

New York State Department of Environmental Conservation

In the Matter of the Application of

FINGER LAKES LPG STORAGE, LLC

**Application Number
8-4432-00085**

**for a permit pursuant to the Environmental Conservation
Law to construct and operate a new underground liquid
petroleum gas storage facility in the Town of Reading,
Schuyler County**

PETITION FOR FULL PARTY STATUS

by

Gas Free Seneca

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INTRODUCTION

Pursuant to title 6, section 624.5(b), of the New York Codes, Rules and Regulations (“NYCRR”), Gas Free Seneca (“GFS”), by its counsel, Earthjustice, hereby petitions for full party status in the above-captioned proceeding. *See* 6 NYCRR § 624.5(b)(1)(i), (iv). GFS is an organization of concerned citizens, local business owners, and regional environmental groups seeking to protect Seneca Lake, its iconic landscape, and home-grown businesses from the threat of invasive industrialization. GFS’s members live, raise their families, and own property in the area surrounding Seneca Lake and the wider Fingers Lakes region. They have worked for years—and in some cases generations—to build a thriving, mutually supportive, and sustainable community centered on the region’s rich agricultural land, scenic beauty, and outdoor recreational opportunities.

GFS seeks full party status to resist threats to the character of its community and the integrity of its natural environment that are presented by the proposal of Finger Lakes LPG Storage, LLC (“FLLPG” or the “Applicant”) to develop liquid petroleum gas (“LPG”) storage facilities on the western shore of Seneca Lake in the Town of Reading, Schuyler County, New York (the “Project”). The Project would involve injection of 2.1 million barrels (88.2 million

gallons) of propane and butane into solution-mined salt caverns and the establishment of ancillary industrial facilities at the surface, including a rail yard, two brine ponds, and numerous large storage tanks. FLLPG has submitted an application (the “Application”) for an underground storage permit pursuant to article 23, title 13 (“Title 13”), of the Environmental Conservation Law (“ECL”), and the New York State Department of Environmental Conservation (“DEC” or the “Department”) has published a set of conditions proposed for the permit, if a determination is made to grant the Application.

Before DEC determines whether to grant the Application, the disputed substantive and significant issues identified below must be resolved through adjudication, and several legal issues not dependent upon facts must be resolved on the merits. If granted party status at a hearing on the adjudicable factual issues, GFS will present evidence, including expert testimony, that the Project will result in significant and unmitigated adverse cavern integrity, public safety, water quality, noise, and community character impacts on the natural and human environment of Seneca Lake, specifically, and the Finger Lakes, generally. In this Petition, GFS demonstrates that the Draft Supplemental Environmental Impact Statement (“DSEIS”) for the Project fails to meet the requirements of the State Environmental Quality Review Act (“SEQRA”), and a revised DSEIS should be released for public comment before DEC decides whether to grant the Application, because: the DSEIS fails to include any analysis of community character; the DSEIS fails to include any cumulative impact analysis; and the DSEIS fails to analyze the no-action alternative or most reasonable alternatives to the Project. The factual evidence and legal arguments proffered by GFS warrant denial of the underground storage permit for LPG because: (i) the DSEIS and other documentation submitted in support of the Application provide a factually and legally inadequate foundation for the findings required under SEQRA and its

implementing regulations, ECL art. 8; 6 NYCRR Part 617; and (ii) FLLPG has not proven the Application's compliance with the regulatory standards established in section 23-1301(1) of the ECL.

**IDENTITY AND ENVIRONMENTAL AND STATUTORY INTERESTS OF GFS
(6 NYCRR § 624.5(b)(1)(i)–(iii))**

GFS is a group of concerned citizens and 266 local business owners from the Seneca Lake area who are committed to protecting their communities from the Project and related natural gas storage infrastructure. GFS was formed in 2011 in response to the Applicant's plan to use underground salt caverns on the shore of Seneca Lake to store millions of barrels of LPG. GFS's mission is to protect Seneca Lake and its environment and communities from the threat of significant industrialization.

GFS and its members have participated actively in DEC's review of the Project. The group and its members submitted comments on the DSEIS, including letters relating to cavern integrity and regional geology, community safety, and the impact of the Project on the local sustainable economy. GFS also met with key decisionmakers to highlight deficiencies in the DSEIS and to emphasize the conflict between the Project and the local economy and community character. Joseph Campbell, Yvonne Taylor, and Jeffrey Dembowski, the three co-founders of GFS, will act as GFS's organizational representatives during the issues conference and at the adjudicatory hearing, if GFS is granted full party status. GFS is represented by Earthjustice, with Deborah Goldberg and Moneen Nasmith acting as counsel.

