

1 ISSUES CONFERENCE VOLUME 3

2

3 In the Matter of the Applications of

4 CROSSROADS VENTURES, LLC

5

6 for the Belleayre Project at Catskill Park
7 for permits to construct and operate pursuant to
8 the Environmental Conservation Law

8

Margaretville Fire House
Margaretville, New York
June 8, 2004

9

10 B E F O R E :

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12 Administrative Law Judge

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1 (June 8, 2004)

2 (9:27 A.M.)

3 P R O C E E D I N G S

4 ("CROSSROADS VENTURES ROUTE 28

5 CORRIDOR SITE VISIT SCHEDULE AND MAP RECEIVED

6 AND MARKED FOR IDENTIFICATION AS OFFICE OF

7 HEARINGS EXHIBIT NO. 13, THIS DATE.)

8 ALJ WISSLER: It is June the 8th, 2004
9 and this is the Issues Conference in the
10 matter of the applications of Crossroads
11 Ventures, LLC continued. The record should
12 reflect that yesterday, Monday, June the 7th,
13 2004, we had a site visit visiting many of the
14 neighboring hamlets, and the itinerary area of
15 that site visit will be submitted into the
16 record as Office of Hearings Exhibit Number
17 13.

18 A couple of preliminary matters before
19 we begin. The first is I have received a
20 motion from CPC received by my office on June

21 the 3rd, 2004 making an application for
22 discovery pursuant to Article 31 of the Civil
23 Practice Law & Rules, CPLR, for the most
24 current version of the Unit Management Plan
25 for the Belleayre Mountain Ski Center. That
(COLLOQUY ON MOTION)

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1 has been responded to by the Applicant's
2 counsel, and it's my understanding that staff
3 will be making a decision with respect to the
4 motion this morning.

5 what I have asked counsel to do is to
6 provide me with some colloquy with regard to
7 the motion, and in that regard I'm going to
8 first ask Mr. Gertsman to tell us the
9 substance of the motion and the basis that he
10 believes that the relief he seeks should be
11 granted. And I will allow response first by
12 staff and then the Applicant.

13 Mr. Gertsman.

14 MR. GERSTMAN: Thank you, your Honor.
15 First let me state that I have agreed to
16 accept papers from the DEC staff at some later
17 point this week. Since Mr. Altieri was out in
18 the field with us yesterday, he did not have
19 an opportunity to review the documents that
20 were prepared by his staff, and so at his
21 convenience late today or tomorrow, we're
22 certainly willing to accept those papers. We
23 would also ask your Honor for an opportunity
24 for reply as I requested in the Notice of
25 Motion.

(COLLOQUY ON MOTION)

6 with the director of the Belleayre Mountain
7 Ski Center, that a significant expansion is
8 being called for. The Unit Management Plan
9 has been discussed in the local media. The
10 Unit Management Plan Draft has been withheld
11 from us, the supporting documents associated
12 with the expansion have been withheld from us
13 in response to my Freedom of Information Law
14 request.

15 Ordinarily under 624, the Freedom of
16 Information Law process is what we're entitled
17 to prior to an issues ruling. However, due to
18 the Commissioner's unique role as the --
19 essentially the lead agency under SEQRA for
20 the Crossroads Ventures project and also as
21 the, essentially, lead agency for any
22 expansion that might take place at
23 Belleayre -- we believe that full disclosure
24 on the record is absolutely essential.

25 There are cumulative and synergistic
(COLLOQUY ON MOTION)

□

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1 impacts that would be associated with the
2 expansion of the Belleayre Mountain Ski
3 Center, including, as you have heard already,
4 traffic impacts, secondary growth impacts,
5 potential visual impacts, although we will
6 have to explore that later, certainly
7 community character impacts that all are
8 involved here.

9 We also believe there are very
10 significant potential cumulative impacts in
11 terms of the water budget for both the

12 expansion and for the project. we believe
13 that the project is already constrained by a
14 significant scarcity of water resources in the
15 project area, and that if expansion of the
16 Belleayre Mountain Ski Center calls for
17 additional water withdrawals, additional use
18 of surface waters in the area, there's a
19 potential for further degradation and impact,
20 and a very significant one to the trout
21 fisheries in the area and aquatic habitat.
22 You will hear testimony later on from our
23 experts concerning the existing state of
24 affairs.

25 The fact of the matter is, your Honor,
(COLLOQUY ON MOTION)

□

1 that the Commissioner has the responsibility ²⁹²
2 under the Environmental Conservation Law to
3 evaluate cumulative impacts, both under SEQRA
4 but also Article 3, which gives the
5 Commissioner broad authority to take into
6 account those impacts. We believe it would
7 be, essentially, a violation of the public
8 trust for the Commissioner to ignore a project
9 that is, in fact, being formulated and may
10 have, in fact, been formulated within the
11 Department while going forward with an
12 evaluation of the environmental impacts of the
13 Crossroads Ventures project.

14 we have been told indirectly -- I
15 certainly did not have conversations about
16 this with Mr. Lanza himself, but Mr. Lanza has

17 told members of the Coalition that the UMP has
18 been withdrawn so as not to implicate the
19 Belleayre Mountain Ski expansion with the
20 Crossroads Ventures project. That's contrary
21 to what we believe is the Commissioner's
22 responsibility here, to evaluate the full
23 impacts to this community, to the natural
24 resources in the area.

25 The Commissioner has authority for the
(COLLOQUY ON MOTION)

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1 care and the custody of the forest preserve.
2 we believe there are implications to the
3 forest preserve and its use. we believe that
4 within those responsibilities, the
5 Commissioner has the responsibility ultimately
6 to disclose this information and to make it
7 part of the record in this proceeding.

8 I anticipate, without having read
9 these papers now, that both the Applicant and
10 DEC staff will claim that since there is no
11 final application on the table, if you will,
12 that this is not the kind of -- this is not
13 right for a cumulative impact review, that the
14 plans are continuing to be formulated within
15 DEC, and therefore there's nothing for us to
16 evaluate. Or that, similar to situations
17 where there are private Applicants, there is
18 no application filed with a Planning Board or
19 Town Board or even with DEC, and therefore
20 there is nothing to evaluate in the context of
21 cumulative impacts.

22 we believe that this is a unique

23 situation because of the nature of the direct
24 action being contemplated by DEC. If this
25 were a private applicant, that would be
(COLLOQUY ON MOTION)

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1 subject to a different discussion and a
2 different debate, which I think we'll probably
3 have during the cumulative impact discussion
4 in this Issues Conference.

5 We believe that the aspect of this
6 project that involves a direct action by DEC
7 and the Commissioner makes this extraordinary
8 circumstances and supports our claim that this
9 is extraordinary circumstances which warrants
10 disclosure.

11 ALJ WISSLER: Let me just -- so that I
12 am clear. The Commissioner will have the
13 ultimate say with respect to permits and SEQRA
14 findings with respect to this project.

15 MR. GERSTMAN: Yes, your Honor.

16 ALJ WISSLER: And she presides over an
17 agency, Division of Operations runs Belleayre
18 Ski Center, so she wears that hat too, and
19 because she's wearing both of those hats, that
20 creates the extraordinary circumstances?

21 MR. GERSTMAN: Yes, your Honor, we
22 believe it does. We believe that the
23 geographic proximity of the projects,
24 proximity in time in terms of the discussion
25 of the issues, we believe that the close
(COLLOQUY ON MOTION)

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1 interrelationship between the impacts of the

2 project that's before your Honor and the
3 Belleayre Mountain Ski Center also create
4 those unique circumstances. So yes, your
5 Honor, I think that dual role of the
6 Commissioner presents extraordinary
7 circumstances and that the unique
8 responsibility of the Commissioner in this
9 proceeding, and as the custodian of the forest
10 preserve and the operator ultimately of the
11 Belleayre Mountain Ski Center, provides those
12 unique circumstances.

13 ALJ WISSLER: Mr. Gertsman, let me
14 share a couple concerns with you with respect
15 to your motion. A couple things trouble me.
16 One is the issue of whether the extraordinary
17 circumstances as contemplated by 624.7(a)
18 actually exist, or whether that means --
19 extraordinary circumstances means something
20 somewhat more factual, that because of the
21 time of the year that certain tests need to be
22 done on a site or certain evidence needs to be
23 gathered or certain data needs to be obtained
24 because failure to do so would impede the
25 Issues Conference process. I don't know that
(COLLOQUY ON MOTION)

1 I'm hearing that. I want you to know that up²⁹⁶
2 front. I don't know that I'm hearing that in
3 this case.

4 Secondly, I'm troubled by the fact
5 that where we are in the process is we are at
6 the Issues Conference stage. The only
7 threshold that you have to make at this point

8 is to show that an issue is substantive and
9 significant, which to me suggests that what
10 you are pointing out is that there are areas
11 where we ought to inquire further, and that we
12 need to inquire further in those areas because
13 it may affect permit issuance, it may affect
14 some condition of a permit, it may affect the
15 scope of the project that goes forward, if any
16 project goes forward at all.

17 what we're really doing now, again, is
18 framing those issues. Your motion, the facts
19 you articulate in your motion don't really
20 tell me anything more than what you told me in
21 your petition. So I'm trying to understand
22 how your offer of proof with respect to
23 whether or not an issue is adjudicable in this
24 matter somehow will be left defective and you
25 will fail to meet that threshold unless you
(COLLOQUY ON MOTION)

□

1 have this management plan in front of you. 297

2 There are quotes from Tony Lanza about
3 the number of skiers that Belleayre will cater
4 to, 225,000, maybe 250,000, instead of 4500
5 skiers a day, 9,000 skiers a day. You have
6 articulated that, and you have said given
7 these facts, maybe we ought to look further
8 into this. Isn't that all we're doing at the
9 Issues Conference stage?

