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January 31, 2014

VIA FED-EX AND EMAIL

Joseph Martens, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Re: Demand for Finalization of the Supplemental Generic Environmental
Impact Statement Concerning High-Volume Hydraulic Fracturing.

Dear Commissioner Martens:

Through this letter, the Joint Landowners Coalition of New York, Inc. (“JLCNY”); the Kark Family Trust; Schaefer Timber and Stone, LLC (“Schaefer”); and LADTM, LLC (collectively “Clients”), demand that you respond by February 13, 2014 with a date on which the Supplemental Generic Environmental Impact Statement (“SGEIS”) relative to high-volume hydraulic fracturing (“HVHF”) will be complete as required by the State Environmental Quality Review Act (“SEQRA”). As Commissioner of the New York State Department of Environmental Conservation (“DEC”) you are responsible for insuring that the DEC, the Lead Agency charged with fulfilling the requirements set forth by SEQRA, fulfills its duties. If you are unable to provide a definite and reasonable timeline for completion of the SGEIS process, on February 14, 2014 our Clients will pursue immediate mandamus relief from the courts of New York State, seeking and order to compel you to carry out your obligations and finalize the SGEIS.

The JLCNY is a grassroots, non-profit organization, incorporated under the laws of New York State. The JLCNY’s stated mission is “to foster, promote, advance, and protect the common interest of the people as it pertains to natural gas development through education and best environmental practices.” JLCNY Bylaws, art. 1, B. The JLCNY’s members include individual landowners and landowner coalitions, all of whom support the JLCNY’s express mission. The JLCNY’s members have been injured in numerous ways as a direct result of the Moratorium. Landowners have been unable to lease their mineral interests or otherwise develop oil and natural gas resources on their properties. JLCNY members face uncertainty as to when the DEC will begin issuing drilling permits again. Many JLCNY members live in economically depressed

communities that would benefit from job creation related to oil and natural gas development must stand idly by and wait for the DEC to complete the SGEIS process. There is no indication the Moratorium on issuance of well permits that propose the use of HVHF will be lifted any time soon.

The Kark Family Trust, as represented by trustee, Jonathan R. Kark, is owner of a mineral estate in the town of Colesville. The Kark Family Trust holds a valid oil and gas lease for this property with Chesapeake Energy Corporation ("Chesapeake"). The lease had an initial term of five years commencing on July 10, 2007, subject to an option to extend the lease for an additional five years. On June 29, 2009, Chesapeake filed a well permit application for six horizontal wells to be developed using HVHF. Due to the current Moratorium on the issuance of drilling permits for wells that propose the use of HVHF, Chesapeake's well permit application remains on hold pending completion of the SGEIS. Chesapeake extended the primary term of the lease to July 9, 2017, and recorded the extension with Broom County on September 20, 2012. To date, the Kark Family Trust has not received any royalty payments.

Schaefer Timber and Stone, LLC ("Schaefer") is a limited liability company organized under the laws of the State of New York with an address of 315 Old Route 10, Deposit, New York. LADTM, LLC ("LADTM") is a limited liability company organized under the laws of the State of New York with an address of 315 Old Route 10, Deposit, New York. Schaefer is a member of LADTM. On or about July 20, 2007, Schaefer, as owner in fee simple of 93.3 acres in Colesville, entered into an oil and gas lease with Norse Energy Corporation USA ("Norse"). The lease provided for an initial five-year primary term, subject to an option to extend the lease for an additional five-year term.

Pursuant to its lease with Schaefer, Norse filed a well permit application with the DEC on February 4, 2010. The DEC granted Norse's application on September 16, 2010, however; the permit granted was for a conventional, vertical well. Because HVHF was not permitted in New York State, Norse's drilling activities under this permit were limited. Norse's well permit has expired and on December 6, 2012, Norse filed for bankruptcy. On August 7, 2012, LADTM acquired full ownership of all of the oil, gas, and other minerals underlying the Schaefer property. To date, neither Schaefer nor LADTM have received any royalty payments.

It is undisputed that SEQRA was not intended to be a tool to stop development. *See generally*, Environmental Conservation Law ("ECL") §§ 8-0103(7), 8-0107; 6 NYCRR §§ 617.1(d), 617.3(h); *see also Pilot Corp v. Pl. Bd. of Town of Newburgh*, N.Y.L.J., July 18, 2001, p. 23, col. 4 (Sup. Ct. Orange Cnty 2001). Rather, SEQRA's purpose is to inform agency decision-making by incorporating environmental factors into the process and ultimately striking a balance among environmental, social and economic considerations. *Spitzer v. Farrell*, 100 N.Y.2d 186, 190 (2003). To that end, SEQRA contains explicit timeframes to bring the environmental impact review process to completion (*see, e.g.*, 6 N.Y.C.R.R. § 617.9[a][5]) and mandates generally that "[a]gencies must carry out the terms and requirements [of the statute] with minimum

procedural and administrative delay . . . and must expedite all SEQRA proceedings in the interest of prompt review.” 6 N.Y.C.R.R. § 617.3(h); ECL § 8-0107.