The members of GFS possess a common and profound interest in the health of the environment and communities of the Seneca Lake area. The construction and operation of the Project will result in significant adverse environmental impacts, including potential contamination of Seneca Lake, degradation of the viewshed, significant noise pollution, and

increased risks to public safety. The members of GFS live, work, and recreate in the Seneca Lake area. Some members' families have owned land and operated businesses in the Seneca Lake area for generations. All GFS members have a substantial interest in protecting the quality of their local environment from the Project and similar industrial development.

The Project will transform a rural, tranquil, and scenic area into a region degraded by re-industrialization. The Project will forever mar the scenic beauty of the Seneca Lake landscape, injuring the interests of GFS members who live on the opposite shore of the lake or who recreate on the lake itself. Construction and operation of the Project will involve the use of heavy machinery and equipment and result in significant noise, which will negatively affect not only members who live or recreate near the facility, but also those individuals who live across the lake, where the noise can be transmitted over the water. Injection of LPG into the underground caverns threatens to increase the salinity of Seneca Lake, a source of drinking for many GFS members. Moreover, members of GFS live in the communities around the Project and face increased threats to public safety due to unaddressed questions about cavern integrity and the potential for LPG to leak out of the caverns and migrate, as well as the increased presence of LPG-laden trains traveling through the area. The members of GFS therefore have a significant environmental interest in this proceeding which will address whether and under what conditions the Project should proceed.

GFS' interests also relate to the administration and implementation of SEQRA and Title 13 of the ECL. As discussed in greater detail below, questions relating to cavern integrity and the impact of injecting LPG into the underground caverns on the salinity of Seneca Lake raise significant concerns regarding the adequacy of the Application and the draft underground storage permit under Title 13. The adverse noise, community character, public safety, and cumulative

impacts from the Project also raise questions about the sufficiency of the DSEIS and present significant issues under SEQRA.

**PRECISE GROUNDS FOR OPPOSITION
(6 NYCRR § 624.5(b)(1)(v))**

The five factual grounds for GFS's opposition to the Project are explained in the six expert reports attached to this Petition. In addition, the grounds for opposition are elaborated in the discussion below, identifying the substantive and significant issues that qualify for adjudication.

**ISSUES FOR ADJUDICATION AND OFFERS OF PROOF
(6 NYCRR §§ 624.4(c), 624.5(b)(2))**

GFS proposes for adjudication five factual questions regarding the significant and unmitigated adverse impacts related to (1) cavern integrity, (2) public safety, (3) water quality, (4) noise, and (5) community character of the Project. All five issues presented by GFS are both substantive and significant and therefore satisfy the regulatory standard for adjudication.

An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." 6 NYCRR § 624.4(c)(2). An issue is significant if it "has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." *Id.* § 624.4(c)(3). Because DEC is the lead agency and prepared the DSEIS, the determination whether to adjudicate issues relating to the sufficiency of the DSEIS or the ability of DEC to make necessary findings pursuant to SEQRA also is made according to the "substantive and significant" standard. *See id.* § 624.4(c)(6)(i)(b).

Under Title 13, the Applicant is required to show that the caverns are adaptable for storage purposes before DEC may grant the underground storage permit. ECL § 23-1301(1).

The attached expert reports on cavern integrity, the potential salinization of Seneca Lake, and public safety demonstrate that the Applicant has failed to provide sufficient data to demonstrate that the caverns are safe for LPG storage. At a minimum, further inquiry into the propriety of storing LPG in these caverns therefore is required before Title 13 can be satisfied, demonstrating the existence of substantive issues. The questions raised below regarding the long-term integrity of the caverns, the impacts to public safety, and the potential for salt flow into Seneca Lake also are significant. If left unresolved, these issues require the denial of the permit Applicant's permit application. Even with additional information from the Applicant, GFS's testifying experts conclude that the permit cannot be granted without substantial additional conditions.

The expert testimony proffered with this Petition also demonstrates the existence of substantive and significant issues under SEQRA. As the expert reports appended to the Petition show, the DSEIS does not present an adequate analysis of potentially significant adverse environmental impacts in the areas of cavern integrity, public safety, the water quality of Seneca Lake, noise, and community character, as required under SEQRA, 6 NYCRR § 617.9(b)(1). Further evaluation of the Project's significant adverse impacts and potential mitigation or avoidance therefore is required. GFS's experts also will show that, even with that additional analysis, the permit should be denied because DEC will not be able to make the findings required under SEQRA 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 will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

Id. § 617.11(d)(5). The questions raised by the experts therefore qualify as substantive and significant issues.

