

TOWN OF OTSEGO  
P.O. Box 183  
Fly Creek, NY 13337

December 14, 2011

Attn: dSGEIS Comments  
New York State Department of Conservation  
625 Broadway  
Albany, NY 12233-6510

To Whom It May Concern:

We, the Town Board of the Town of Otsego, Otsego County, N.Y., are writing to comment on the 2011 draft Supplemental Generic Environmental Impact Statement regarding Oil, Gas and Solution Mining Regulatory Program (draft SGEIS), particularly the portions of Chapters 7 and 8 that relate to local comprehensive plans and land use ordinances. Section 7.12 states, "Local and regional planning documents are important in defining a community's character and are the principal way of managing change within a community. These plans are used to guide development and provide direction for land development regulations (e.g., zoning, noise control, and subdivision ordinances) and designation of special districts for economic development, historic preservation, and other reasons."

We are addressing in this letter the need to confirm that local comprehensive plans and land use ordinances play a *far* more important role in the issuance of gas drilling permits than the draft SGEIS now reflects. We believe this to be the case, and we ask the DEC to amend the draft SGEIS to require that *all* drilling permit applications be deemed complete only if accompanied by a certification from the local municipal authority stating that the proposed activities comply with all local laws.

**Action Requested:**            **Amend the draft SGEIS at 8.1.1.5 to require that all "complete" drilling applications include a Certificate of Compliance with local laws issued by the town in which such activity is proposed.**

Our reasons for this request are discussed below:

### **Undue Burden**

As currently written, the draft SGEIS does nothing to assure that applicants correctly represent that they are in compliance with all local laws, even those that may prohibit heavy industry, including drilling for oil or gas at the specified location. The draft SGEIS also allows the DEC to issue a permit regardless of notification by the host town that the proposed activity is not allowed under local law. Unless this language is modified, an undue burden will be imposed on towns to challenge both the DEC and applicants. First, this burden is unreasonable, especially for many rural towns that have limited or no resources for legal representation. Second, this situation will force towns to seek court protection to enforce local laws. Asking the courts to clarify the relationship between local laws and the SGEIS is an unnecessary and expensive solution that shifts responsibility to the judiciary.

### **Small Wells**

Under the draft SGEIS applicants are not required to certify that wells using under 300,000 gallons of hydrofracturing water comply with local laws (see Section 7.12), and the DEC is not required to notify local governments (see Section 8.1.1.3). Community concerns about the industrial aspects of drilling are significantly more important than the mere arbitrary measure of how much water is used during a hydrofracturing operation.

Wherever both “small” and “high-volume” wells are drilled, local governments will be faced with the following paradoxes: being notified by the DEC of some wells but not others; having drillers certify compliance (or non-compliance) with local law on some wells, but not others; having the DEC investigate compliance with local laws for some wells, but not others; and seeing antiquated 1992 regulations (setbacks, open pits, casing requirements, etc.) applied to some wells and new regulations based on the draft SGEIS on the same issues applied to others. These absurdities are all based on an arbitrary volume of 300,000 gallons that the draft SGEIS never supports or justifies.

**All drilling, not just drilling of certain size wells, must be compliant with local comprehensive plans and land use laws.**

### **Bias Against Local Laws**

Letting the courts decide the relevance of local land use laws (as Commissioner Martens has stated in several interviews on the subject) establishes a bias against adopting local laws, because town boards may be fearful of incurring legal expenses to defend against threatened litigation on this issue. In fact, the gas industry has recently filed complaints in the towns of Dryden and Middlefield, and we believe that these complaints are purposely intended to discourage other towns from adopting prohibitive local laws.

### **Local Impacts**

The Town of Otsego's economy is based on tourism, recreation and health care. Our assessment is that heavy industrial activity such as gas drilling will have a negative socio-economic impact. Some other towns are less concerned about heavy industry and drilling and may want to allow it. If a town sees drilling carried out successfully in another locality, it may decide to change local land ordinances to permit it. Likewise, towns that generally favor drilling may decide it is not appropriate in certain areas areas, such as a village center or near a school or hospital. **Each town should be permitted to decide the issue for itself.**

### **Towns Must Sue**

The draft SGEIS allows permitting for drilling to proceed regardless of whether applicants follow local laws, forcing towns to sue drillers if they wish to enforce local land use laws. This is precisely the opposite of zoning's function, which is to allow issuance of construction permits only after approval by the zoning officer.

