. Moreover, the project is expected to contribute significantly to the local tax base and to create jobs and associated economic activity and development.

Conclusions

The potential benefits identified in the FEIS outweigh the potential adverse effects that would result from construction and operation of the proposed facilities. The mitigation measures proposed are reasonable responses to identified impacts, and would avoid or minimize the identified adverse effects to the extent practicable.

The Commission certifies that the requirements of SEQRA have been met, based on the procedural measures administered by the Lead Agency, the input of Involved Agencies, and the substantive mitigation of adverse effects based on facility design and the requirements of the agencies findings, the various permits to be issued, and the requirements of the Certificate of Public Convenience and Necessity.

The Commission also certifies that, consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts would be avoided or minimized to the maximum extent practicable because of the incorporation of conditions requiring appropriate

mitigation measures in the Certificate of Public Convenience and Necessity.

Jeffrey C. Cohen
Acting Secretary

Speaker Biographies

Deborah Goldberg is the Managing Attorney of Earthjustice's northeast office, located in New York City. Since 2008, she has been conducting litigation and other advocacy to protect public health and the environment from the adverse effects of shale gas development and to defend the right of local communities to exclude industry operations. Currently, she is representing the Town of Dryden, New York, in defense of a zoning provision clarifying that oil and gas activities are not permitted uses within the town borders. Following graduation from Harvard Law School in 1986, Ms. Goldberg served as a law clerk for then-Judge Stephen Breyer of the First Circuit Court of Appeals and the late Constance Baker Motley of the Southern District of New York. She then spent a decade in private practice, concentrating on environmental impact review, historic preservation, and hazardous waste litigation. Before joining Earthjustice, Ms. Goldberg was the Democracy Program Director of the Brennan Center for Justice at NYU Law School. She also holds a Ph.D. in philosophy and taught for three years at Columbia University.

ALAN J. KNAUF

Alan J. Knauf is a partner in the law firm of Knauf Shaw LLP, located at 1400 Crossroads Building, 2 State Street, Rochester, New York 14614. He concentrates his law practice in environmental, municipal, land use and real estate law, and civil litigation and appeals, representing municipalities, citizens, landowners and businesses in issues including hazardous waste and petroleum spill cleanup, brownfield development, environmental impact review, water pollution and wetlands, zoning and planning, project siting, alternative energy, municipal law, and commercial real estate. Knauf is attorney for the Towns of Ontario and Huron in Wayne County, New York. He is listed in *Best Lawyers in America*, where he was designated as “Lawyer of the Year” in Rochester for both Environmental Litigation and Land Use and Zoning Litigation, and as a *Superlawyer* in the areas of Environmental Law, Land Use/Zoning and Real Estate Law. Knauf has been counsel on over 100 reported decisions. Some of the notable precedents he helped establish include:

- § *Norse Energy Corp. USA v Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dep’t 2013), where he represented Dryden Resources Awareness Coalition, and the Third Department upheld local zoning legislation banning hydrofracking. This case is on appeal to the Court of Appeals.
- § *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, 14 N.Y.3d 161, 897 N.Y.S.2d 693 (2010), where the Court of Appeals overruled DEC’s interpretation of the definition of “brownfield site,” allowing the Lighthouse sites to enter the Brownfield Cleanup Program, and opening up the program to voluntary remediation of sites across the state.
- § *Concerned Area Residents of the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), *cert. den’d* 514 U.S. 1082, 115 S.Ct. 1793 (1995), establishing that concentrated animal feeding operations required permits for manure discharges under the Clean Water Act, resulting in widespread implementation of comprehensive nutrient management plans at farms across America, and reduced water pollution.
- § *Snyder v. Newcomb*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep’t 1993), which established a private right of action to bring a direct action against the insurer of a petroleum discharger under the New York Oil Spill Act.

Mr. Knauf is a former Chair of the Environmental Law Section of the New York State Bar Association, and a member of the Section on Environment, Energy and Resources of the American Bar Association. He was founding Chairperson of the Environmental Law Committee of the Monroe County Bar Association and has returned as Co-Chair this year, and is former Chairman of the Real Estate Council of the Monroe County Bar Association. He has also served as Chairman of the Center for Environmental Information, Inc. Mr. Knauf has taught Environmental Law at the Rochester Institute of Technology and the University of Rochester, and is a frequent lecturer at continuing education programs.