I. Salt Cavern Integrity

The Project raises substantive and significant issues for adjudication because numerous outstanding questions remain regarding the current and future integrity of the solution-mined caverns, and the Application contains data gaps that are serious enough to warrant denial of the underground storage permit. The attached report authored by Dr. H.C. Clark (attached hereto as Ex. 1), a geologist with expertise in salt cavern integrity proffered here as an expert witness, demonstrates that the permit should be issued *only if* new studies are performed to supply crucial missing information, and the Application materials are revised to demonstrate a high probability of long-term cavern integrity. Significant additional conditions also must be included in the underground storage permit, if it is issued, to ensure that a timely and effective response can be made to any problems that may develop during the operation of the Project.

Dr. Clark will testify to the findings in his report, including that the evidence presented by FLLPG's Application materials fails to demonstrate long-term cavern integrity. Ex. 1 at 2. His report concludes that "much of the information that a geologist would ordinarily expect to find about the surrounding geology and features of the caverns is missing, incomplete, or incorrect." *Id.* He concludes that "the FLLPG application and draft permit conditions defeated all of my expectations and failed to conform to standard industry practices I have observed over decades as a professional geologist," *id.* at 4, and recommends that the issues conference be postponed until substantial additional information is provided to DEC. *Id.* at 31–33.

The data gaps and errors Dr. Clark identifies in FLLPG's Application include:

- [REDACTED] showing all faults, fracture systems, lineations, historical cavern outlines, fracture pathways, and fracture histories, *id.* at 12; [REDACTED]

- [REDACTED] that do not include thrust faults and tear faults and incorrectly display cavern floors as being solid rather than mounds of broken rock, *id.* at 12–13; Ex. B; and
- Measurements for Caverns 27, 28, 30, and 31 that do not fully characterize the size and shape of the rubble pile at the bottom of the gallery, *id.* at 14–16.

“When the [Applicant’s] omissions are cured, and the mistakes corrected, the need for further study is immediately apparent.” *Id.* at 3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] without more study, “the data ...is insufficient to demonstrate that the reservoir is suitable for LPG storage.” *Id.* at 27. Review of other scientific sources also provides information [REDACTED] that indicates that the Project’s caverns “show effects of age and anomalies suggesting that long-term integrity may not be possible.” *Id.* at 2.

Even if the information gaps are filled and errors are corrected to demonstrate a substantially higher likelihood of long-term cavern integrity, Dr. Clark recommends that extensive additional permit conditions be imposed. *Id.* at 33–34. The additional monitoring measures Dr. Clark has deemed necessary are listed at the end of his report. *Id.* at 33. “Without the addition of these monitoring requirements as permit conditions, DEC cannot ensure that emerging cavern integrity problems will be timely identified.” *Id.* at 34.

The issues discussed by Dr. Clark plainly are substantive and significant. Neither the DSEIS nor the Application materials provide sufficient information to assess whether the caverns are suitable for storage of LPG or to take a hard look at whether the caverns could leak and cause

significant environmental impacts. The record provided by the Applicant to date requires the denial of the underground storage permit and fails to provide DEC with an adequate record to make the findings required by SEQRA. Indeed, even with further inquiry, there is serious doubt that the Applicant can establish the long-term integrity of the caverns with enough certainty to satisfy regulatory requirements, at least not without additional permit conditions. Questions about cavern integrity therefore qualify as adjudicable issues.

II. Overall Project Safety

A substantive and significant issue exists regarding the overall safety of the Project. Dr. Rob Mackenzie, who is proffered here as an expert witness, conducted a high-level quantitative risk assessment (“QRA”) to evaluate the major risks associated with the Project (attached hereto as Ex. 2). Although the Applicant employed an outside contractor to conduct a QRA in 2012, the previous QRA’s analysis was limited to the risks associated with on-site releases from equipment.¹ The DSEIS also does not analyze the safety impacts of the Project beyond the property line or evaluate the risks of events associated with rail transport, pipeline transmission, and salt cavern storage of LPG. Dr. Mackenzie’s QRA evaluates these risks and finds that the Project poses an unacceptable risk to the community that cannot be sufficiently mitigated. Ex. 2 at 1.