Importantly, New York courts have expressly recognized SEQRA’s timing directives and granted mandamus relief in the face of bureaucratic delays. *E.g.*, *Mamaroneck Beach & Yacht Club, Inc. v. Fraioli*, 24 A.D.3d 669, 670–71 (2d Dep’t 2005); *Carerra v. Reilly*, N.Y.L.J., Dec. 24, 2002, p. 23, col. 2 (Sup. Ct. Suffolk Cnty. 2002). Specifically, courts have confirmed that finishing the SEQRA process is not discretionary, nor can the process be held in abeyance for political reasons or other reasons unrelated to the objectives of the environmental review. *Costco Wholesale Grp.*, 90 A.D.3d at 658–59; *Lowe’s Home Ctrs., Inc. v. Venditto*, 15 Misc. 3d 1108(A), 2007 WL 852057 at *3–*4 (Sup. Ct. Nassau Cnty. Mar. 19, 2007); *United Water New Rochelle, Inc. v. Pl. Bd. of the Town of Eastchester*, N.Y.L.J., Dec. 3, 2001, p. 17, col. 3 (Sup. Ct. Westchester Cnty. 2001); *Pilot Corp.*, N.Y.L.J., July 18, 2001, p. 23, col. 4.

As explained in Article 23 of the ECL, as Commissioner of the DEC, you are duty-bound to promote the development of oil and gas resources in New York State, protect the correlative rights of owners, and prevent waste of the oil and gas resources in the state. ECL § 23-0301. These statutory mandates have their origins in the Interstate Oil and Gas Compact, which is memorialized in ECL Article 23, Title 21, as well as the draft SGEIS and revised draft SGEIS. Moreover, the statutory framework for implementing these provisions contemplates expeditious action by the DEC. *See* ECL § 23-0501(3). Thus, the DEC’s failure to complete the SGEIS in a timely manner not only violates SEQRA, but conflicts with these statutory mandates.

The DEC has further acted in an arbitrary and capricious manner by referring its duties to Dr. Nirav Shah, Commissioner of the New York State Department of Health (“DOH”). Your decision to ask Dr. Shah to consider the putative health impacts associated with HVHF amounts to an illegal delegation of your decision-making authority under SEQRA. “[A] lead agency’s discretion to solicit comments at [a] late stage in the SEQRA process must be balanced against SEQRA’s mandate that the regulations be implemented ‘with minimum procedural and administrative delay . . . [and] in the interest of prompt review.’” *Riverkeeper, Inc. v. Pl. Bd. of Town of Southeast*, 9 N.Y.3d 219, 235 (2007).

The DOH has been involved extensively in the SGEIS process since its inception. The DOH participated in the preparation of both the 2009 draft SGEIS and the 2011 revised draft SGEIS, which fully evaluated public health impacts. Accordingly, the belated referral to Dr. Shah on September 30, 2012—just weeks prior to the November 2012 election, long after a full review by the DOH had already been conducted, and more than one year following the release of the second revised draft SGEIS—was both unnecessary and improper. By all reports, the supplemental review occasioned by the September 2012 referral to DOH has been complete for some time, yet, those findings still have not been released to the public and the final SGEIS has not been issued. Balanced against SEQRA’s mandate against unnecessary delays, your referral to an agency that had already completed its review constituted an abuse of discretion. To the


extent that the DEC continues to defer to the DOH and refuses to finalize the SGEIS, such action is arbitrary and capricious and amounts to an improper delegation of the DEC's lead agency responsibilities. *See Coca-Cola Bottling Co. of N.Y., Inc. v. Bd. of Estimate of City of N.Y.*, 72 N.Y.2d 674, 681-83 (1988).

The DEC may not refuse to complete the SGEIS process indefinitely. The DEC is required to comply with the statutory mandates of ECL Articles 8 and 23. Pursuant to those statutes, New Yorkers have a right to develop their protected oil and gas resources for the collective benefit of landowners, operators, and the citizens of the state. Because the DEC is duty-bound to complete environmental reviews in a timely and prompt manner and to promote the development of indigenous oil and gas resources, the JLCNY, the Kark Family Trust, Schaefer, and LADTM respectfully request that you identify a date in the very near future when the SGEIS will be completed and permit applications may be processed in New York State.

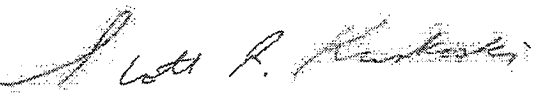
Thank you for your prompt attention to this request.

Sincerely,

MOUNTAIN STATES LEGAL FOUNDATION


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Partner

Attorneys for the Joint Landowners Coalition of New York, Inc., the Kark Family Trust, Schaefer Timber and Stone, LLC, and LADTM, LLC.

Cc: Andrew M. Cuomo, New York State Governor
Nirav R. Shah, M.D., M.P.H., New York State Health Commissioner
Stephen M. Nagle, Albany Assistant Attorney General