10 It may well be that if cumulative
11 impacts are determined by me and upheld by the
12 Commissioner to be an issue for adjudication,

13 it may well be at some future time, yeah, we
14 ought to have a look at what the current plan
15 is. But it seems to me that we're not
16 necessarily there yet. And I need to have you
17 tell me how. Judge, I have an issue here, I
18 think there's an issue here on cumulative
19 impacts but I can't make that argument, I
20 can't raise that issue unless I have this.
21 And I'm not hearing that.

22 You know, with respect to the memo
23 that's attached and the amendment to the Unit
24 Management Plan and so forth, you also have a
25 FOIL request out there. And, you know, there
(COLLOQUY ON MOTION)

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1 may be an argument that you can make with
2 respect to your right under FOIL to documents
3 where there has been some kind of final agency
4 action. What I'm talking about today is your
5 Article 31 discovery application. This has
6 nothing to do with your FOIL request. Those
7 two things trouble me.

8 We are only at the Issues Conference
9 stage. The issue right now is have we raised
10 an issue that is substantive and significant.
11 And you need to tell me -- we may never get to
12 that if I can't find that the extraordinary
13 circumstances here exist; but number 2,
14 assuming arguendo that I do, you need to tell
15 me how your issue fails with respect to
16 cumulative impacts -- will fail -- and you
17 will not make your threshold unless you have
18 that report. Because to me, that is the

19 relevance of that report for this proceeding.
20 If you don't need that, if you are saying:
21 Tony Lanza has made these comments, that
22 should be enough, Judge. And it may well be
23 that staff will say, yeah, he said those
24 things. So this great increase in the number
25 of skiers at Belleayre in my view, in terms of
(COLLOQUY ON MOTION)

1 your offer of proof, it's on the record. You²⁹⁹
2 got it. Why do you need that Unit Management
3 Plan at this point?

4 MR. GERSTMAN: Thank you, your Honor.
5 Let me attempt to respond to the questions
6 that you've raised. First, we're clearly at a
7 disadvantage at this point because of a denial
8 of our Freedom of Information Law request.
9 Department chose not to even redact those
10 opinions -- those matters of opinion and
11 provide us with data or factual information
12 that was set forth in either the Draft Unit
13 Management Plan or any supporting documents
14 concerning that plan that would support the
15 proposed Belleayre Mountain ski expansion.

16 I'm certainly not going to concede,
17 your Honor, but for this information my offer
18 of proof fails on cumulative impacts, because
19 we believe that we have made a prima facia
20 case for cumulative impact evaluation that has
21 not been addressed in the Draft Environmental
22 Impact Statement. So I'm certainly going to
23 suggest to you that in order to insure that I

24 meet my burden in the Issues Conference, which
25 is to show substantive and significant issues
(COLLOQUY ON MOTION)

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1 that warrant adjudication based upon the
2 potential for permit denial or substantial
3 permit conditions, that my burden as an
4 intervenor is particularly great, and that in
5 order to establish that burden and in order to
6 establish a record for which the Commissioner
7 -- on which the Commissioner and yourself can
8 base the findings for issues determination and
9 party status, that this information, in fact,
10 is critical, that my burden of proof is great.
11 I need to show experts and factual basis for
12 achieving the ultimate result, which is to
13 convince you and the Commissioner that there's
14 something substantive and significant here.

15 Anticipating DEC staff and the
16 Applicant's arguments, they're going to say:
17 You have one staff member, albeit the director
18 of Belleayre Mountain Ski Center, who is
19 making statements on the public record and is
20 going out with meetings and talking about this
21 expansion. That's not a final agency action.
22 It's a final agency action when the
23 Commissioner signs the document that says
24 there's a Unit Management Plan approved for
25 Belleayre Mountain Ski Center, which includes
(COLLOQUY ON MOTION)

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1 an expansion. I don't know the timing of
2 that. I don't know what kind of documents
3 have been put forward to support that. I

4 imagine there have been engineering reports,
5 there has been a water study, there's been an
6 evaluation of marketing and feasibility for
7 that information, especially since Mr. Lanza
8 indicated that the document would be released
9 shortly, and the newspaper articles indicate
10 that. And somehow that was pulled back by the
11 agency. If you believe what members of the
12 Coalition say, that was because of the desire
13 to avoid complications of review of this
14 project with that.

15 So in terms of the factual showing, we
16 think that the information that's provided
17 -- inevitably provided by Department
18 consultants and Department staff concerning
19 water withdrawal, water usage, traffic,
20 marketing and feasibility, and potential
21 cumulative impacts on growth in the area, we
22 believe all that information that goes into
23 formulation of a major expansion to the
24 Belleayre Mountain Ski Center is critical to
25 this fact finding process. It's critical to
(COLLOQUY ON MOTION)

□

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1 our ability to convince you and the
2 Commissioner that there are substantive and
3 significant issues concerning cumulative
4 impact.

5 It's not just the preliminary
6 statements of Tony Lanza that are important
7 here, but the agency as a whole that has moved
8 forward with this planning process -- not to

9 the point of final. Again, the reason was
10 given that they don't want to implicate the
11 process, but moving forward almost to the
12 point of release and then pulled back.

13 We would certainly think that the
14 issue of whether or not there are
15 extraordinary circumstances in discovery
16 includes all the factual scenarios that you
17 have set forth, but I don't think from my
18 reading of 624 and the cases under 624, and
19 there are very limited cases that interpret
20 extraordinary circumstances, that it's limited
21 to those factual circumstances where somebody
22 has to do four-season testing and there needs
23 to be access to the site immediately because
24 there's a potential to determine whether an
25 endangered or threatened species exists in a
(COLLOQUY ON MOTION)

1 particular habitat. I don't know that that ³⁰³
2 precedent is out there that limits our inquiry
3 into extraordinary circumstances.

4 Again, and I don't want to repeat
5 myself, these are extraordinary circumstances.
6 The timing of this Issues Conference, the
7 timing of the proposed Belleayre Mountain Ski
8 expansion, the ability to move ahead with the
9 hearing on the environmental impacts with this
10 project with blinders on, and excluding the
11 evaluation of the impacts associated with the
12 project next-door -- I'm sorry, in the middle
13 of the proposed Crossroads project -- would be
14 extraordinary circumstances in my mind, not

15 because there are factual issues that we need
16 to run out and get right away, because they're
17 there, they're there already, but because the
18 Commissioner has this responsibility and role
19 under the Environmental Conservation Law to
20 insure environmental protection, to evaluate
21 the cumulative impacts and to protect the
22 forest preserve. Throughout the Environmental
23 Conservation Law, the Commissioner has this
24 authority which essentially would be
25 undermined by ruling, refusing to allow us
(COLLOQUY ON MOTION)

□

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1 access to this information.

2 As for the procedural step, your
3 Honor, we believe the procedural step is
4 satisfied by this motion, and that if
5 Department staff want to assert that there
6 should be some protective order applied for,
7 that the time to do so is in response to this
8 motion. 624 is not entirely clear on that
9 issue as to how the process unfolds and the
10 interrelationship between 624.7 and Article
11 31, but I believe there's authority under
12 624.7 to immediately direct disclosure of the
13 documents in question, and that staff's
14 opportunity to request a protective order
15 based upon executive privilege, or whatever
16 other confidentiality that they might come up
17 with, would be in response to my motion. And
18 I would certainly consent if that's your
19 Honor's ruling for an extension for them to do

20 that. Thank you, your Honor.

21 ALJ WISSLER: Ms. Krebs.

22 MS. KREBS: Your Honor, the staff's
23 basic point of view is that, first of all,
24 that before there's an actual release of the
25 Draft UMP, that we simply can't rely on any
(COLLOQUY ON MOTION)

1 facts or thoughts or ideas of the Department 305
2 staff that may or may not be, in whatever form
3 they may be in, before a Draft UMP is released
4 by the Commissioner. There simply may be too
5 many changes. There are many levels of
6 review. I think counsel for CPC mentioned
7 several of them regarding marketing, regarding
8 the number of studies reviewed by different
9 program staff. I imagine there's a budgetary
10 constraint, and before the actual release of
11 the Draft UMP by the Commissioner, I feel it
12 is not appropriate to put those thoughts into
13 the record.

14 ALJ WISSLER: You're not saying that
15 Mr. Lanza was somehow incorrect in the
16 statements that he made, but rather that the
17 plan, the proposed Belleayre Mountain project,
18 is still under review and you might have
19 something where you service so many skiers a
20 day, but it might be a lesser number; is that
21 what you're saying?

22 MS. KREBS: I'm saying the actual
23 service of skiers per day should be known up
24 to last winter, your Honor, I'm saying that a
25 Draft UMP is in the future. The current one

□

1 actually says it's for a ten-year period, the ³⁰⁶
2 current 1998 UMP. A new Draft UMP is looking
3 into the future and it's predicting what
4 changes might occur at the ski resort.
5 Factually I think we can rely on the 1998 Unit
6 Management Plan, and skier attendance numbers
7 through the last winter.

8 There are factual things -- and I
9 believe Mr. Gertsman has received a number of
10 documents under his FOIL request, and he did
11 receive a number of documents. The ones that
12 were withheld, I believe were appropriately
13 withheld pursuant to FOIL guidelines. So I
14 don't think CPC's motion seeks relevant
15 information. I don't think it will assist the
16 final arbitrator's decision in this proceeding
17 in determining traffic or community character
18 or cumulative impacts. I think it may
19 actually cloud the proceedings because there
20 might be statements, rough draft notes from
21 different staff that are contradictory to each
22 other, and the Final UMP could be completely
23 180 degrees from whatever staff is thinking
24 about.