QRAs are designed to categorize risks according to an event’s probability of occurrence and likely consequences into three categories: (1) “unacceptable” requiring that measures be taken to reduce the risk, (2) within an “assessment range” where mitigation measures must be considered, or (3) “acceptable” and mitigation measures can be considered based on other

¹ See 2012-02-16, Quantitative Risk Assessment, Quest Consultants.

considerations.² *Id.* at 3. Dr. Mackenzie analyzes two sets of risks that are ignored by the DSEIS: the risk of transporting LPG by rail to the Project and the risk of transmitting LPG by pipeline to and from the Project. Dr. Mackenzie concludes that the risk of transporting LPG by rail is within the “assessment range” and requires consideration of further mitigation. *Id.* at 6–7. Although unlikely, it is possible for a catastrophic event to occur if a train carrying LPG to the facility derailed on the trestle located near the Project, which is located over a gorge uphill from the Village of Watkins Glen. If the rail cars were punctured and leaked their contents, it is possible that LPG could flow into the town and ignite. *Id.* at 5–6. Because such an event would result in extremely serious consequences, Dr. Mackenzie concludes that the risk of transporting LPG by rail requires consideration of further mitigation measures. *Id.* at 6–7. Similarly, pipeline accidents occur with medium frequency and with moderate consequences and therefore Dr. Mackenzie concludes that the risk posed by transporting LPG via pipeline is within the “assessment range” and requires consideration of additional mitigation measures. *Id.* at 7–8.

Dr. Mackenzie also reviews the risk of using salt caverns to store LPG, which the DSEIS fails to evaluate adequately. The storage of LPG in the Project’s salt caverns poses an unacceptable risk that must be mitigated. *Id.* at 8–13. Numerous accidents have occurred in the U.S. involving salt cavern facilities; as discussed above in Section I, there is significant concern regarding the long-term integrity of the caverns; and as discussed in Section III below, the storage of LPG in the caverns poses a risk to Seneca Lake. Based on this and other information, Dr. Mackenzie concludes that storing LPG in these salt caverns poses a medium likelihood of an

² For example, an event with a low probability of occurrence BUT extremely serious consequences poses an unacceptable risk, whereas an event with a low probability occurrence with serious or moderate consequences is within the “assessment range.”

extremely serious event and therefore represents an unacceptable risk to public safety. *Id.* at 9, 12, 14.

Dr. Mackenzie's report demonstrates that there is a substantive and significant issue with respect to the Project's compliance with Title 13 and SEQRA. According to Dr. Mackenzie, the safety risks associated with the storage of LPG in salt caverns raise real doubts about the Applicant's ability to demonstrate that the caverns are "adaptable for storage purposes." *See* ECL § 23-1301(1). Dr. Mackenzie's report also raises substantive issues under SEQRA, as the significant adverse impacts he describes relating to rail and pipeline transportation were not analyzed or proposed for mitigation in the DSEIS, and the DSEIS's discussion of safety risks relating to storage of LPG in salt caverns is inadequate. The DSEIS therefore does not provide DEC with a sufficient record on which to base DEC's findings under SEQRA. *See* 6 NYCRR § 617.11(d)(5). As Dr. Mackenzie is prepared to testify, because the Project as proposed will result in significant public safety impacts which cannot be mitigated, the Project should undergo major modification, or the permit should be denied. The public safety concern raised by Dr. Mackenzie therefore qualifies as a substantive and significant issue.

III. Potential Salinization of Seneca Lake

Even if the Applicant is able to demonstrate that no substantive and significant issues exist with respect to cavern integrity, the storage of LPG in these formations still presents a substantive and significant issue for adjudication because the Application and DSEIS fail to adequately address the Project's potentially significant adverse impacts to the water quality of Seneca Lake. As expert hydrologist, Dr. Tom Myers, explains in his report (attached hereto as Ex. 3), there is a high risk that changes in pressure in the caverns caused by the storage of LPG therein may result in significant salt discharges into Seneca Lake from deep groundwater sources.

As is discussed above in Section I, the geology underlying the shores of Seneca Lake consists of bedded salt formations. The proposed storage caverns do not intersect with the lake bottom, which is made of sediment, but the bedded salt formation that houses the caverns slopes upwards from south to north and ultimately intersects the porous sediments of the lake bottom. Ex. 3 at 7–8. Groundwater is driven from higher to lower pressure areas and thereby moves through the layers of sediment below the lake and into the lake itself. *Id.*, Appx. D. When groundwater moves through salt layers and into the lake, it contributes to the lake’s salinity.

