Suggested Real Estate Comments to the NYS DEC rdsGEIS

From the Tompkins County Council of Governments, Task Force on Gas Drilling Assessment and Land Valuation Subcommittee

11-29-11

I. Recognize Conflicts with Existing Law. Take time to rewrite the sGEIS after a true study of the impact to the residential mortgage lending industry.

NYS must recognize that there are conflicts in its existing law, the sGEIS, and the proposed regulations with long standing (decades old) requirements of residential mortgage lending and secondary market standards established by Fannie Mae, Freddie Mac, FHA, VA and SONYMA (State of NY Mortgage Agency).

Additional detail is provided in Section XXXX, below about minimum standards required to provide NYS consumer protection to secure customary residential mortgage financing (including Fannie Mae/Freddie Mac, FHA, VA, SONYMA backed loans) and take steps to avoid the exclusions of coverage to conform with NYS residential title insurance Schedule B.)

The prior smaller scale of drilling activity in NYS may have enabled NYS banks to work around the problem by keeping mortgage loans in their internal portfolios, but they will not be able to continue that practice on this new scale. In order to continue to do business in NYS, lenders must meet these long-standing requirements, adopted on a federal level with nationwide acceptance and that are commonly used in residential lending.

Other states have recognized this problem and address it in their regulations. Section 8.4 of the dSGEIS, released in September 2011, demonstrates that the DEC examined and highlighted the actions of several other states regarding such set back requirements. It appears that such regulations were adopted in an effort to avoid the conflict that NYS is now facing. This problem needs to be fixed in the final sGEIS and in the regulations.

Section 21 of the standard Fannie Mae/Freddie Mac mortgage document specifically prohibits the storage, discharge, release, etc. of any environmentally hazardous materials (gas is specifically named) on the mortgaged property and goes on to prohibit the home owner from giving anyone else the rights to do so. If property owners with mortgages fail to adhere to either of these covenants, it is considered a technical default of the terms of the mortgage.

Fannie, Freddie, FHA, VA and SONYMA all require that no "surface or subsurface" activity occur within prescribed distances from either residential improvements or property boundaries. The setback distances are measured on the surface but are designed to protect the wedge of property rights from the '“center of the earth to the heavens above” per common practice with ownership of real estate. That is the common practice in NYS.

In the dSGEIS, the chart in section 8.4 demonstrates that the DEC acknowledges and reports on setback distances in those states where drilling has been more common. Why would the dSGEIS not have gone on to set such minimum setback to residence standards for NYS? The standard that is currently in place in NYS, which is 100 feet from residential structures and 150 feet from commercial structures, is entirely inadequate to protect the market.

Please note that Texas and several other states where drilling is more common have established minimum setback distances that adhere to the secondary market standards to address these issues in traditional residential mortgage lending. In addition, Texas allows municipalities the home rule authority to increase those distances. Many of the communities with higher density residential activity have, in fact, availed themselves of that jurisdiction and have established minimum setback to dwellings of 800' or more.

FHFA has confirmed that the lender is responsible to assure that the covenants of the mortgage document are met and that they would not buy loans that do not meet these terms.

NYS must address these issues if it wants to preserve the ability for NYS lenders to continue to remain in the residential lending business.

II. Environmental and Community Character Concerns will also impact the mortgage and real estate industries:

Risks to the environment and existing community character have not been resolved or fully mitigated in the EIS document, many of which will provide further risk to the real estate industry, in addition to those created by the failure to meet the secondary market guidelines.

Additional considerations provided by others related to risk of environmental contamination and the change of character in residential communities will also impact the mortgage market and the real estate industry. NYS has not fully studied those impacts, especially the impacts of methane leakage into the water supply and/or of chemical spills on residential property values. The DEC and the DOT should conduct a full study of the impact of increased truck traffic on the real estate market.

III. 300' Setback to dwelling would preserve residential lending ability, but it is not large enough to protect New York real estate.

In Addition, it is my understanding that this request to meet the requirements of the secondary mortgage market does not provide an environmentally safe recommendation, but would provide minimal distance to ensure that extraction law does not conflict with procedural requirements of the real estate industry. Therefore, I urge NYS to establish a minimum setback distance of not less than 1,000 feet, measured on the surface but

extending subsurface, for all drilling and all ancillary activities, from the boundary lines of all parcels containing a residential structure, a school or any public building.

IV: Require complete and timely filing of all lease information, including extensions and memoranda, that must be signed by all parties.