25 I think Mr. Gertsman agreed that -- I
(COLLOQUY ON MOTION)

□

1 think he stated that we don't know exactly ³⁰⁷
2 when it will be released, which is true. So
3 to wait for the cumulative impact portion or
4 to put off the Issues Conference while we're

5 waiting for a Draft UMP to be released by the
6 Commissioner I think is not appropriate
7 either.

8 We are going to make a motion to
9 oppose the discovery motion, and perhaps a
10 protective order under 624.7. I did want Mr.
11 Altieri to review those papers, and Mr.
12 Gertsman has kindly allowed us an extra day
13 for that since Mr. Altieri was on the site
14 visit.

15 ALJ WISSLER: Initially it's staff's
16 position that the application under Article 31
17 of the CPLR ought to be simply denied?

18 MS. KREBS: Yes, your Honor, although
19 I was treating it more as an application under
20 624.7(a) for extraordinary circumstances, and
21 (c), by permission of the ALJ. Since we are
22 in the Issues Conference, I don't think 624.7
23 (a) actually applies, the standard of the
24 exceptional circumstances because I think it's
25 by permission of your Honor but --
(COLLOQUY ON MOTION)

□

1 ALJ WISSLER: That's an interesting
2 comment. You're saying if the ALJ gives
3 permission, it doesn't matter whether
4 extraordinary circumstances exist?

5 MS. KREBS: The way I read it, your
6 Honor, but I actually came to that conclusion
7 based in part on Judge Goldberger's decision
8 in, I believe it's Palumbo Block.

9 ALJ WISSLER: The one cited by Mr.
10 Gerstman?

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11 MS. KREBS: Yes, and it will be cited
12 by myself in my opposition papers. In that
13 case, Judge Goldberger believed since the
14 Issues Conference had started, that 624.7(c)
15 applied. She applied certain standards which
16 she believed the intervenors did meet in that
17 case, but I would submit, your Honor, that CPC
18 has not met those standards.

19 ALJ WISSLER: When are you going to
20 have your papers to Mr. Gerstman?

21 MS. KREBS: We actually can submit it
22 now, your Honor, if that is helpful to your
23 Honor.

24 ALJ WISSLER: Very helpful.

25 MS. KREBS: But we would request that,
(COLLOQUY ON MOTION)

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1 at least by my reading of 624.7, in the
2 protective order that there is a 10 day --

3 ALJ WISSLER: Let me tell you what's
4 going to happen. You're going to submit your
5 papers to Mr. Gertsman. He has Mr. Ruzow's
6 papers. I will first rule on the motion as to
7 whether or not there will be discovery, then I
8 will give you an opportunity to file any kind
9 of motion that may be appropriate with respect
10 to that.

11 MS. KREBS: Thank you, your Honor. I
12 have the papers here. (Indicating).

13 ALJ WISSLER: Go ahead.

14 MS. KREBS: I just want to say a few
15 other things. With all due respect to Mr.

16 Lanza, he is certainly an enthusiastic
17 proponent of the ski center, which is his
18 role.

19 ALJ WISSLER: Staff would agree that
20 there is some expansion planned for Belleayre
21 Mountain; am I right?

22 MS. KREBS: There is currently an
23 expansion actually. There was a trail last
24 year, there was a trail two years ago. That's
25 under the current 1998 Unit Management Plan.
(COLLOQUY ON MOTION)

1 ALJ WISSLER: So there is going to be ³¹⁰
2 more there than there is now?

3 MS. KREBS: Yes, although it's limited
4 to 25 miles of trails by the New York State
5 Constitution. I'm not denying that some
6 people are thinking about a new Draft UMP, but
7 Department staff's position is it has not
8 risen to the level where it's released to the
9 public.

10 ALJ WISSLER: That, I understand, but
11 so the record is clear, we are talking about
12 an expansion, so when Mr. Gertsman speaks
13 about that expansion and the impacts of that
14 expansion in his petition, he is not just
15 -- he is not saying something that isn't, in
16 fact, true. There is going to be some kind of
17 expansion there?

18 MS. KREBS: That's kind of speculative
19 too, your Honor. My -- at least on
20 information and belief, there are discussions
21 concerning how large Belleayre Mountain Ski

22 Center should be. It is limited by 25 miles
23 of trail. I can't really comment on the final
24 version. It's very probable, I guess, that
25 there will be expansion, but until the final
(COLLOQUY ON MOTION)

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1 document is released, I truly can't say.

2 As to Mr. Lanza's comments about its
3 imminent release, that which was cited by
4 counsel for CPC and attached as exhibits, I
5 think one of the statements was in 2001, I
6 think one of the statements was in 2003.
7 Certainly, again, Mr. Lanza is an enthusiastic
8 proponent of the ski center and he doesn't
9 speak for the final arbitrator, the
10 Commissioner.

11 ALJ WISSLER: You would agree with me,
12 however, that we are only at the Issues
13 Conference stage; correct?

14 MS. KREBS: Yes, I would agree we're
15 only at the Issues Conference.

16 ALJ WISSLER: And at the Issues
17 Conference stage, we are only framing the
18 issues that we may want to adjudicate?

19 MS. KREBS: Yes.

20 ALJ WISSLER: And at the Issues
21 Conference stage, what we're doing here today
22 is not evidence; is that correct?

23 MS. KREBS: That's correct.

24 ALJ WISSLER: So they're offers of
25 proof; am I right?

(COLLOQUY ON MOTION)

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MS. KREBS: Yes.

ALJ WISSLER: And an attorney needs to have a good faith basis to make that offer of proof; right?

MS. KREBS: Yes.

ALJ WISSLER: So maybe comments by Mr. Lanza could be used as a good faith basis by counsel to make an argument; am I right?

MS. KREBS: Yes, your Honor.

ALJ WISSLER: Anything else?

MS. KREBS: I do believe we are at the Issues Conference and that the CPC has made, I believe, a factual basis concerning the cumulative impacts. I would think that the FOIL review process would be appropriate, perhaps more appropriate between now and should this become an issue, between now and the adjudication, certainly the FOIL process can be availed by CPC. Since it hasn't gone through an in camera review, the FOIL review process, your Honor, we don't know what's been withheld. And certainly if Mr. Gertsman is looking for factual tabulations of data, that's one thing. If he's looking for department staff's thoughts on the matter,
(COLLOQUY ON MOTION)

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that's something else.

MR. RUZOW: Your Honor, with respect to the first question of the relationship of 624.7(a) and the issue raised by Ms. Krebs' comments, I think you can't read 624(a) without 624.7(b), you have to read them

7 together because (b) speaks about when you can
8 have discovery without the permission of the
9 ALJ, and it provides for once the issues have
10 been created. And so there's, in effect --
11 there would be a gap in reading just (a) the
12 way -- I think it was actually ALJ Dubois is
13 Palumbo in the decision, but reading them
14 separately --

15 ALJ WISSLER: Judge Goldberger did one
16 too.

17 MR. RUZOW: Then there are two. With
18 respect to -- at least with respect to that, I
19 believe extraordinary circumstances does apply
20 here, and that they have not been established.

21 Secondly, I want to address the issue
22 of the legal issues. Counsel has argued facts
23 because the law is not with him. The legal
24 issues are that it is not relevant. And it is
25 not relevant. A potential Draft UMP, which is
(COLLOQUY ON MOTION)

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1 what we're talking about -- Mr. Gertsman
2 talked about Final UMP, the Commissioner's
3 final action. what we're talking about here
4 is whether or not a proposed draft amendment
5 to a UMP, which is discretionary on the part
6 of the Department because the current UMP is
7 good for 10 years from 1998, is the issue. I
8 would argue, your Honor, that whatever Mr.
9 Lanza says in the public is not probative
10 because at the end of the day, it is -- unless
11 and until the Department follows its own UMP

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12 planning process, it gathers information, it
13 distills that information, it may debate that
14 information in-house. Until the Commissioner
15 signs off on a Draft UMP to the public, which
16 then has its own public comment process, you
17 don't have a proposal for action. And now
18 taking that as a principle and applying it to
19 the SEQRA process for cumulative impact
20 review, for any environmental impact review --
21 the case law, and we've cited it, the
22 Programming Systems case in our memo, says
23 that until that occurs, until you have a
24 specific project proposal for action, the
25 environmental review process can't apply to
(COLLOQUY ON MOTION)

1 it. why? Because it's speculative. It's too³¹⁵
2 uncertain.

3 We don't know whether Mr. Lanza and
4 the Department at some point in time will
5 propose a decrease -- taking a trail out
6 because it's not used or it's not effective
7 enough, and adding a different trail. Or
8 whether he'll say: You know what, if we could
9 get the funding, let's put 500,000 skiers a
10 day. All of those things are never going to
11 be certain until the Department actually
12 proposes something.

13 what would we assess? what specifics
14 would we look at? Is there going to be a new
15 lodge? Is there going to be a new parking
16 lot? Is there going to be a trolley system?
17 Is he going to put a gondola into Pine Hills?

18 we don't know any of those things. It's all
19 speculative. So what would we assess from our
20 project's impacts -- which are specific and we
21 have assessed those? How would we combine
22 them? It's just speculation. And the Court
23 of Appeals decision, Industrial Liaison
24 Coalition, says you don't have to look at
25 speculative impacts. The policy reasons
(COLLOQUY ON MOTION)

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1 against it for environmental review are
2 lacking.

3 ALJ WISSLER: Should there be any
4 difference in the analysis when we're at the
5 Issues Conference stage where we're framing
6 the issues? What you're saying may well mean
7 that if cumulative impact is found to be an
8 issue and there is no final plan, that it will
9 be too speculative and CPC wouldn't be able to
10 prevail on that issue?