Pumping LPG in or out of the caverns creates significant pressure changes that spread through the salt beds surrounding the caverns. *Id.* at 11–12. Increasing the pressure within the caverns, especially if they are tight, squeezes the surrounding formations and causes a compression or strain to spread across the viscoelastic salt layers. *Id.* at 12; Appx. E at 4. Although the stress changes will decline with distance, the stress change caused by the cavern could still affect salt layers that intersect the lake sediments and cause brine to be squeezed from these layers. *Id.* In addition, even a small increase in pressure to the salt layers under the lake will raise the pressure gradient between the lake and underlying formations, causing an increased flow of now-salt-laden groundwater into the lake. *Id.*

Although this phenomena is difficult to detect or monitor given the involvement of subsurface formations, Dr. Myers’ conclusion that changes in pressure in the LPG caverns pose a real risk of increasing the salinity of Seneca Lake is supported by an examination of a previous spike in the lake’s chloride levels in the mid-1960s. This significant increase coincided with the beginning of LPG storage in salt caverns close to those that FLLPG proposes to use. *Id.* at 5. Dr. Myers evaluated and rejected other potential explanations for this increase in salinity in

Seneca Lake, concluding that “the most likely source is advection through the sediments beneath the lake.” *Id.* at 11.

The risk that cycling LPG into the caverns will cause increased salinity in Seneca Lake is both a substantive and significant issue. Seneca Lake is the source of drinking water for more than 100,000 people, the salt levels in Seneca Lake already are much higher than other Finger Lakes, and an increased amount of chloride in the lake would take a very long time to dissipate given the lake’s limited outflow. *See id.* at 6, Appx. A at 1, 6. The Application and the DSEIS do not assess whether the reintroduction of underground LPG storage will degrade Seneca Lake’s water quality and do not form a sufficient basis for DEC to make the required findings under SEQRA. Dr. Myers’ report also demonstrates that, absent proof that pressure changes from storing LPG will not drive salt into Seneca Lake, the underground storage permit should not be granted. *Id.* at 14–15. The Project’s potential to cause salt migration into Seneca Lake therefore qualifies as a substantive and significant issue. *See* 6 NYCRR § 624.4.

IV. Noise Impacts

The Project raises substantive and significant issues for adjudication because the DSEIS fails to take a hard look at the Project’s adverse noise impacts. The attached expert report by Dr. A. Brook Crossan of Sandstone Environmental Associates, Inc. (“SEA”) (attached hereto as Ex. 4) concludes that “residents of the Seneca Lake community and tourists visiting the area are likely to suffer significant and unmitigated noise impacts from the Project, notwithstanding the mitigation measures proposed by the Applicant and conditions that [DEC] proposes to attach to the Applicant’s permit.” Ex. 4 at 1–2.

SEA identifies multiple deficiencies in the Applicant’s evaluation of the Project’s noise impacts. *Id.* at 9–15. These include:

- Delineating the “region of influence” or the area of interest for purpose of analysis to include only the on-site and receptors in the immediate vicinity of the Project, when the Project will increase off-site transportation noise, *id.* at 9–10;
- Failing to evaluate sufficiently the noise impacts of the Project on residential and recreational receptors on the eastern shore of Seneca Lake, *id.* at 2, 10–11;
- Failing to properly monitor and report baseline noise levels, *id.* at 11–12; and
- Omitting an analysis of effective mitigation measures, *id.* at 15.

SEA makes numerous recommendations for improvement of the noise analysis, including definition of a region of influence that includes the western portion of Seneca Lake from Watkins Glen to Geneva and the entire eastern shore, a special study of noise transmission over Seneca Lake during different meteorological conditions, and the complete characterization of Project construction and operation, including the hours during which those activities will take place. *Id.* at 16–19. SEA also concludes that the Applicant must model construction and operation noise at all receptors and develop a revised Sound Study that addresses all of the deficiencies noted in SEA’s report. *Id.* 16–19.

Until the measures recommended in the SEA report are completed and the numerous deficiencies in the Applicant’s analysis of noise impacts corrected, SEA’s expert opinion is that “it will be impossible for [DEC] to make the findings required under SEQRA, and the permit therefore should not be issued.” *Id.* at 19. The DSEIS therefore did not take the requisite hard look at the potential adverse significant noise impacts and does not provide DEC with an adequate legal or technical record on which to base findings under 6 NYCRR § 617.11(d)(5). Noise that will be created by the Project therefore is a substantive and significant issue.