Lenders, private appraisers, Realtors and Public Assessors all require information about which properties are currently leased in order to conduct their business. The EIS recognizes that property values will be affected over the lifetime of wells, in some cases dependent on the distance from those wells. However, the EIS does not recommend any mitigation or even require that lease information be made available in a timely or complete fashion.

Without expressing any opinion regarding the practice of leasing mineral rights, environmental impact or regulations surrounding gas and/or oil leases, REALTORS have highlighted potential conflicts for residential home and land sales that they expect to impact their business. Their experience is that potential buyers are asking whether there are or aren't leases on listed properties or neighboring properties. They cannot obtain full information about a current lease on listed properties or neighboring properties. Currently, only a lease memo is available at the County Clerk's Office – the big problem is that full lease documents are not on file.

The Ithaca Board of Realtors has added a field to their Multiple Listing Service (MLS) for Realtors to indicate whether or not there is a current gas lease on properties offered for sale. However, sellers often believe their leases have expired or are not aware of leases from the past that companies may still attempt to activate. Public Assessors require the information on an annual basis for tax assessment purposes.

To ensure that Realtors can continue to do business, the DEC must require the following:

- NYS must require full disclosure of lease information at the appropriate County Clerk's office.
- NYS must require disclosure of complete lease information within 30 days of signing of gas leases, with signatures required by both parties.
- NYS must require disclosure of gas lease extensions within the same 30 day time period, with signatures required by both parties to the extension.
- NYS must require that property records indicate the existence and terms of a gas lease.
- NYS should provide a GIS layer for Tax Maps to indicate where gas leases are by parcel number.

NYS should revise the EIS and the regulations to require full disclosure of lease information by gas companies at the appropriate County Clerk's office. Further, NYS should require disclosure of complete lease information within 30 days of signing of gas leases as well as disclosure of gas lease extensions within the same 30 day time period,

with signature required by both parties to the extension. NYS must require that property records indicate the existence and terms of a gas lease and should provide that information in the form of a GIS layer for Tax Maps to indicate where gas leases are by parcel number.

V. Require disclosure by landmen of possible mortgage violations prior to signing of gas leases.

The EIS does not establish standards for the purchase of property rights. NYS should require that Landmen provide a plain-language disclosure, prior to the signing of any lease, that the lease might violate the terms of any existing mortgage on the property. It should include a recommendation that the landowner confirm the terms of their mortgage with their own lending institution.

VI. Current and Proposed NYS Setback to Dwelling regulations are inadequate.

Current NYS setback is established at 100 feet from a residential structure to the well head and 150 feet from a commercial structure to the well head. The setback in both cases does not meet any lending guidelines of Fannie, Freddie, SONYMA, FHA or VA based on my research.

Gas companies, and even many NYS real estate attorneys, currently misunderstand a reference in the standard lease form that was used and signed by many landholders in NYS that contains a reference to a 200' setback. THAT CLAUSE IS INADEQUATE, as described below. It does NOT provide the necessary protection to allow for secondary market lending.

As NYS regulations are currently written, and as they are proposed to continue in the sGEIS, if a standard gas lease exists on a residential property, the terms of the lease would make the loan ineligible for consideration or sale by Fannie, Freddie, SONYMA, FHA or VA programs. These type leases existed in the past but have become far more common with the introduction of high volume horizontal hydro-fracking in the last few years. Nor will it be possible to indicate that exceptions are acceptable if "commonly granted" by private institutional lenders as a way to avoid the conflict that exists.

In addition, section 18 and section 21 of a standard Fannie/Freddie mortgage document specifically restricts the home owner from executing a gas leas and from conducting activities that commonly occur with a gas lease.

VII. FHFA and Other National Secondary Market Members Have Confirmed a Conflict.

Members of the Tompkins County Gas Drilling Task Force of the Council of Governments who have worked on this issue have had many detailed communications (directly and indirectly so that our information could be confirmed by various sources) with the agencies and with Federal Housing Finance Agency, (FHFA), the major

regulator of Fannie and Freddie. **FHFA RESPONSES HAVE BEEN QUITE CLEAR THAT THEY WILL CONTINUE TO ENFORCE THEIR CURRENT PROVISIONS TO PROTECT THEIR OWN INVESTMENTS AND THEIR MARKET. The responses have been: 1) that the setback requirements have been in place for many years, 2) there has not been any consideration to modify those requirements and 3) the lender is fully responsible to assure that the loan meets all the requirements outlined in the agencies manuals.**