11 MR. RUZOW: That's correct.

12 ALJ WISSLER: But we're not at the
13 adjudicatory stage, we're not even at that
14 weighing stage yet, we're framing issues right
15 now.

16 MR. RUZOW: In framing issues, you
17 need to look down the road to what -- this is
18 critical for the application of the SAPA
19 obligations that, in effect, guide the 624
20 process. We are looking at potentially
21 substantive and significant issues that can
22 affect permit issuance in a material way or

23 conditions, major modifications to the project
24 or significant conditions.

25 If what Mr. Gertsman is looking for is
(COLLOQUY ON MOTION)

1 a level of analysis of a speculative plan for ³¹⁷
2 which the SEQRA law -- the law itself does not
3 recognize its applicability, then what are we
4 arguing about at an Issues Conference? We are
5 wasting our time and efforts looking at things
6 that will never ripen to that point in time.
7 Just because --

8 ALJ WISSLER: May never ripen.

9 MR. RUZOW: May never, but at this
10 point in time, we don't know that, and there's
11 nothing in the SEQRA process that says the
12 world stops, waiting for some other agency to
13 take some action down the road. You proceed
14 with the information you have in front of you.
15 And you look at the plans that are in effect,
16 the ones that have been approved and adopted.
17 And we're looking at them, the Belleayre 1998
18 Unit Management Plan, the 1985 Catskill Master
19 Plan. There is a proposed amendment to that,
20 so you have at least a proposal to consider in
21 terms of that, but in the absence of a formal
22 proposal by somebody, this is sheer
23 speculation and we don't believe --

24 ALJ WISSLER: Now Mr. Ruzow, are you
25 then saying that I should grant the
(COLLOQUY ON MOTION)

1 application under Article 31 to compel ³¹⁸
2 discovery of such a final plan if it exists?

3 MR. RUZOW: You heard from the
4 Department that it doesn't exist. Your Honor,
5 it would be obvious to all if the plan
6 existed, it would be out there. They have an
7 obligation under the Unit Management planning
8 process to publish it. It isn't there. It
9 hasn't happened.

10 I don't believe, your Honor, with all
11 due respect, I don't think you have the power
12 to compel the Department to propose a plan.
13 That's what you would be doing. It has no
14 legal status, either for SEQRA purposes or for
15 the Department's planning process, when it's
16 an inchoate thought process within the
17 Department. That's the dilemma.

18 ALJ WISSLER: If it is?

19 MR. RUZOW: If it is, but we don't
20 know what it is. It doesn't have any
21 boundaries, and there's a reason why FOIL says
22 you don't have access to things that are, in
23 effect, intra-agency deliberations. The
24 public interest is not served. It is a
25 statutory exception. That poses a dilemma --
(COLLOQUY ON MOTION)

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1 certainly for the intervenor -- it poses a
2 dilemma for us. We could not study that
3 because it didn't exist.

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4 So to suggest now that this should be
5 discoverable and therefore it should be used
6 in the context of evaluating our project is
7 incredibly damaging and prejudicial to the

8 Applicant. And to engage in that speculation,
9 in my judgment, is not the appropriate action
10 for this proceeding or the Commissioner.

11 MR. GERSTMAN: Unless DEP has
12 comments, may I reply?

13 MR. GREENE: The City has no comments.

14 MR. GERSTMAN: I just want to respond,
15 your Honor, to a couple of things that I have
16 heard from both DEC and from Mr. Ruzow.
17 First, I find it extraordinary that the
18 Department staff can sit here and argue that
19 the environmental impacts of a project which
20 has gone through a level of review beyond Mr.
21 Lanza can be ignored in this process. The
22 Department staff, and the agency itself, has a
23 responsibility to go beyond what a private
24 applicant has the responsibility to do.

25 I understand Mr. Ruzow's dilemma in
(COLLOQUY ON MOTION)

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1 not having access to the information, or
2 presumably not having access to this
3 information. It's also surprising that in
4 order to avoid the potentially unmitigated
5 environmental impacts of Mr. Ruzow's client's
6 project, that he wouldn't join with CPC and
7 ask for this information to be disclosed for
8 the record so these rulings can be made.

9 There are several opportunities, your
10 Honor, that we could avail ourselves of in
11 this process in order to find out what it is
12 precisely that the Department has -- at what
13 point precisely the Department has taken this

14 planning process to. I agree with Mr. Ruzow
15 that if it's not a final, signed document by
16 the Commissioner, then essentially Mr. Lanza
17 doesn't have authority to go forward with the
18 process of expanding Belleayre. But the
19 Governor's budget, we believe, has put in
20 funds, and I'll make a FOIL request to the
21 Director of the Budget to find more out about
22 this. The Governor's budget has put in
23 \$30 million for Belleayre when all of the
24 other aspects of this -- I believe this was in
25 the Phoenicia Times article, I don't have the
(COLLOQUY ON MOTION)

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1 date unfortunately on when that was -- it's ³²¹
2 January 22nd, 2004. The Governor's budget had
3 \$30.6 million for the DEC capital improvement
4 projects at Belleayre. Are those the ones
5 that have been approved already? We don't
6 know because we don't have the information.

7 I would suggest, your Honor, in this
8 process, because it's such a critical issue
9 for our evaluation, that you do have the
10 option to direct Department staff to provide a
11 list of documents that not only include the
12 Draft Unit Management Plan, but all those
13 engineering studies and evaluations that have
14 gone into it. Some of those documents may be
15 relevant to finding out how far in the process
16 this Unit Management Plan has been taken.
17 Your Honor could then evaluate whether or not
18 we have gotten close to the Commissioner's

19 approval, whether, in fact, it was pulled back
20 at the last minute because of potential
21 conflicts with the Crossroads Ventures
22 project.

23 ALJ WISSLER: Hasn't a lot of that
24 documentation already been provided to you? I
25 believe that there was some correspondence
(COLLOQUY ON MOTION)

1 between you and Ruth Earl of the Department 322
2 where she indicated that she would give you an
3 opportunity to come in and review various
4 engineering reports. I have a copy of her
5 letter dated May 21st, 2004 to you to that
6 effect. What you just asked me to direct
7 under Article 31 seems to me to have already
8 been -- they have already been provided to you
9 under FOIL.

10 MR. GERSTMAN: Those are historic
11 documents, your Honor, 1988 snow engineering
12 reports. There have not been a lot of current
13 documents in terms of engineering plans.

14 ALJ WISSLER: If they're not, they're
15 not.

16 MR. GERSTMAN: Well, I think that's
17 part of the claimed exemption that I'm
18 suffering under here. Let me remind --

19 ALJ WISSLER: Have you, in fact,
20 contacted Ms. Earl and made arrangements to
21 review the documents she has made available to
22 you under FOIL?

23 MR. GERSTMAN: Yes.

24 ALJ WISSLER: When is that going to
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25 occur?

(COLLOQUY ON MOTION)

1 MR. GERSTMAN: Well, I have seen part ³²³
2 of them. I have not seen the water data. She
3 was compiling that information and was
4 supposed to call me when she had completed
5 compilation. I have seen the Unit Management
6 Plan reports up until the latest one.

7 ALJ WISSLER: Have you done the file
8 review?

9 MR. GERSTMAN: Yes. There's nothing
10 associated with a current proposed expansion
11 that's been made available. I also suggest an
12 in camera review of those documents would be
13 appropriate. I would also like to remind your
14 Honor that a FOIL exemption here, and I know
15 we're not dealing with FOIL here, is
16 discretionary under Department staff.
17 Department may withhold documents, but even
18 that discretion to withhold documents does not
19 include factual data which is required to be
20 upheld. And we will certainly pursue the FOIL
21 appeal to find out --

22 ALJ WISSLER: Have you brought that
23 appeal yet?

24 MR. GERSTMAN: We have not filed it as
25 of yet. We also contest Mr. Ruzow's
(COLLOQUY ON MOTION)

1 suggestion that this is speculative. Again, ³²⁴
2 there has been talk in the public by the
3 director of the Belleayre Mountain Ski Center

4 concerning the proposal, and while it's not
5 finally approved by the Commissioner, we
6 believe that it's gone through a very
7 extensive planning process within the
8 Department based upon those statements, which,
9 again, puts it well beyond mere speculation.

10 In addition, the fact that the
11 Governor has put money in the budget for
12 proposed expansion for capital improvements,
13 we presume is for the capital improvements
14 associated with the expansion, also supports
15 our contention. Thank you, Judge.

16 ALJ WISSLER: Anything else?

17 You have the papers in front of you
18 now from staff?

19 MR. GERSTMAN: Yes, I do. I'd like a
20 chance to reply. I don't think I'll be able
21 to get to it until -- either this weekend or
22 next week.

23 ALJ WISSLER: Can you share with me
24 some of your reasoning with respect to the
25 need for time to reply?

(COLLOQUY ON MOTION)

1 MR. GERSTMAN: For one, I haven't seen ³²⁵
2 the papers yet, I'm not sure what legal
3 arguments are being made. And again, Ms.
4 Krebs suggested an alternative interpretation
5 of 624.7. I would like to do some further
6 analysis of that. If the DEC staff is
7 suggesting that extraordinary circumstances
8 are not the threshold that we have to meet in
9 order to obtain discovery, I may want to join

10 with them in that interpretation.

11 ALJ WISSLER: All right. I'll let you
12 reply. You can do it electronically but it
13 needs to be in my office by close of business
14 next Monday.

15 MR. GERSTMAN: Thank you, your Honor.

16 ALJ WISSLER: If counsel -- any other
17 counsel want to respond to your papers, those
18 papers can be served on me electronically by
19 next Wednesday, the 16th, I think.

20 I will tell you what I am going to do.
21 I am going to rule on the discovery motion
22 first. If the discovery motion is granted,
23 then I will afford staff the opportunity to
24 make whatever motion they feel appropriate
25 under 624.7(d).