V. Community Character Impacts

As discussed in greater detail in the expert reports by Dr. Harvey Flad (attached hereto as Ex. 5) and Dr. Susan Christopherson (attached hereto as Ex. 6), the Project likely will result in significant adverse impacts to community character. The DSEIS however contains absolutely no discussion of community character impacts. SEQRA regulations on determining the significance of a proposed project's impacts require consideration of "the creation of a material conflict with a community's current plans or goals as officially approved or adopted," and "the impairment of the character or quality of ... existing community or neighborhood character." 6 NYCRR § 617.7(c)(1)(iv)–(v). "[T]he impact that a project may have on ... existing community character ... is a relevant concern in an environmental analysis." *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 366 (1986).

Dr. Flad's attached expert report details how the Seneca Lake area combines scenic views, historic sites and districts, scenic roads, open spaces, federally designated viticulture economic zones, and multiple recreation and tourism opportunities to form a distinct cultural landscape that "reflects the integrated social and aesthetic values of residents and vacationers." Ex. 5 at 28. The emergent community character of the area thus is premised on local inhabitants' relationship to the quality of their environment. Ex. 6 at 1. Moreover: "The community is consciously pursuing economic development strategies—especially recreation and agri-tourism—that will enable it to preserve these aesthetic and environmental values and to continue enjoying the high quality of life central to its self-image." Ex. 5 at 4. The Finger Lakes wine and grape industry, in particular, has embraced the clean, serene, and bucolic community character as its brand, attracting thousands of visitors and allowing vineyards, wineries, and hundreds of small business that serve tourists to expand. This is reflected in the region's branding and in turn supports the development of other industries with skilled workers who

demand a high quality of life. *See* Ex. 6 at 1–2, 4–5. The economic impact of this growth also has been substantial, with tourism in the Finger Lakes supporting 58,000 jobs and contributing \$2.8 billion to the local economy. *Id.* at 8.

Dr. Flad’s assessment identifies “seriously detrimental effects of the Project” on scenic vistas, lake-based recreation, and the regional economy and concludes that it “will overlay an indelible industrial image on the cultural landscape of Seneca Lake, and the Finger Lakes more broadly, which will significantly and adversely affect the inhabitants’ hard-won and prized community character.” Ex. 5 at 39–40. According to Dr. Flad, the Project will cause disruption of scenic vistas, traffic and noise impacts, and “socio-economic impacts on the region’s wineries and tourist-related business, which depend on stable community character as the foundation of their brand.” *Id.* at 40. The Project will cause significant adverse economic effects by industrializing the Seneca Lake shoreline and thereby undermining the perception that the regional environment is centered on “aesthetic values, such as scenic views; prospering wineries and vineyards; culinary arts; heritage sites; and recreational activities such as fishing and boating.” *Id.* at 37; *see* Ex. 6 at 1, 2 (noting that “damage to the regional brand from the risks posed by the Project is likely to have a significant adverse effect on the growth trajectory in the region”).

The DSEIS does not provide any analysis whatsoever of community character and therefore fails to meet the requirements of SEQRA. The failure to address any of the Project’s significant negative impacts on community character renders the DSEIS insufficient and precludes DEC from issuing the required finding under SEQRA section 617.11(d)(5) that, “consistent with social, economic and other essential considerations,” the Project “avoids or minimizes adverse environmental impacts to the maximum extent practicable.” The Project

impacts on community character also cannot be mitigated by FLLPG and should form the basis for denial under SEQRA of the Project's underground storage permit. The Project's potentially significant adverse impact on community character therefore is a substantive, significant, and adjudicable issue.

LEGAL ISSUES FOR RESOLUTION
(6 NYCRR § 624.4(b)(2)(iv))

Deficiencies in the DSEIS raise legal issues the resolution of which is not dependent on disputed facts and that can be resolved on their merits following argument at the issues conference. *See* 6 NYCRR § 624.4(b)(2)(iv). As is discussed above, the DSEIS violates SEQRA because it did not include any analysis of community character and therefore failed to provide both the requisite “description of the environmental setting . . . sufficient to understand the impacts of the proposed action and alternatives” and the required “statement and evaluation of the potential significant adverse environmental impacts.” *Id.* § 617.9(b)(5)(ii)-(iii). The DSEIS also failed to include any analysis of potentially significant cumulative impacts. Further, the DSEIS did not analyze the no-action alternative or any other reasonable alternatives to the Project (except for a few different brine pond configurations), as is required under SEQRA. *See id.* § 617.9(b)(5)(v). DEC's compliance with those procedural requirements is subject to a “strict compliance” standard of review. *See Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347–48 (1996).