Mr. Knauf received a B.S.C.E. in Environmental Engineering from M.I.T. in 1977, and a J.D. from the University of Michigan in 1980, where he was President of the Law School Student Senate. He is admitted to the bars of New York, Florida, the U.S. Supreme Court, and various other federal courts.

Sam Laniado
Read and Laniado, LLP

Sam Laniado graduated from the New York University School of Law in 1976. From 1976 to 1983, he served as Staff Counsel with the New York State Public Service Commission. He represented Staff in Article VIII (generation siting) and Article VII (transmission siting) proceedings, in utility rate cases and other investigative proceedings. In addition, he represented the Commission and Siting Board in court challenges to their respective orders and decisions.

In 1983, Mr. Laniado and Howard J. Read resigned from their respective positions in Counsel's Office at the Commission and established the law firm of Read and Laniado. The firm represents clients in many phases of the electric and gas industries. Mr. Laniado and other members of the firm represent clients before the Siting Board, Public Service Commission, the Department of Environmental Conservation, the New York Independent System Operator, the Federal Energy Regulatory Commission, the U.S. Army Corps of Engineers, local planning boards, and in state and federal courts. Matters include power plant and transmission line certification, mergers and acquisitions, contract negotiations, gas transportation, project finance and development and eminent domain matters.

Read and Laniado also serves as outside counsel to the Independent Power Producers of New York, Inc.

Edward F. McTiernan

Edward F. McTiernan is Deputy Commissioner and General Counsel with the New York State Department of Environmental Conservation. He joined the Department in 2011 as deputy Counsel and in his present position he coordinates DEC activities and enforcement programs with State and Federal agencies including with the Office of the Attorney General; USEPA and the Justice Department. Along with the Office of General Counsel's leadership team he manages approximately 90 attorneys and 30 support staff in central office and nine regional offices. Mr. McTiernan is involved in New York's Brownfield Program and Voluntary Cleanup Program as well as policies governing audits and self-disclosure. He served as the Department's principal representative on environmental impact analysis and permit coordination for \$3.2 billion dollar Tappan Zee Bridge replacement project; has extensive involvement in administrative enforcement activities on major hazardous waste and water pollution control matters and he directly coordinate Superfund; RCRA and brownfield activities for 1,200 acre Eastman Business Park including negotiating innovative prospective purchaser agreement.

Prior to joining DEC in 2011, he spent 25 years in private practice including 17 years as a partner with Gibbons P.C. in Newark, NJ and New York, NY where he was a member of the firm's Environmental Law Department and where he represented clients before state and federal administrative agencies in all aspects of environmental matters.

Mr. McTiernan graduated from Fordham University (B.S., Biology 1978); the State University of New York (M.S., Environmental Science 1980); and Seton Hall Law School (J.D., 1987). Prior to becoming an attorney, Mr. McTiernan spent over five years as an Environmental Consultant. He managed projects for private industrial clients involving hazardous site mitigation, permitting new development and natural resource planning.

Jim Muscato is a partner with Young/Sommer and his practice focuses on environmental and energy law and litigation. Jim assists clients in environmental permitting, State Environmental Quality Review Act issues, alternative energy project development, pollution cleanup and litigation. Jim's practice involves land-use permitting and development issues for energy projects, including State Environmental Quality Review Act review, Article 10 siting review and energy regulation before the State Public Service Commission. Jim has been involved with the permitting and siting of the largest wind farm project in the Northeast and a number of other wind projects throughout New York State. More recently, he has been involved in siting and permitting issues involving solar, hydro, biomass and other renewable energy facilities.

In addition to working with clients on siting and permitting, Jim counsels clients on complex liability issues and has successfully assisted clients with resolving potential claims and proceedings under state and federal environmental laws, including the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the State Superfund Law and State Navigation Law. He has substantial experience negotiating resolution of CERCLA cleanups, cost recovery and allocation matters. Jim regularly advises small and large petroleum companies, gasoline station owners, and other entities with pollution cleanup, compliance and re-development issues. He has argued cases at both the state and federal level, including argument at the U.S. Court of Appeals for the Second Circuit. He has been practicing environmental law with the firm since 2002.