(COLLOQUY ON MOTION)

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1 Let's be very clear. The first step
2 is whether or not you're granted the discovery
3 motion in the first instance. Okay. Reply by
4 Monday close of business, sur-replies by
5 Wednesday close of business electronically.
6 That will be it, and then you'll have my
7 decision.

8 Was there something else about
9 anything with respect to expert availability
10 and things like that that you wanted to put on
11 now or can we wait?

12 MR. GERSTMAN: We can wait.

13 MR. RUZOW: Your Honor, I had a
14 question. For tomorrow, for community

15 character, given the list of folks that Marc
16 had given to us yesterday at the -- Mr.
17 Gerstman had given to us on the site visit, I
18 may only be able to -- I need to try to
19 confirm this by phone again -- have access to
20 one of our key presenters at like 1 o'clock.
21 If we could take it out of order.

22 ALJ WISSLER: It's okay with me.

23 MR. GERSTMAN: We can schedule that
24 during a break.

25 MR. RUZOW: I'll try to get him on the
(COLLOQUY ON MOTION)

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1 phone and confirm he can do that.

2 MR. GERSTMAN: We have some scheduling
3 issues with witnesses we would prefer to have
4 tomorrow, but their schedule is they can't be
5 here until the 18th, so maybe at a break we
6 can go over this, your Honor.

7 MR. BURGER: The City has no problem
8 with that scheduling arrangement, Mr. Ruzow's
9 scheduling arrangement, except to the extent
10 that it might that impede our expert's ability
11 to testify tomorrow. Our community character
12 expert is only going to be available tomorrow
13 to testify on that point.

14 ALJ WISSLER: Do this again for me.

15 MR. BURGER: One of our induced growth
16 experts is only available tomorrow, so we just
17 want to make sure that Jeff Donohoe is able to
18 put on his presentation tomorrow.

19 ALJ WISSLER: I have no problem.
20 we're scheduled to do that tomorrow anyway.

21 MR. BURGER: I'm not clear on what
22 Mr. Ruzow's proposed order of proposed
23 witnesses -- whether that has any impact on
24 our -- on the time available for our guy to
25 testify.

(COLLOQUY ON MOTION)

1 MR. RUZOW: I don't think he would be ³²⁸
2 speaking for more than 20 minutes or a
3 half-hour tops, but subject to your Honor's
4 questioning, but that's all.

5 ALJ WISSLER: why don't we take five
6 minutes.

7 (10:15 - 10:30 A.M. BRIEF RECESS
8 TAKEN.)

9 ALJ WISSLER: If we can go back on the
10 record, please.

11 we will be looking at visual impacts.

12 MR. ALTIERI: Judge, may I make a
13 statement?

14 ALJ WISSLER: Sure.

15 MR. ALTIERI: I was just wondering if
16 CPC was putting on its expert, Brian Ketcham,
17 he mentioned a conversation he had with the
18 personnel, particularly Tony Lanza, yesterday
19 when we were doing a site visit.

20 Peter DiModica is apparently being
21 called as a witness for the CPC, and then he
22 interjected at that point that he had a
23 conversation with Tony Lanza since we had the
24 site visit, so the conversation was during
25 this litigation.

(VISUAL ISSUE)

6 MR. GERSTMAN: You can identify the
7 law that suggests that that's the case?

8 MR. ALTIERI: I can identify it's
9 inappropriate for one side to communicate to
10 parties of an opposing side in a litigation.

11 MR. GERSTMAN: You certainly represent
12 a public agency --

13 MR. ALTIERI: Correct.

14 MR. GERSTMAN: -- that has
15 responsibility beyond a private party in
16 litigation. I would think that you would
17 agree with that?

18 MR. ALTIERI: These are standard,
19 established procedures in litigation, and they
20 apply to the DEC. And we just want a heads-up
21 on communication to DEC staff or personnel.
22 That's perfectly appropriate.

23 MR. GERSTMAN: Well, I certainly will
24 not contact any of your staff without
25 contacting you first. To the extent you can
(VISUAL ISSUE)

1 demonstrate to me or if the Judge directs me
2 not to have my experts or my members of the
3 Coalition --

4 MR. ALTIERI: When you say "my" --

5 ALJ WISLER: We don't need to go
6 through this. The fact of the matter is if
7 you want to direct anybody -- any of the
8 parties want to direct their people not to
9 talk, they're free to do so. I'm not making
10 any kind of direction with respect to anybody.

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11 Certainly not when we're not near the
12 adjudicatory hearing stage.

13 Mr. Gerstman, visual impacts.

14 MR. GERSTMAN: Yes. Your Honor, I
15 would like to introduce you to --

16 ALJ WISSLER: Did you want to make a
17 statement with respect to the petition?

18 MR. GERSTMAN: I do, your Honor. I
19 would like to do this first, if I might.

20 ALJ WISSLER: Sure.

21 MR. GERSTMAN: The introduction of
22 these maps has to do with both visual impacts
23 but also the rest of the issues during the
24 Issues Conference. So I wanted to essentially
25 set the table now, and I will be glad to
(VISUAL ISSUE)

1 introduce the visual impacts in a few moments.³³²

2 I would like to introduce your Honor
3 to Mr. Christopher Olney from the Catskill
4 Center for Conservation and Development.

5 Mr. Olney, would you tell the Judge
6 your background and your educational
7 experience?

8 MR. OLNEY: Christopher Olney,
9 O-L-N-E-Y. I am an employee of the Catskill
10 Center for Conservation and Development where
11 I'm the director of our Land Conservation
12 Program. I have a background in Geographic
13 Information Systems as well, so I make maps
14 for the Catskill Center. That background is a
15 Master's Degree in Geography from the
16 University of Buffalo. Different experience

17 with GIS.

18 MR. GERSTMAN: Excuse me for one
19 second, Mr. Olney.

20 Your Honor, I'd like to have marked
21 CPC Exhibit 3. There are three maps, and we
22 might as well mark them as 3A, B and C. And
23 they are from right to left, right is A,
24 center is B, C on the left.

25 ALJ WISSLER: Why don't we take a
(VISUAL ISSUE)

1 second and have the reporter mark these.

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2 (GIS MAP RECEIVED AND MARKED FOR
3 IDENTIFICATION AS CPC EXHIBIT NO. 3A, THIS
4 DATE.)

5 (GIS MAP RECEIVED AND MARKED FOR
6 IDENTIFICATION AS CPC EXHIBIT NO. 3B, THIS
7 DATE.)

8 (GIS MAP RECEIVED AND MARKED FOR
9 IDENTIFICATION AS CPC EXHIBIT NO. 3C, THIS
10 DATE.)

11 MR. GERSTMAN: Thank you, Mr. Olney.
12 Would you proceed?

13 MR. OLNEY: These three specific maps
14 are maps that I have made at the Catskill
15 Center over the past week or so, but it's all
16 data that I've had for quite some time and
17 used internally.

18 This first map, 3A, is a slope map
19 showing slopes in the vicinity of the
20 Crossroads Ventures project area. Slope is in
21 percent not degree slope. The slope is

22 6-8-04 bcrossroadsf
calculated using standard GIS software using
23 ten meter Digital Elevation Models that are
24 publicly available.

25 The property boundary of Crossroads
(VISUAL ISSUE)

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1 Ventures' property should be considered
2 approximate in case I don't have the exact
3 boundaries correct, but as far as I can tell
4 from the silhouettes, that's the project area.

5 So this slope map is broken down into
6 five categories: 0 to 5, 5 to 15, 15 to 25, 25
7 to 40 and 40 to 60 percent slopes. And I
8 guess just for point of reference, you can see
9 the ski runs, Belleayre Ski Area labeled on
10 the map, the slopes there, how they compare to
11 other areas.

12 Any questions on that map?

13 ALJ WISSLER: No.

14 MR. OLNEY: This next map, 3B is a --
15 I guess kind of a regional overview map of the
16 Crossroads vicinity that shows -- it shows the
17 Catskill Park boundary. It shows New York
18 City watershed, major drainage basin
19 divisions. It shows Catskill Forest Preserve
20 lands, and that's broken down into three
21 colors; one color representing wilderness
22 areas in the forest preserve, one color
23 representing wild forest areas in the forest
24 preserve, and one color representing intensive
25 use areas of the forest preserve such as
(VISUAL ISSUE)

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1 Belleayre and the campgrounds. There's a
Page 43

2 fourth DEC category that's non-forest preserve
3 land outside Catskill Park, such as the state
4 forests.

5 Also on this map in purple is New York
6 City DEP watershed lands, and that's always
7 changing. They're adding new lands all the
8 time, but this is current as of December 2003.
9 And this only shows fee acquisitions that were
10 completed by that date, nothing in contract
11 and doesn't show the easements.

12 Labeled around the edges of this map
13 are annotations that show where priority
14 project areas are that are listed in the New
15 York State Open Space Plan. Through my
16 position at the Catskill Center, I serve on
17 the Region 3 and Region 4 Open Space
18 Committees. At the time that the current plan
19 was being formulated -- the current plan is
20 2002 Open Space Plan, and at that time I
21 served on the Region 2 Committee.

22 So these are the project areas that
23 are listed by name in the Open Space Plan. I
24 guess it should be noted that the entire New
25 York City watershed is listed in the Open
(VISUAL ISSUE)

□

1 Space Plan as a major resource area or major
2 project area, but then it goes further and
3 talks about the Catskill Park and certain
4 areas where projects should be focused. So
5 those are labeled on this map.