Such major omissions cannot be cured merely by including the missing analysis in the Final SEIS. *See Webster Assoc. v Town of Webster*, 59 NY2d 220, 228 (1983) (“[T]he omission of a required item from a draft EIS cannot be cured simply by including the item in the final EIS.”). Rather, DEC must issue a revised version of the DSEIS for public comment. A revised DSEIS should be submitted for public comment also because the Applicant has substantially

changed the Project since the DSEIS was published in August 2011, including as recently as last December 2014. *See* 2014-12-02, Product Transportation Allocation – Revised December 2014, letter and attachment. Although GFS repeatedly has requested—on these and other grounds—that DEC publish a revised DSEIS, the Department so far has refused to do so.³ GFS therefore requests that argument be heard on this legal issue at the issues conference.

I. The DSEIS Does Not Comply with SEQRA Because It Ignores Potential Cumulative Impacts.

The DSEIS fails to include an analysis of the cumulative impacts of the Project, in violation of SEQRA. An EIS must discuss the “reasonably related short-term and long-term impacts, *cumulative impacts* and other associated environmental impacts.” 6 NYCRR § 617.9(b)(5)(iii)(a) (emphasis added). DEC acknowledges that cumulative impacts “can occur when the incremental or increased impacts of an action, or actions, are added to other past, present and reasonably foreseeable future actions.”⁴ DEC also requires that cumulative impacts be assessed “when actions are proposed, or can be foreseen as likely, to take place simultaneously or sequentially in a way that the combined impacts may be significant.”⁵

As DEC is well aware, Arlington Storage Company, LLC (“Arlington”), an affiliate of FLLPG, has received permission from the Federal Energy Regulatory Commission (“FERC”) to expand its natural gas storage facility on property adjacent to the Project. Arlington received FERC permission to acquire the property from NYSEG in August 2010, and DEC knew of “future NYSEG/Arlington natural gas storage” in the wells providing the expanded capacity by

³ Counsel for GFS sent Ms. Schwartz written requests for a revised DSEIS in an e-mail message on March 4, 2013 and in letters dated May 5, 2013, September 4, 2013, and August 8, 2013.

⁴ DEC, 83 (3d ed. 2010) *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [hereinafter “SEQR Handbook”].

⁵ *Id.*

April 2011.⁶ The expansion thus was reasonably foreseeable when DEC prepared the DSEIS, and the expanded operation predictably would affect the same environmental resources and communities as the Project. DEC therefore was obligated to evaluate, but failed to evaluate, whether these two adjacent projects, as well as any other nearby projects, cumulatively would have significant adverse environmental impacts. Having failed to conduct that assessment, DEC also could not evaluate whether any of the significant impacts could be mitigated, and if so, to what extent and using what measures. Absent a meaningful analysis of cumulative impacts, DEC cannot make a reasoned finding under SEQRA that the Project's significant adverse environmental impacts have been minimized or mitigated to the maximum extent practicable. *See* 6 NYCRR § 617.11(d)(5). The DSEIS therefore is deficient under SEQRA and must be revised to include a cumulative impacts analysis that is made available for public comment.

II. The DSEIS Is Fatally Flawed Because it Does Not Analyze the No Action Alternative or Reasonable Alternatives to the Project.

The DSEIS does not include a discussion of the no action alternative or any reasonable alternative to the Project, except for alternative designs for the brine ponds. SEQRA regulations provide, however, that all EISs *must* include “a description and evaluation of the range of reasonable alternatives to the action that are feasible,” including the no action alternative. 6 NYCRR § 617.9(b)(5)(v). DEC's SEQR Handbook states that “[t]he ‘no action’ alternative must always be discussed to provide a baseline for evaluation of impacts and comparisons of other impacts.”⁷ The failure to include a discussion of the no action alternative in the DSEIS therefore is a fatal error under SEQRA. *See, e.g., MYC NY Mar., L.L.C. v Town Bd. of Town of E. Hampton*, 842 NYS2d 899, 906 (Sup Ct, Suffolk County 2007); *Matter of Long Is. Pine Barrens*

⁶ 2011-04-19, BSK to DEC – NOIA Response (redacted) at 3–4.

⁷ SEQR Handbook, *supra* note 4 at 126.

Socy., Inc. v Town Bd. of Town of Riverhead, 736 NYS2d 87, 88 (2d Dept 2002). This defect can be cured only by issuing a new draft SEIS for the Project. *See Webster* 59 NY2d at 228.