Jim is a frequent speaker on issues involving environmental law, including a recent conference on Article 10 and New York State's Brownfields program. He is a member of the New York State Bar Association and is actively involved with the Environmental Law section and the Committee on Hazardous Waste and Enforcement.

Practices

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Gail S. Port is head of the interdepartmental Environmental Group, resident in the New York office. Gail has been practicing environmental law, land use and litigation for over 35 years. Her practice at Proskauer is concentrated in counseling clients, nationally and internationally, respecting environmental risks in mergers and acquisitions, real estate transactions and financings; environmental compliance; Superfund and RCRA cases; federal and state enforcement proceedings; sustainability and climate change issues; remediation; environmental litigation and administrative proceedings; land use matters; and historic preservation.

Prior to joining Proskauer, from 1984-1989, Gail was the Deputy General Counsel, and Acting General Counsel, and the chief environmental advisor to the New York State Urban Development Corporation, where she was involved in the environmental law aspects of high visibility large-scale land use and development projects and related financing transactions. Before her public service, Gail was an associate at a prominent environmental boutique law firm.

Gail recently was honored by being invited by her peers to become a Fellow of the American College of Environmental Lawyers, a professional association of preeminent environmental lawyers with distinguished careers. The induction will take place in the Fall 2012. In addition, from June 1992, following her appointment by Governor Mario Cuomo (and State Senate confirmation), Gail served for the past 20 years as one of only five citizen members on the New York State Environmental Board. She had been reappointed to the Board twice by Governor Pataki and then served at the pleasure of Governors Spitzer, Paterson and Andrew Cuomo).

Gail has lectured and written widely on a broad spectrum of environmental topics. She also was an adjunct faculty member of Pace University School of Law, where she taught "Commercial Environmental Law."

Steven C. Russo
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Steven C. Russo chairs the firm's New York Environmental Practice. He focuses his practice on environmental law and litigation, environmental permitting, National Environmental Policy Act (NEPA), State Environmental Quality Review Act (SEQRA) review, toxic tort litigation, environmental crimes, Brownfields redevelopment, government, energy and the environmental aspects of land use and real estate law. Steven is equally experienced litigating in federal and state courts, as well as counseling his clients with regard to environmental liability risk and due diligence, permitting, Brownfields, and impact assessment and review. He also practices election and campaign finance law.

Prior to joining the firm, Steven was the Chief Legal Officer of the New York State Department of Environmental Conservation. There, he supervised approximately 90 attorneys in Albany as well as the agency's nine regional offices. He also supervised the agency's legislative affairs department and Office of Environmental Justice. At the agency, Steven initiated a reform of the state's environmental review regulations and assessment forms, completed the issuance of new power plant siting regulations pertaining to environmental justice and carbon emissions and revised the agency's environmental audit policy. He also was a key member of the executive team supervising the preparation of the Supplemental Generic Environmental Impact Statement and regulations relating to unconventional natural gas drilling in New York State.

Steven has more than 15 years of experience at a New York-based environmental law firm (with ten as a principal), where, among other things, he served as either lead or co-counsel in several trials before federal and state courts, as well as state administrative agencies. He also served as election law counsel to a number of New York State and federal campaigns.

Education

J.D., Columbia Law School, 1989

Chief Articles Editor, *Columbia Journal of Environmental Law*

B.A., *summa cum laude*, State University of New York at Albany, 1985

Joel H. Sachs

Senior Counsel



Professional Experience

Joel H. Sachs represents private entities and governmental agencies in a wide variety of environmental, real estate, land development and zoning matters. A significant portion of his practice is devoted to representing municipal boards, municipalities and private clients before municipal boards and agencies throughout the State of New York in land use, zoning and environmental disputes. He serves as Construction Arbitrator for the American Arbitration Association. Widely recognized as a leader in Environmental Law, Mr. Sachs has received a number of awards, which are listed below. Mr. Sachs has enjoyed the rare privilege of serving as Chair of two Sections of the New York State Bar Association, the Environmental Law Section and the Real Estate Law Section.

Mr. Sachs manages the firm's role as Town Attorney of the Town of Bedford, NY and Village Attorney of the Village of Pleasantville, NY. On behalf of the firm, he also serves as Special Land Use and Environmental Counsel to municipalities in Westchester, Putnam, Dutchess, Rockland, Orange and Ulster Counties.