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6 The third map, 3C, is just a map of

7 New York City's West of Hudson Watershed,
8 Catskill Delaware Watershed, and the land's
9 protection priority areas within that
10 watershed that the City identified upon the
11 signing of the MOA to disguise their land
12 protection efforts. This data was provided by
13 the City. It shows where Crossroads Ventures'
14 property sits in relation to the DEP priority
15 areas, and this is just a zoomed-in inset.

16 Any questions?

17 (NO AFFIRMATIVE RESPONSE.)

18 MR. GERSTMAN: Thank you, your Honor.
19 Are there any questions?

20 ALJ WISSLER: Nope.

21 MR. GERSTMAN: Thank you.

22 ALJ WISSLER: I do want the record to
23 reflect, though, that CPC Exhibits 3A, B and
24 C, what has been given to counsel, appear to
25 be accurate depictions, but the north and
(VISUAL ISSUE)

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1 south of the maps that we have been -- that
2 has been provided to counsel are a little bit
3 cut off compared to the actual exhibits that
4 are in evidence that are on the tripods.

5 MR. GERSTMAN: Your Honor, we would
6 introduce those and leave those for you to
7 carry back and forth to Albany.

8 ALJ WISSLER: Thank you.

9 MR. GERSTMAN: Without the boards,
10 though, your Honor. So if we could mark
11 those, that would be great.

12 ALJ WISSLER: They are. I mean, you
Page 45

13 have provided us -- we have our copies of what
14 are, in fact, the exhibits.

15 MR. GERSTMAN: Thank you. Your Honor,
16 we will be referring to these maps throughout
17 the Issues Conference.

18 ALJ WISSLER: Okay.

19 MR. GERSTMAN: Your Honor, at this
20 time I would like to introduce you to
21 Mr. Daniel Sundell, who is from Peter J. Smith
22 Associates.

23 Before I do that, your Honor, we would
24 like to -- at this time, the CPC would like to
25 supplement its petition concerning the
(VISUAL ISSUE)

1 significant adverse visual impacts which will³³⁸
2 result from this project. Our submission in
3 -- I believe Exhibit A addressed those
4 impacts. We are going to supplement that
5 submission at this time.

6 Your Honor, it's our position that the
7 Commissioner will not be able to issue her
8 findings pursuant to the State Environmental
9 Quality Review Act due to the inadequacy of
10 the Draft Environmental Impact Statement in
11 evaluating and mitigating significant adverse
12 and visual impacts.

13 Specifically, your Honor, we believe
14 that the DEC Visual Impact Assessment Policy
15 has not been met. We believe that the
16 Applicant has not done a proper inventory of
17 resources of statewide concern, has not taken

18 into account the significant adverse visual
19 impacts on community character, has under-
20 represented the impacts of the project through
21 manipulation of photo simulations in a way
22 that disguises what the project will actually
23 appear to be, and fails to adequately evaluate
24 the potential impacts as a result. And
25 therefore, the mitigation has not been done in
(VISUAL ISSUE)

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1 accordance with the DEC policy.

2 We believe as a result of that, your
3 Honor, there are substantive and significant
4 issues that have been raised by our petition
5 which will be supplemented at this time in
6 connection with the significant adverse visual
7 impacts. These visual impacts, your Honor,
8 have a direct effect on what we believe will
9 be the significant adverse community character
10 impacts as well, which you'll hear further
11 from our witnesses tomorrow.

12 I would like to introduce now
13 Mr. Sundell, and actually we're going to
14 change to -- direct your attention to ring
15 number two.

16 Mr. Sundell, would you tell the
17 Judge --

18 ALJ WISSLER: We'll mark this CPC
19 Exhibit 4.

20 (VISUAL ASSESSMENT SUPPLEMENT
21 RECEIVED AND MARKED FOR IDENTIFICATION AS CPC
22 EXHIBIT NO. 4, THIS DATE.)

23 MR. GERSTMAN: Your Honor, what CPC
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24 Exhibit 4 is, is a reproduction of the
25 PowerPoint that Mr. Sundell will show you.
(VISUAL ISSUE)

1 Mr. Sundell, would you tell the Judge³⁴⁰
2 what your educational background is?

3 ALJ WISSLER: Before you begin, the
4 frames that he is going to show us are part of
5 this supplement?

6 MR. SUNDELL: Everything is included
7 in that.

8 ALJ WISSLER: We can just follow along
9 in the supplement?

10 MR. SUNDELL: Yes. I'm a landscape
11 architect with the Peter J. Smith & Company.
12 I have a Bachelor's Degree in Landscape
13 Architecture, and I've been licensed by New
14 York State as a landscape architect for
15 approximately ten years now.

16 It might take a second. I'm not
17 seeing my image here. Could I have a moment?

18 ALJ WISSLER: Absolutely.

19 (10:49 - 11:00 A.M. BRIEF RECESS
20 TAKEN.)

21 MR. SUNDELL: I have a few slides I'm
22 going to show you. Here is what we're going
23 to do. I have some graphics that are divided
24 into two categories, community
25 character-related graphics and that is --
(VISUAL ISSUE)

1 those are graphics and views from private land³⁴¹
2 north of Route 28, and the other thing I will

3 show you is graphics from state land. These
4 are photographs and images from the DEIS and
5 photo simulations we've done. And after I
6 have gone through those, we'll look at what
7 the DEC policy is and why it's not met with
8 the DEIS.

9 I'll start out, we're talking about
10 community character now, this is Figure 3-25A
11 from the DEIS, and this is a viewshed map.
12 what you see here is simply the area that the
13 resort will be visible from, and that's both
14 wildacres and Big Indian Resort. So the pink
15 or red areas, if you're standing there looking
16 back, you will see one or both of the resorts.
17 The darker red is views from roads.

18 (Indicating)

19 I just want to also make the point
20 that this viewshed map is based on current
21 vegetation stance. As we saw when we toured
22 the site, if you're at the Brisbane mansion
23 looking out, you see a wide sweeping panorama,
24 but most of it is tree covered. So on private
25 land, people can cut and move trees and build
(VISUAL ISSUE)

1 residences, and they'll actually increase the³⁴²
2 viewshed map as time goes on. (Indicating)

3 I also want to point out on this
4 graphic that Route 28, particularly down here
5 in Pine Hills, is also indicated as big red,
6 and they're indicating you will be able to see
7 the resort from Route 28. The next graphic
8 will be from the road from Pine Hill that

9 comes out on the east -- actually east of Pine
10 Hill by the day-use area. So this is from
11 the corner of those two roads. You're looking
12 over the pond there up on the ridge. Now,
13 this is the ridge that the Big Indian Resort
14 will be located on. (Indicating)

15 Now, this has always been very
16 difficult for me, and everybody else here who
17 is trying to get a grasp on this, where the
18 resort is because when you look, there's no
19 landmarks or things to help you identify,
20 they're located on a plan. So what I have had
21 to do is use contours and things, grades to
22 try to help me understand what you'll see.

23 MR. GERSTMAN: Before you go further,
24 go back to that image, Dan. When was that
25 image taken?

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1 MR. SUNDELL: Yesterday.

2 MR. GERSTMAN: That was taken by you?

3 MR. SUNDELL: Yes.

4 Now, to help illustrate my point, I've
5 taken a grading plan from the DEIS and just
6 some very quick markups that show you what
7 some of the major contours are. You'll see
8 the 2,000 elevation here, and on the north
9 side, it -- it's just ever so slightly below
10 the proposed golf course, and then it wraps
11 around the ridge here. And in blue here,
12 you'll see the ridge line. (Indicating)

13 Off to the left there, you'll see

14 6-8-04 bcrossroadsf
14 where the 2500 contour is. And from this we
15 can see that along the ridge line, the resort
16 will occupy in vertical elevation, looks like
17 about 400 feet in elevation gain down the
18 ridge line. (Indicating)

19 And I also want to show you with
20 reference to the next slide, that on this
21 there's a ridge that kind of extends down this
22 way, and there's some contours here that are
23 25-foot contours -- and I'm counting one, two,
24 three, four, five, six, seven, so that's
25 175 feet of drop from this ridge.

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1 (Indicating)

2 MR. GERSTMAN: Mr. Sundell, when you
3 say from this ridge, you're referring to an
4 area that is proximate to what you referred to
5 on this graphic as green TYP, in that area?

6 MR. SUNDELL: Yes, that's correct. As
7 I flip the slide back, this is that ridge as
8 best I can ascertain. (Indicating)

9 MR. GERSTMAN: Now, when you say this
10 is that ridge, can you describe for the record
11 where you're referring to, as best as possible
12 given that limitation?

13 MR. SUNDELL: It's difficult verbally,
14 but the ridge line that goes down the mountain
15 on the plateau behind runs down behind the
16 ridge line that we're looking at in the
17 foreground here. (Indicating)

18 From that contour plan, you saw that
19 from that ridge, you were looking down at

20 about 175 feet from the top that the golf
21 fairways would be cleared for. My point here
22 is that it looks -- strongly appears to me
23 that the golf course will be visible from this
24 location, from Route 28, which the graphic on
25 the viewshed map also indicates. (Indicating)
(VISUAL ISSUE)

1 This is a view from the village of Big ³⁴⁵
2 Indian at Firehouse Road looking across the
3 intersection to the same ridge, we're calling
4 it Big Indian Plateau at the top of that.
5 (Indicating)

6 Here again, this is very difficult to
7 try to understand where the resort is and
8 whether it's visible from this location, so
9 what tools we used to try to ascertain that is
10 this, which is a line-of-sight graphic
11 generated by the computer. And this -- end of
12 this line-of-sight profile -- actually, this
13 green area is the ground level, and this is
14 the ridge as it comes up. (Indicating)

15 MR. GERSTMAN: "This" meaning these
16 sort of squiggly lines --

17 MR. SUNDELL: Yes.

18 MR. GERSTMAN: -- from the point at
19 the beginning of the graph to the top of the
20 green area?

21 MR. SUNDELL: That's correct.

22 MR. GERSTMAN: When you say
23 "light-of-sight profile," what exactly do you
24 mean by that?

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MR. SUNDELL: The line of sight is if
(VISUAL ISSUE)

25

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1 a viewer were standing at the left point on
2 this graph, this is a direct line to the
3 slope, or more commonly referred to as the
4 line of sight. That's the line that you would
5 see, straight line between two points.