VIII. We urge NYS to revise the dsGEIS and regulations to meet the needs of the real estate industry and provide the following specific remedies, as requested by this letter from representatives of the lending institutions:

To the DEC:

[As a Mortgage Lender, Real Estate Attorney, Realtor, or Appraiser, I] strongly urge NYS DEC to amend gas/oil drilling regulations to preserve the ability of New York State residents and taxpayers to buy and sell homes in the State and secure residential mortgages. Traditional residential mortgage lending in New York State is in jeopardy if the State's current regulations are not changed to account for the long standing secondary market requirements of Fannie Mae, Freddie Mac, FHA, VA and SONYMA as they relate to setback distances. If traditional residential mortgages are not readily available, the market for buying and selling residential homes will be severely negatively impacted as a result.

The specific issues are highlighted below:

- Surface or subsurface rights within 200 feet of a residential structure would not be acceptable for conventional financing to satisfy Fannie Mae and Freddie Mac requirements as published in their manuals. (Freddie Mac manual Section 39.4, various subsections, similar under Fannie Mae requirements, and adopted by SONYMA in its manual).

Freddie Mac Seller/Servicer Manual Section 39.4(i)

(i) Oil, gas, water and mineral rights
Exceptions for outstanding oil, gas, water or mineral rights are acceptable if commonly granted by private institutional Mortgage investors in the area where the Mortgaged Premises are located, and: • The exercise of such rights will not result in damage to the Mortgaged Premises or impairment of the use or marketability of the Mortgaged Premises for residential purposes and there is no right of surface or subsurface entry within 200 feet of the residential structure, or • There is a comprehensive endorsement to the title insurance policy that affirmatively insures the lender against damage or loss due to the exercise of such rights

- Surface or subsurface rights within 300 feet of a residential structure OR within 300 feet of property boundary lines would not be acceptable for FHA (Department of HUD) financing. (HUD Minimum Property Standards, Section 4150.2; VA commonly accepts the FHA requirements).

HUD Valuation Analysis for Single Family One- to Four- Unit Dwellings (4150.2) Chapter 2, Site Analysis

Section 2-2 SPECIAL NEIGHBORHOOD HAZARDS AND NUISANCES
D. OPERATING AND ABANDONED OIL OR GAS WELLS
Operating and abandoned oil and gas wells pose potential hazards to housing, including potential fire, explosion, spray and other pollution.
1. Existing Construction
No existing dwelling may be located closer than 300 feet from an active or planned drilling site. Note that this applies to the site boundary, not to the actual well site.

An additional consideration is title insurance. Title insurance has become a requirement for the vast majority of residential mortgages. If a gas lease exists on a residential property, the title policy is ineffective to protect the lender against common activities undertaken pursuant to a gas lease.

The commonly accepted mortgage document utilized in New York State is the standard Fannie Mae/Freddie Mac form last revised in 2001. Section 18 and Section 21 of that mortgage form specifically prohibit activities that gas leases commonly allow and create a conflict with long standing secondary market practices and requirements.

Communication with the secondary market agencies noted and their regulator, the Federal Housing Finance Agency (FHFA), has resulted in a restatement of the requirements highlighted above and reaffirmation of the responsibility of the lenders to enforce these requirements and the setback distances noted.

In the dSGEIS released in September 2011, Section 8.4 details setbacks from residential properties in several other states where gas/oil drilling has occurred in the past. Many of the states highlighted in this section of your report require setbacks that conform to or satisfy traditional secondary market residential lending requirements.

I strongly urge New York State to take similar decisive action to preserve the rights of the State's residents and taxpayers to own and finance a home. The specific requests to address these issues are as follows:

- Revise the DEC Regulations under Environmental Conservation Law Title 23, DEC Regulation Part 553.2 to establish a minimum setback distance of

not less than 300 feet, measured on the surface but extending subsurface to preserve the fee simple ownership of all subsurface rights, for all drilling and all ancillary activities, from the boundary lines of all parcels containing a residential structure, a school or any public building.

- Revise the dSGEIS by completing Section 7.1.12.1 with the specific setback requirements as follows: A minimum setback distance is established of not less than 300 feet, measured on the surface but extending subsurface to preserve the fee simple ownership of all subsurface rights, for all drilling and all ancillary activities, from the boundary lines of all parcels containing a residential structure, a school or any public building.

Taking these actions will preserve the ability of New York State consumers and taxpayers to buy and sell homes and secure traditional residential mortgage financing that satisfies the requirements of current programs from Fannie Mae, Freddie Mac, FHA, VA and SONYMA, and would take steps to avoid the exclusions from coverage provided under standard New York State residential title insurance policies.