The DSEIS also contains almost no discussion of reasonable alternatives to the Project. The “Alternatives to the Proposed Action” section of the DSEIS is limited to an analysis of alternative designs to the proposed brine pond. Final DSEIS Text at 170–73. That discussion falls far short of the required consideration of all feasible and reasonable alternatives. *See, e.g., Matter of City of Ithaca v Tompkins County Bd. of Representatives*, 565 NYS2d 309, 311 (3d Dept 1991) (upholding an environmental review that initially considered 11 alternative sites “with attention devoted to such matters as wetlands, aquifers, wildlife, traffic, zoning and the like” and conducted further evaluation of six plans on five sites, including a review of issues relating to “water, soils, wetlands, land use, visual and noise impacts and traffic.”); *Aldrich v Pattison*, 486 NYS2d 23, 30 (2d Dept 1985) (upholding a environmental review under SEQRA that considered “a continuum of options” with respect to multiple aspects of the proposed project).

One obvious alternative that should have been analyzed is suggested by FLLPG’s recent submission of a revised Product Transportation Allocation. With this submission, the Applicant ostensibly has adopted an alternative to the originally proposed Project—one that no longer uses trucks for delivery of LPG to markets.⁸ According to this recent submission, all of the LPG will be transported to and from the FLLPG facility via rail or pipeline. The alternative of eliminating the use of trucks at the Project clearly is reasonable but was not analyzed in the DSEIS, and there is no other analysis of the alternative’s environmental impacts.

⁸ 2014-12-02, BSK to DEC, Transportation Allocation.

As the Court of Appeals recognized in *Webster*, “the purpose of requiring inclusion of reasonable alternatives to a proposed project is to aid the public and governmental bodies in assessing the relative costs and benefits of the proposal.” *Webster*, 59 NY2d at 228. The failure of the DSEIS to discuss an alternative eliminating truck deliveries makes it impossible for the public to understand the adverse environmental impacts associated with this alternative, including the risk to public safety and natural resources posed by increasing the amount of LPG transported by rail and pipeline. Announcing this major change to the Project more than three years after the publication of the DSEIS also eliminates the public’s ability to compare the impacts of this alternative with those of the Project, as discussed in the August 2011 DSEIS. Moreover, neither the public nor DEC can evaluate the impacts of other changes to the Project that might result from FLLPG’s announced change in product transportation allocation. For example, the Applicant has not indicated whether eliminating trucks for LPG deliveries also will alter the design of the Project, for instance by removing the need to construct the previously-contemplated truck depot or by requiring alterations to the design of the rail terminal or pipeline system. Such a major change in the Project warrants the issuance of a new DSEIS.

The new DSEIS also should discuss another alternative to the Project suggested by the revised Product Transportation Allocation. If propane goes by pipeline straight to Selkirk, as counsel for the Applicant suggests it will, the LPG stored at FLLPG’s facility almost certainly will not be delivered to local customers. Residents of the Finger Lakes region therefore no longer stand to benefit from the propane price reductions that supposedly would result from storing LPG closer to their homes and businesses, because the Project will not alleviate local price spikes. Locating an LPG storage facility closer to the likely consumers could better address the declared purpose and need for the Project, *see* Final DSEIS Text at 12–14, and

therefore should be considered as an alternative to the Project. *See Webster*, 59 NY2d at 227–28. (holding that “both the draft and final EIS, must contain a description and evaluation of reasonable alternatives to the action which would achieve the same or similar objectives.”) (internal quotations omitted). The failure to discuss this option in the DSEIS has deprived the public of the opportunity to evaluate a range of reasonable alternatives.

DEC therefore should be required to prepare a new DSEIS that analyzes the no action alternative, clearly reasonable alternatives of eliminating truck deliveries and relocating the Project, as well as other reasonable alternatives. The failure to include any discussion of any of those alternatives cannot be cured by including the missing discussion of alternatives in a final EIS. *See id.* at 228. Although the *Webster* Court declined to overturn the environmental review at issue in that case, it did so *only* because the omitted alternative had been “the subject of extensive publicity and of debate by public officials and the general public.” *Id.* at 228–29. There has been no such publicity or debate with respect to the foregoing transportation and location alternatives to the Project, and the no action alternative must be included under all circumstances. Because the DSEIS therefore is fatally flawed, it requires revision and resubmission for public review and comment.

CONCLUSION

For the foregoing reasons, GFS requests that it be granted full party status in a hearing scheduled for adjudication of the substantive and significant issues identified above and that all legal issues not dependent on disputed facts be resolved on the merits in favor of GFS.

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PUBLIC VERSION

Respectfully submitted,

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