6 (Indicating)

7 From that graphic we can see that
8 -- two lines, one goes up to the 2500-foot
9 elevation. That was looked at before. And
10 this is at the 200-foot elevation, indicating
11 that some of the golf course will be visible
12 from this vantage point. (Indicating)

13 Bear in mind when you look at it, that
14 the top of this green area is the ridge line
15 and it is covered with vegetation. That is
16 approximately 30 feet in height. So there
17 would be some reduction of the visibility of
18 the fairways in the foreground here, but you
19 will be able to see the top, as best I can
20 ascertain. (Indicating)

21 Also, another community
22 character-related view is from a variety of
23 residential -- rather, private land that's
24 north of Route 28. This is a viewpoint taken
25 on a offshoot of Red Mountain Road called
(VISUAL ISSUE)

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1 St. Katherine's Street, what I read off the
2 sign the other day, and I believe that is
3 correct. But this is a building site that
4 somebody is working on. And it's directly

5 north to northeast of the proposed Big Indian
6 golf course. You can see the ridge line on
7 the left is the ridge that we were referring
8 to that was visible over the top of the pond
9 at the day-use area, and the golf course will
10 be visible along this ridge line there from
11 this vantage point. (Indicating)

12 In the DEIS, there were a number of
13 figures, graphics of what the proposed resort
14 would look like from certain vantage points,
15 and I was told yesterday that you visited the
16 vantage point from Wood Road. And in the
17 DEIS, there was a computer-generated photo
18 simulation I want to walk you through. The
19 top figure, an existing photograph of the
20 site, has been superimposed with an AutoCAD
21 generated 3D wire frame drawing of the resort
22 development area. (Indicating)

23 Now, to read the key on that figure,
24 it's -- in red are proposed buildings, yellow
25 is finished ground, that's ground that's being
(VISUAL ISSUE)

□

1 adjusted that's predominantly golf course
2 fairways; and in green we see the new edge of
3 the tree canopy. The white is not the ground
4 plane but the top of the existing vegetation.

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5 MR. GERSTMAN: Let me interrupt you
6 for a second. When you say these are
7 representative of AutoCAD imagery --

8 MR. SUNDELL: AutoCAD is a design
9 software that professionals use and has the

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10 capability for 3D modeling.

11 ALJ WISSLER: The wire frame canopy
12 then lays on top of the existing vegetation?

13 MR. SUNDELL: Yes. What you'll do is
14 generate a 3D view in AutoCAD, and then the
15 software allows you to pick a viewer position.
16 It allows you to select a focal length of the
17 lens. If I'm looking from this location
18 through a 50-millimeter standard lens on a
19 35-millimeter SLR camera, the computer will
20 tell you what you would see in a wire frame
21 from that location. (Indicating)

22 Now, that's been superimposed on the
23 existing photograph which verifies its
24 accuracy. You can see that the top of the
25 wire frame fits very closely with the top of
(VISUAL ISSUE)

1 the ridge line in the existing photograph. So³⁴⁹
2 it looks to me that the wire frame generated
3 on AutoCAD is reasonably accurate, very
4 accurate. However, from this point in the
5 DEIS, there was a photo simulation done. What
6 you do to do the photo simulation is, you know
7 that in the yellow is golf fairway, so you
8 take the existing photograph and generally you
9 put a color over, you know, a green color over
10 a fairway, or you sample a bit of foreground
11 vegetation. There's grass in the foreground
12 here, so we'll apply it to the fairway to
13 generate a realistic representation of what
14 you're seeing. (Indicating)

15 However, I would argue that this photo
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16 simulation minimizes the visibility of golf
17 fairways. This is -- doing these photo
18 simulations is a bit of science and a bit of
19 art --

20 ALJ WISSLER: Minimizes in what way?

21 MR. SUNDELL: Pardon me?

22 ALJ WISSLER: Minimizes it in what
23 respect?

24 MR. SUNDELL: In the photo simulation
25 here, you can see the buildings --
(VISUAL ISSUE)

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1 ALJ WISSLER: Yes.

2 MR. SUNDELL: -- and they're very low
3 contrast. Granted --

4 ALJ WISSLER: Should have been a
5 brighter color or something; is that what
6 you're saying?

7 MR. SUNDELL: Light in color. The
8 roof and the wall of this building are very
9 similar in value of color. You would think
10 the wall might be a little darker than the
11 roof. The architect has designed this to have
12 a green roof and brown walls that might fit in
13 with the existing site. So they have done
14 some reasonable mitigation. (Indicating)

15 However, roof overhangs the wall and
16 there's a shadow line under it, and there's
17 windows on buildings. And I would argue just
18 from my experience doing photo simulations and
19 looking at settings that this is not an
20 accurate portrayal. It's a little bit low in

21 contrast. (Indicating) 6-8-04 bcrossroadsf

22 And I would also argue that the golf
23 fairways, just at a glance, they're not
24 terrible visible. It looks to me that a
25 foreground grass was sampled and then spread
(VISUAL ISSUE)

1 onto the fairways. And this is literally 351
2 foreground grass with a great deal of texture.
3 Grass off in the distance might have less
4 texture. And it's irrigated fairway, so it
5 would probably have a different color than
6 unmaintained grass. (Indicating)

7 So I've done a photo simulation, and
8 this photo simulation at the top of this
9 graphic here is one that we had done, and it's
10 based on the wire frame that was in the DEIS.
11 I accepted that as accurate. And then where
12 there was yellow, which was golf fairway, I
13 applied my own colors, added shadow lines for
14 the edge of the tree canopies, added a shadow
15 line under the roof, and increased the
16 contrast between the roof and the wall of the
17 building. So this is our version. And then
18 on the bottom is the version that's in the
19 DEIS. And I would argue that the top version
20 is a more accurate representation of what you
21 would see. (Indicating)

22 MR. GERSTMAN: Mr. Sundell, is it your
23 professional opinion that the CPC photo
24 simulation more accurately represents the
25 proposed project than the photo simulation
(VISUAL ISSUE)

1 that appeared in the DEIS?

2 MR. SUNDELL: That's correct.

3 Just to understand the significance of
4 the view, I've juxtaposed -- I'm comparing the
5 photo simulation that we have done at the top
6 with the existing conditions. And this gives
7 you a more accurate representation of what the
8 visual impact is of this particular part of
9 the -- actually, the wildacres part of the
10 development from Wood Road. So you're going
11 from this situation to that situation.
12 (Indicating).

13 ALJ WISSLER: The shade of green that
14 you chose, did you choose that out of the
15 existing landscape?

16 MR. SUNDELL: No, I didn't, because I
17 couldn't find a good color to sample. There's
18 grass off in the distance on the ski runs.
19 This photo appears to me to have been taken
20 later in the summer when the grass was
21 starting to dry out a little bit; you'll see
22 it in some of the foreground here in the
23 existing conditions photo. (Indicating)

24 So the green I selected was not in the
25 photograph, and it was picked out to look like
(VISUAL ISSUE)

1 a fairway in the distance.

2 MR. GERSTMAN: Where would you select
3 that color from?

4 MR. SUNDELL: It's just selected from
5 a color pallet that is provided for you in the

6 software. But, you know, with the
7 understanding that these fairways are
8 irrigated, mowed fairways, there wasn't a
9 condition in that photo that I could use as a
10 sample. (Indicating)

11 MR. GERSTMAN: Is it your professional
12 opinion that the color of the fairways that
13 you depicted in the photo simulation more
14 accurately represent the condition of the golf
15 course during the use of the golf course from
16 spring to maybe fall season?

17 MR. SUNDELL: Yes. I would argue
18 that in color and in texture, the photo
19 simulation I had done is more accurate, a more
20 accurate portrayal.

21 Now I want to switch over to visual
22 impacts from state lands. There's a number of
23 photo simulations in the DEIS I am going to
24 look at here, but I'm providing to you here a
25 map that was in the DEIS that shows where some
(VISUAL ISSUE)

1 of the photo points are. Towards the bottom ³⁵⁴
2 of this figure is Balsam Mountain, and within
3 this outline here is the Big Indian
4 development site. There was two views in the
5 DEIS from these vantage points labeled B2, B3,
6 and B4, from Balsam Mountain. This is figure
7 3-31 of the DEIS and it's a leaf falloff --

8 ALJ WISSLER: Would you just back me
9 up to the last one. Which DEIS view is that?

10 MR. SUNDELL: This, I believe is 3-25,
11 but I am -- I'm not positive of that. I

12 neglected to put the figure number. If it's
13 not 25, it's 26 or 27. Right in there.

14 ALJ WISSLER: Sorry, go ahead.

15 MR. SUNDELL: Also, the red lines
16 indicate the direction that the photo was
17 taken in. And then to go forward again here,
18 this is -- I wasn't sure, but this looks to me
19 like it's from B2, which is the westernmost of
20 the two Balsam Mountain views. (Indicating)

21 Here again, there was an AutoCAD-
22 generated wire frame 3D model superimposed
23 over the existing conditions photo that seems
24 to be, by my estimation, an accurate portrayal
25 location of the proposed development. In red
(VISUAL ISSUE)

□

1 is the buildings, yellow is finished ground, 355
2 and green is the canopy edge. But in this
3 figure, the view toward the resort area is
4 obscured by the vegetation. This is leaf
5 falloff, and you're still not going to see the
6 resort from this location. (Indicating)

7 But I would like to point out that in
8 the Catskills map, this location -- it appears
9 to be the location that there is a star
10 indicated on as a viewpoint, and that the
11 viewpoints are maintained by the DEC to
12 maintain views. They cut trees and cut brush
13 in order to provide a view from that
14 viewpoint.