Mr. Sachs previously clerked for a federal judge in the Southern District of New York and served as an Assistant Attorney General of the State of New York and Deputy Chief of its Environmental Protection Bureau for five years. Mr. Sachs also served as the former Town Attorney of the Town of Greenburgh, the largest Town in Westchester County. He joined Keane & Beane in 1993 with many years of experience practicing environmental law, municipal law and land development and zoning.

Awards & Recognition

- Metro *Super Lawyers* List, one of the 25 best attorneys in Westchester County (2010-2013)
- *The New York Times Magazine*, *Westchester Magazine* and *New York Magazine* (2008-2013) one of the best environmental attorneys in the New York Metropolitan area
- Best Lawyers in America (Environmental), 2009-2013, presented by ALM publications
- Distinguished Teaching Award, presented by Pace University School of Law (2010)
- Above the Bar Award for Leading Environmental Attorney awarded by Citrin Cooperman, the *Westchester County Business Journal*, Pace University School of Law and Mahopac Bank (2007)
- Business Leadership Award presented by Yeshiva Ohr Hameir (2002)
- Lawyer of the Year presented by Institute for Jewish Humanities (1997)
- Henry Heissenbuttel Award for excellence in land use planning given by the New York State Planning Federation (1986)
- Pioneer of New York Environmental Law - George W. Perkins Award (NY Parks and Trails Association) (2012)
- Has received a peer review rating of "AV[®] Preeminent[™]" on Martindale-Hubbell[®]

Admissions

- State and Federal Courts of New York
- Federal Courts of Connecticut

- State and Federal Courts of Florida
- United States Supreme Court
- United States Tax Court

Professional Associations

- American Arbitration Association (Construction Industry Panel)
- Federal Bar Council
- National Institute of Municipal Law Officers (Past Chairman of the Committee on Environmental Protection)
- New York State Bar Association (Member, House of Delegates; Past Chair, Real Property Law Section; Past Chair, Environmental Law Section; Member, Task Force on Eminent Domain; Member, Continuing Education Legal Committee)
- Westchester County Bar Association
- White Plains Bar Association (Past President)

Professional Activities/Publications

Mr. Sachs serves as an Adjunct Professor at Pace University School of Law, where for over 30 years he has taught courses on state and municipal environmental law, land use and construction law. He is also a frequent lecturer before bar association groups on environmental and land use topics.

Community Service

Mr. Sachs is a Former President of the Westchester County Legal Aid Society and continues to serve on its Board of Directors. He also was a member of the Board of Trustees of Lyndhurst.

Education

- 1970, LL.M., New York University
- 1966, LL.B., University of Pennsylvania
- 1963, B.A., Cornell University

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Practice Areas

- Construction Law
- Environmental Law
- Land Development & Zoning
- Litigation & Dispute Resolution
- Municipal Law
- Real Estate

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NYSBA 2014 Annual Meeting
Environmental Law Section Meeting
Biography for Adam Schultz

Mr. Schultz has more than 20 years' experience providing strategic planning, regulatory permitting, environmental compliance, land use, and litigation advice to national, regional and local clients, including infrastructure and natural resource extraction companies throughout the Northeast. He appears regularly before federal and state agencies, as well as local jurisdictions to secure and defend the approvals required for commercial and industrial development.

Mr. Schultz has spoken frequently throughout New York, and at national conferences on the issues surrounding the safe and environmentally responsible development of New York's natural gas resources for the benefit of all New York citizens.

Adam has recently joined Couch White, LLP as a partner and works in both their Albany and Syracuse area offices.

David F. Slottje is a co-founder of and an Attorney at Community Environmental Defense Council, Inc., based in Ithaca, NY. CEDC is a not-for-profit, public interest law firm dedicated to helping municipalities and citizens obtain the benefits of environmental and land-use laws.

In his prior, law firm life, Mr. Slottje was an associate at Gardere & Wynne (now Gardere Wynne Sewell) in Dallas, and a partner at Choate, Hall & Stewart in Boston. He is a graduate of Syracuse University (1978) and of Emory University School of Law (1981). He is admitted in Texas, Massachusetts, and New York.