IX: Provide equal protection for all watersheds:

We urge NYS to provide the same protections to ground and surface water in all geographic regions of the state that it proposes for the NY City and Syracuse watersheds.

X: Setback to Structures Shown in Chapter 11, Table 11.1:

Table 11.1, Page 1096: States that Section 7.1.12.1 "Specifies setback distances from structures, surface waters, public/private water wells, and water supply springs." However, there is no section 7.1.12.1. That needs to be added. Setbacks to structures must be set, **not only** as per the above requirements of the mortgage market, described above, but to ensure distances that are truly safe enough to mitigate the effect of placing such activity in residential neighborhoods. Further, communities must be allowed, under home rule authority, to set for themselves the minimum setback distances from structures that will preserve their community character as determined by the local community..

XI: 8.4 Other States Provide More Stringent Protection for Homeowners and the Real Estate Industry:

Section 8.4 states, "The Department committed in Section 2.1.2 of the Final Scope for this SGEIS to evaluate the effectiveness of other states regulations with respect to hydraulic fracturing and to consider the advisability of adopting additional protective measures based on those that have proven successful in other states for similar activities."

However, the DEC failed to note or follow the example of other states that set setback

distances to dwellings that are at or very far in excess of the minimum requirements of the secondary mortgage market.

Table 8.3 discusses setbacks, recognizes larger setbacks in other states, but failed to find the 800' and greater setback distances that are set in higher density residential communities in Texas and other states more experienced with gas production activities.

NYS should follow the lead of Texas and other states that allow home rule for municipalities, so that communities can determine appropriate limits on setback distances between drilling activities and dwellings and property boundaries, as well as other limits to preserve property values.

In addition, in order to preserve property values, NYS must require companies to honor existing deed restrictions that have been determined by landowners.

XII: Housing Section *2.4.11.3 Housing*
Note this section discusses types of housing units and numbers related to owner occupied units without any discussion of the impact the above stated mortgage lending problems for the future viability on the residential mortgage market. To be complete, such information and proposed mitigation activities must be researched and added to this section.

XIII: Projections in the Socio-economic Section 8.4, in particular Table 6.3:

Consultants were retained to write Section 8.4 regarding Economic Impact:

The consultants were only able to show a projected "up-side" of economic activity in the range of a $2.4 billion estimate, That is the largest figure given, which is for employee earnings and is the maximum economic impact they are projecting from drilling. Note how insignificant that is by state standards. Although there are certain individuals and businesses, primarily trucking, gravel, and short-term hotel businesses that might make great gains, contrast that with NYS Department of Agriculture, Census, I Love NY, and other figures that show CURRENT economic activity in just the core area of the Marcellus Shale of $17 - 20 BILLION a year for just activities that already exist in direct competition that will most certainly be impacted by drilling (things like hunting, fishing, tourism, agriculture, grapes and wine, etc.) It doesn't include other businesses. Over 30 years, this would be $510 - $600 BILLION. And that assumes only the current level, no inflation - with no investment and growth in true, sustainable, development in those or other realms.

On an annual basis, the total employee earnings impacts, even at their maximum projection, at the $2.4 Billion over 30 years, comes to an average of $80 million a year (although it is projected to build gradually and fall over that time). Although that sounds high to the lay ear, the comparison with Wildlife watching, hunting and fishing, Dairy products, farm receipts from agriculture, the grape and wine industries, and Tourism easily show those activites at figures many,many times higher.

In that same section:
Employment figures in the study are projected to be MAXIMUM of 0.2% - 0.7% of NYS workforce. (That is a range of two tenths of a percent under the low scenario to seven tenths of a percent under the high scenario.)

Total employee earnings projected in the study show a MAXIMUM of 0.1% to 0.5% of NYS wages.

XIV. Conclusion:
Section 8 does not address the question of whether one-tenth to one-half a percent of gain in earnings is worth risking the environmental future of the whole region. The cited gains that can be achieved, given the current technological capability of this industry, are not large enough to warrant the risk that the whole state might have to assume the burden of costs of cleanup in the future. NYS should reevaluate the risks and potential benefits when technological advances are achieved in extraction methodology.

XV. ATTACHMENT:

Secondary Mortgage Market additional detail can be found in the White Paper on Residential Lending for Gas and Oil Leases, prepared by the Tompkins County Council of Governments, Task Force on Gas Drilling, Assessment and Land Valuation Subcommittee.