### **DEC Practice**

The DEC's current practice is to avoid entering into a dispute between a town and a mine excavation operator regarding the legitimacy of local laws. Commissioner Martens apparently feels that the same policy should be applied to gas drilling. He has stated that the courts will resolve the relationship between a town's land use laws and DEC's permitting of drilling. However, the DEC *would not* be entering into a dispute if it requires as part of the permit application that the applicant include evidence *from the town* that a proposal complies with local land use laws. If the town refuses to provide this evidence, then the applicant can sue the town. DEC *would* steer clear of a possible dispute and *would not* proceed with a permit review until receiving a completed application which includes evidence of compliance with local law.

### **Modify 8.1.1.5**

We ask for a slight but important modification to section 8.1.1.5, that the administrative burden be placed where it belongs: on the applicant. Applicants should provide a certificate of compliance that any proposed activity is in accordance with local laws. No application should be considered complete without such a certificate. Any dispute about the legality of local laws should be challenged by the applicant *prior to* proceeding with the DEC permit. This is standard procedure for any zoning dispute. Unfortunately, as the SGEIS stands now, the DEC would issue a permit without first assuring compliance. In fact, the permit would be issued even if a town has notified the DEC that the applicant is not in compliance with local laws. Thus, the town is forced into going to court to stop work based on a DEC permit.

As Commissioner Martens has stated, the only way this issue will be resolved is in court. Meanwhile, towns that believe drilling and hydrofracturing are heavy industry, inconsistent with local laws and economies, will be faced with extraordinary legal costs to stop drillers with DEC-issued permits. Why place this burden on our municipal governments? Instead, place the burden on the industry that seeks to impact a town.

Changing the draft language of 8.1.1.5 is the straightforward way to address the entire issue of local land use laws: no new legislation needed; no need for municipalities to initiate litigation; no need for the DEC to work on permits that will be halted by litigation filed by towns where local laws are being violated by DEC-permitted activity.

### **No Change of Intent**

The requested change to 8.1.1.5 does not change the basic intent of the revised language of this paragraph in the draft SGEIS, but it does alter the sequence, and it assures that when applications come to the DEC, any issues between the applicant and the town regarding local land use laws will already have been resolved before the permits are approved.

### **History as Guide**

In 1998 the mining industry and towns were at odds over this very same issue. Gregory Sovas, the assistant commissioner of the DEC at that time and is now an expert witness for the drilling industry, gave a speech at Albany Law School explaining the permitting process for mining. He said at the time that the DEC wants to be friendly with towns and wants to partner with towns. Where is this spirit of cooperation in 8.1.1.5?

Sovas concluded his 1998 speech with the following remark: “We need to improve the public perception of mining and of the role of the DEC. After all these years, we still have conflicts with local governments and adjacent homeowners on issues of noise, traffic, hours of operation, and blasting, to name a few. Many of these conflicts would diminish if locals undertook comprehensive zoning in their communities. DEC does not want conflicts with local governments and does not have any interest in siting mines in areas where the locals don’t want them. Unfortunately, as I have continually said, DEC is not a land use agency.”

This same attitude should be carried over into gas drilling.

**Resident Concern**

Petitions and surveys in the Town of Otsego have shown overwhelming support for the Town's Comprehensive Plan and Land Use Law, which considers heavy industrial activities, including oil and gas drilling, as inappropriate activities within the Town.

We strongly request that the DEC revise the SGEIS so that permits to drill may be issued only after the applicant has obtained a certificate of compliance from the local municipality.

Sincerely yours,

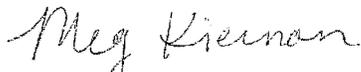
Supervisor  
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