Executive Biography – David Vandor

David Vandor is the Co-Founder & Chief Technology Officer of **Expansion Energy LLC**, which develops and owns innovative, patented and patent-pending energy-related technologies. David is the inventor or co-inventor of each of Expansion Energy's technologies. His Bachelor of Science degree was obtained from the City College of New York (CUNY) in 1969, followed by a Bachelor of Architecture in 1970. Through 1985, he achieved positions of increasing responsibility at the New York City Planning Commission, dealing with public policy and environmental issues. That was followed by several years of consulting, including for entities seeking cost-effective solutions for deploying alternative fuel vehicles (AFVs). By the mid-1990's, David's work focused exclusively on energy-related matters, through which he developed extensive expertise in the science of cryogenics, which is at the core of many of Expansion Energy's innovative energy & environmental technologies. His work during this period has included the following:

- Co-wrote the New York State “**Alternative Fuel Vehicle Act of 1997**”, establishing incentives for the production and deployment of AFVs in New York State.
- Through 1998, was a member of the **New York State Energy Research and Development Authority's (NYSERDA) LNG Study Group**.
- In 1999, completed a study for **US DOE's Brookhaven National Lab** regarding the technical and economic issues associated with producing **Liquid Natural Gas (LNG) from Landfill Gas (LFG)**.
- In 2001, completed NYSERDA PON 559, which offered “**An Innovative Liquid Natural Gas (LNG) Storage Model**.”
- In 2002, completed NYSERDA PON 519-99, which focused on off-pipeline uses of LNG for heating and refrigeration; and quantified the value of “**cold recovery**” where LNG is vaporized prior to its use as a fuel.
- Also in 2002, with NYSERDA and **Praxair** co-funding, co-wrote a “**Technology Evaluation of Small-Scale LNG Plants**.”
- From 2002 through 2005, served as a consultant to **NYSEG** and **KeySpan Energy (now National Grid)**, regarding protocols for LNG systems.
- Through 2006, was a member of NYSERDA's **LNG Steering Committee**, helping to frame policy for LNG production, storage, transport, and dispensing in New York State.
- Also in 2006, began work on the invention of a cost-effective Small-Scale LNG Production System, which became Expansion Energy's patented “**VX Cycle**” technology.
- From 2004 through 2006, David completed “**The Storage of Cold Compressed Natural Gas (CCNG) in Solution-Mined Salt Caverns**,” an in-depth R&D study which was co-funded by NYSERDA. The team included **Geocomp**, a world-renowned geotechnical consulting firm, which confirmed David's hypothesis that solution-mined salt caverns can be used to store cryogenic natural gas.

- Project Director for NYSERDA Contract #18814, examining the feasibility of deploying Expansion Energy's patented utility-scale power storage system, called the "VPS Cycle" at a steam-generating facility operated by **Con Edison** in New York City. The project team also includes equipment suppliers such as **Dresser-Rand**, **Cameron** and **Chart Industries** as contributors and peer reviewers.

David's R&D work focuses on developing innovative, patentable technologies that have demonstrable commercial value and address a known market need. The following is a sampling of Expansion Energy's patented technologies invented or co-invented by David Vandor:

U.S. Patent No. 7,464,557 B2, a "**System and Method for Cold Recovery**", granted on December 16, 2008. -- Cold Compressed Natural Gas (CCNG) is a supercritical phase of natural gas, achieved by moderate refrigeration (-116° F and colder), and moderate pressures (700 psig and greater), achieving approximately 85% of the density of LNG. The invention focuses on "cold recovery" during the "shift" from CCNG to CNG.

U.S. Patent 8,020,406, for a "**Method and System for the Small-Scale Production of Liquid Natural Gas from Low-Pressure Pipeline Gas**" (Granted in the U.S. and in Australia, and pending in other international jurisdictions.) A method and system (called the "VX Cycle") for the small-scale production of LNG using an innovative version of a methane expansion cycle, which does not require a high-pressure feed gas stream or a low-pressure outflow gas "sink". The VX Cycle uses natural gas as both the "product" and the "refrigerant".

U.S. Patent No. 7,821,158 B2, a "**System and Method for Power Storage and Release**", the "**VPS Cycle**", granted October 26, 2010. -- The VPS Cycle stores off-peak, low-value electricity as dense, liquid air (L-Air) in aboveground cryogenic vessels. The energy is released by pumping the L-Air to pressure, warming the now-compressed air by waste exhaust heat, and sending the hot, high-pressure air to the combustion chamber of a generator-loaded hot gas expander. During "send-out" the cold energy of the stored L-Air is recovered in a smaller "power loop(s)" that drives one or more additional generators.

U.S. Patent Application No. 12/247,902, for a "**System and Method of Carbon Capture and Sequestration**", the "VCCS Cycle". (Patented under "fast track" review by USPTO, per its Green Technology Pilot Program.) The VCCS Cycle captures CO₂ in a non-aqueous solvent to which an alkali has been added. That alkali can include the alkaline ash (fly ash) that is produced at coal-fired power plants. The reaction between the acidic CO₂ (as carbonic acid) and the alkali yields carbonates, water and heat. The non-aqueous solvent allows the carbonates to precipitate out of solution, yielding a dry powder that is non-toxic and has many post-production uses, while avoiding the need for energy intensive water removal (drying) of the carbonate. VCCS also provides for the recovery of valuable rare earth elements, other minerals, and bulk construction materials, while "detoxifying" the fly ash.

U.S. Patent 8,342,246, for "**Fracturing Systems and Methods Utilizing Metacritical Phase Natural Gas**" (Granted in the U.S. on 1/1/13, and pending internationally.) Vandor's Refrigerated Gas Extraction (VRGE) process uses locally available natural gas to fracture shales and tight hydrocarbon formations and to deliver the proppants used to allow the released hydrocarbons to flow to the surface. The core concept of VRGE is to use "like with like," i.e., to use natural gas (NG) to release and bring to the surface the hydrocarbons trapped in the formation, avoiding the use of large quantities of water "imported" to the well site and avoiding the need to bring costly fracturing fluids such as nitrogen, carbon dioxide or propane to the well site.

Biography

Lawrence H. Weintraub is an Assistant Counsel for the New York State Department of Environmental Conservation (DEC), Office of General Counsel. He is the program counsel for the Division of Environmental Permits which administers the State Environmental Quality Review Act and the Uniform Procedures Act for the agency. Larry also represents the Department in proceedings before the Public Service Commission. Before joining the DEC in September 2007, he worked in both private practice and as a municipal attorney. He graduated from Antioch School of Law (David C. Clark School of Law at the University of the District of Columbia), and also received a Bachelor of Arts degree in geology from the State University of New York at Binghamton. He is admitted to the New York Bar and several Federal Courts.



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Thomas S. West, founder and managing partner of The West Firm, PLLC, is recognized for his distinguished accomplishments in the oil and gas and environmental fields by the Best Lawyers in America®, Super Lawyers, Corporate Counsel Top Lawyers, and Strathmore's Who's Who. He is rated AV, Preeminent, by Martindale Hubbell. At The West Firm, Tom represents clients in the oil and gas sector on a broad variety of issues involving legislation, compulsory integration, administrative adjudication, civil litigation, and investigations by the New York Attorney General's office. In 2010, he and his firm launched a title practice in New York and Pennsylvania and they are actively writing title opinions in both states for the oil and gas industry.

In his more than 30 years of practice, Tom has represented the oil and gas industry on many issues. He was one of the principal authors of the spacing and compulsory integration legislation that overhauled New York's oil and gas program in 2005. He was also at the forefront of the 2008 amendments to New York law to accommodate the development of the shale resources in New York State. That law authorized spacing units up to 640 acres in size and multiple wells on a common well pad. Since the passage of that law, he has been actively involved with the environmental review process being conducted by the New York State Department of Environmental Conservation ("DEC") to prepare a Supplemental Generic Environmental Impact Statement ("SGEIS") relative to high-volume hydraulic fracturing. He has been working closely with industry on their comments to the DEC relative to the SGEIS and recently represented an industry working group in responding to technical comments from the DEC. He is also currently counseling several clients concerning the steps that must be taken to defend against the highly anticipated litigation that will be brought challenging the SGEIS and is working with multiple operators in developing

the strategy for permitting that will comply with the high environmental standards being set by the SGEIS. Those projects include representation of clients relative to road use agreements and water supply issues, including permitting before the Susquehanna River Basin Commission and the Delaware River Basin Commission.

Tom also regularly represents clients relative to state legislation and currently represents one major operator before the New York State Legislature and the Governor's office relative to oil and gas issues.

Tom is frequently called upon to assist industry with mineral lease interpretation issues, which sometimes involves representing operators in associated litigation and dispute resolution procedures. In that capacity, he has represented operators in cases involving lease extensions, site access for seismic testing, site access for pipeline routing, trespass claims, and top lease disputes, and is currently representing several operators in litigation concerning force majeure lease extensions. Through the title practice, Tom and his firm offer integrated land services to the operator, providing operators title information for permitting and the proper and timely notification of uncontrolled mineral interest owners of their rights under the compulsory integration program. The firm also prepares and sends compulsory



integration notices and represents operator interest at the compulsory integration hearing. Tom has represented a number of operators in the disputes referred to adjudication due to issues raised by uncontrolled owners at the compulsory integration hearing.

Tom has also represented clients on a variety of pipeline certification and construction issues. He was active in the legislation streamlining the pipeline certification process before the New York State Public Service Commission and regularly counsels clients concerning midstream strategies and transactions associated with midstream development. Also, he has represented major interstate pipelines on environmental issues and is currently working with one large interstate pipeline company to help streamline the review process before the United States Army Corps of Engineers.

Outside of the oil and gas area, Tom has an extensive environmental practice, representing a broad variety of clients on environmental issues involving counseling, civil litigation, administrative practice, and criminal defense. He represented industry groups in litigation successfully challenging overzealous regulations relative to the State Superfund and pesticide programs in New York State. He also has extensive experience assisting clients in obtaining permits in all of the regulatory programs, including air quality, water quality, water quantity, solid waste, hazardous waste and low-level radioactive waste. He is currently involved in one permitting matter where he is defending the right of a landfill operator in New York State to accept drill cutting waste despite allegations of NORM contamination.

Representative Matters

- Presently represents oil and gas companies on a broad variety of legislative, regulatory and commercial issues, including well spacing, compulsory integration, and pipeline siting.
- Presently is involved with the siting of a major interstate gas pipeline project and the permitting of expansion projects at several landfills.
- Presently represents major ski areas in connection with water withdrawal and related environmental issues.
- Successfully represented several large power producers in connection with complex air quality and other permitting issues in the metropolitan New York City area.
- Successfully represented a client in a hazardous materials cost recovery action, absolving the client of all liability at the site and leading to full recovery for the client and attorneys' fees.
- Successfully represented a major manufacturing client in a criminal investigation, leading to a decision by the New York Attorney General not to pursue charges against that client.
- Successfully represented a client in the New York State Court of Appeals on a novel Martin Act issue.
- Obtained a declaration that a portion of New York's Subdivided Lands Act is unconstitutional.
- Handled a case which is cited as leading authority for establishing the grounds for "grandfathering" under the State Environmental Quality Review Act (SEQRA).
- Successfully served as the lead counsel in litigation brought by certain New York industries, resulting in a declaration that New York's inactive hazardous waste disposal site regulations are invalid on substantive grounds.
- Successfully served as lead counsel in a challenge to New York's pesticide notification regulations.

Selected Activities

- Speaker, Energy & Mineral Law Foundation 31st Annual Institute May 9-11, 2010, Amelia Island, Florida.
- Panelist, State Oil and Gas Conservation Agency Issues, Rocky Mountain Mineral Law Foundation Conference, December 6-7, 2010, Pittsburgh, PA.
- Chair, LeBoeuf, Lamb, Greene & MacRae, LLP Environmental Practice Group, 1992-96.
- Member, American, New York State and Albany County Bar Associations
- Member of the Executive Committee of the Environmental Law Section of the New York State Bar Association.
- Co-Chair of the Mining and Oil & Gas Exploration Committee.
- Listed in *Best Lawyers in America*® in the field of Environmental Law 2006 - 2012.

- Listed in Upstate New York *Super Lawyers* 2007-2012.
- Listed in Strathmore's *Who's Who*.
- Listed in *Corporate Counsel* @ Top Lawyers 2009, 2010.
- Rated AV, Preeminent, by Martindale Hubbell 2011-2012

Education	Bar Admissions
Albany Law School of Union University, J.D. 1977 National Moot Court Team 1976-77 (Captain 1977) St. Lawrence University, B.A. 1974	New York Pennsylvania

Court Admissions
U.S. Supreme Court U.S. Court of Appeals for the Second Circuit U.S. District Court for the Eastern District of New York U.S. District Court for the Northern District of New York U.S. District Court for the Southern District of New York U.S. District Court for the Western District of New York

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