15 MR. GERSTMAN: When you refer to the
16 Catskill map, are you referring to the

17 6-8-04 bcrossroadsf
-- which map are you referring to?

18 MR. SUNDELL: This is a Catskill Trail
19 Map that is commonly commercially available.
20 We used this map as a guide on our site tour.
21 I don't know the manufacturer --

22 ALJ WISSLER: It's a New York-New
23 Jersey Trail Map?

24 MR. GERSTMAN: That's correct. We'll
25 provide that.

(VISUAL ISSUE)

1 ALJ WISSLER: If you are going to make³⁵⁶
2 reference to it and a viewpoint and so forth,
3 you need to put a copy in evidence. I'm not
4 going to give you my copy.

5 MR. SUNDELL: That's one viewpoint
6 from Balsam Mountain. (Indicating)

7 The next viewpoint is either B3 or B4
8 on the previous figure from Balsam Mountain
9 looking towards the Big Indian development.
10 (Indicating)

11 Again, this is an existing photograph
12 of fall leaf color with AutoCAD-generated wire
13 frame of the proposed development superimposed
14 onto the photograph. In this case, since the
15 vegetation is in fall color, it's red, so
16 buildings are depicted with a black color.
17 Again, finished ground is yellow, and the new
18 canopy edge is green. (Indicating)

19 I want to point out that in this
20 figure we see these black spots -- there's
21 one, two, three, four, five buildings visible
22 in the AutoCAD-generated wire frame, however,

23 again, they're obscured by vegetation. And so
24 -- again, like the previous slide, the point
25 is that DEC maintains these viewpoints for
(VISUAL ISSUE)

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1 visibility by cutting brush and trees.
2 (Indicating)

3 MR. GERSTMAN: I need to interrupt you
4 a second, Mr. Sundell.

5 MR. SUNDELL: Do you want me to go
6 back?

7 MR. GERSTMAN: No, that's fine. I
8 want to ask you your opinion concerning the
9 viewpoints from these Balsam Mountain
10 locations, and whether or not it would be your
11 reasonable opinion that the site of the
12 project will be visible with some, not very
13 little, pruning of those shrubs to open the
14 viewshed?

15 MR. SUNDELL: From the vantage points
16 that were given with some brush trimming, you
17 will be able to see the development from
18 Balsam Mountain.

19 MR. GERSTMAN: Thank you.

20 MR. SUNDELL: This is the same
21 viewpoint, however, this one, the photo
22 simulation is developed from the wire frame,
23 and along the ridge line here we can see very
24 faintly a new tree line and only one building.
25 (Indicating)
(VISUAL ISSUE)

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1 I also want to point out that in the

2 winter, obviously it gets dark much sooner.
3 If a hiker were to be out here 5 o'clock,
4 6 o'clock, skiing, the lights of the resort
5 would be plainly visible from any of these
6 locations. (Indicating)

7 I also would like to point out that in
8 the design of the golf course on this part of
9 it, there was a buffer of vegetation left at
10 the southern edge of the fairways intended to
11 screen the views of the fairway and to screen
12 the views from these detached hotel lodging
13 units that are lined up down the ridge. But I
14 would suggest that, particularly from the
15 hotel lodging units, a view could be enhanced
16 by a little bit of tree cutting. That would
17 be the view from the hotel unit outward as
18 well as the view from Balsam Mountain back to
19 the hotel unit. (Indicating)

20 This is Figure 3-44A from the DEIS.
21 what we're looking at is an enlargement of a
22 photo simulation done from Sunset Lodge
23 looking towards the Belleayre Highlands
24 development. You can see here the location of
25 the Brisbane mansion, some golf fairways and
(VISUAL ISSUE)

□

1 some housing condo units, I believe, in the
2 foreground. (Indicating)

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3 The thing I want to point out in this
4 graphic, which seems to me a reasonably
5 accurate photo simulation, is that in the
6 background, you're looking at undisturbed tree
7 cover on the sides of the mountains back

8 there, which I believe would significantly
9 alter the view from this location, alter the
10 character of it.

11 MR. GERSTMAN: Can you explain that
12 further, Mr. Sundell? Could you identify on
13 the photo simulation what you're referring to
14 in particular?

15 MR. SUNDELL: Currently a viewer from
16 this location would see an undisturbed tree
17 canopy, presumably forest or wilderness, it
18 would appear to be. However, when the
19 development is built, the character of that
20 view from an undeveloped character would be
21 changed to the resort. (Indicating)

22 This is a photograph taken from a
23 location on the backside of Belleayre Mountain
24 referred to as Simon's Rock. Simon's Rock is
25 literally a large rock on the backside of
(VISUAL ISSUE)

1 there. This is what you would see from that ³⁶⁰
2 location, obviously. This is the upper
3 portion of the ridge there. The golf course,
4 by my estimation, would begin about this
5 elevation and continue down the ridge line.
6 So from this location, it would be -- proposed
7 development would be plainly visible.
8 (Indicating)

9 I want to point out though, that
10 Simon's Rock was not a viewpoint on the
11 Catskill Trail Map that we referred to
12 previously, however, this is a viewpoint

13 that's described in the Unit Management Plan
14 of the DEC for this area, referred to as the
15 Big Indian Beaver Kill Range Wilderness Area
16 Unit Management Plan.

17 ALJ WISSLER: What Unit Management
18 Plan is that?

19 MR. GERSTMAN: Your Honor, they're
20 excerpts attached to the submission that you
21 got, it's later on in the documents.
22 June 1993, your Honor.

23 MR. SUNDELL: In that Unit Management
24 Plan, you'll see a reference to Simon's Rock,
25 and this is the view from that location.
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1 (Indicating)

2 we point out that Simon's Rock is a
3 viewpoint that has not been maintained in the
4 recent past by DEC, so it's an overgrown
5 viewpoint. So this is a view from that
6 rock. (Indicating)

7 MR. GERSTMAN: Is it your opinion,
8 notwithstanding some of the overgrowth that's
9 occurred, that you would be able to visit
10 parts of the proposed development?

11 MR. SUNDELL: Yes, if some of this
12 vegetation were removed, the resort area would
13 be even more visible from this location.

14 ALJ WISSLER: In your opinion, it's
15 visible now?

16 MR. SUNDELL: It's visible now, and
17 there would be less obstruction in the future
18 with the foreground vegetation.

24 (Indicating)

25 In the pink area in this figure is the
(VISUAL ISSUE)

1 property of the resort area, and in green is ³⁶³
2 where the golf courses are being proposed, and
3 the hotel in the center. There's a scale on
4 this map and this distance is a mile. It
5 appears from the scale that the edge of the
6 golf course will be approximately
7 three-quarters of a mile from Simon's Rock.

8 (Indicating)

9 MR. GERSTMAN: Could you identify on
10 the map where the second viewpoint that you
11 identified -- it was adjacent to Simon's
12 Rock -- might be found?

13 MR. SUNDELL: It's slightly down slope
14 and about 20 paces off the trail.

15 MR. GERSTMAN: When you say "slightly
16 down slope," can you --

17 MS. BAKNER: Can we see that again?
18 I'm sorry, you pointed too quickly.

19 MR. SUNDELL: To point out where the
20 second viewpoint is?

21 MR. GERSTMAN: Yes.

22 MR. SUNDELL: This is existing Simon's
23 Rock, and then it's down the slope, down the
24 trail, and about 20 paces to the east off
25 trail. (Indicating)

(VISUAL ISSUE)

1 ALJ WISSLER: That 's the trail ³⁶⁴
2 leading over to Balsam Mountain, is that the
3 Pine Hill west Branch, whatever that is?

4 MR. SUNDELL: Yes. PW is the
5 designation, Pine Hill West.

6 MR. GERSTMAN: Does that lead into the
7 Mine Hollow Trail?

8 MR. SUNDELL: I'm not sure. We'll
9 enter that map as an exhibit.

10 MR. GERSTMAN: We should be able to
11 provide that after lunch.

12 MR. SUNDELL: Also from state land,
13 this is a photograph taken from Panther
14 Mountain -- a hazy day like this morning --
15 however, you can make out a faint line here in
16 the distance. That is Route 28. You can see
17 the top of this mountain is Belleayre
18 Mountain. It might be more visible on the
19 paper copies than the PowerPoint screen, but
20 you can see the -- I guess we're calling it
21 the Big Indian Plateau, the proposed Big
22 Indian development site along the ridge.
23 (Indicating)

24 Now, this is a distance of slightly
25 more than five miles. However, I did want to
(VISUAL ISSUE)

1 point out that in the DEIS there's some views³⁶⁵
2 taken from Panther Mountain as well, and
3 they're completely obscured by dense
4 vegetation, tree trunks, things like that.
5 Now, this is taken about three paces off
6 trail, not at the viewpoints. (Indicating)

7 ALJ WISSELER: This is not taken at one
8 of the --

9 MR. SUNDELL: Off trail about three
10 paces.

11 MR. GERSTMAN: When you say "three
12 paces," how many feet are you talking about,
13 approximately?

14 MR. SUNDELL: Nine feet.

15 ALJ WISSLER: Mr. Gerstman, you're
16 going to put in the trail map; right?

17 MR. GERSTMAN: Yes.

18 ALJ WISSLER: Are you going to
19 indicate where on the trail this photo was
20 taken from?

21 MR. SUNDELL: Yes.

22 MR. GERSTMAN: Was this typical of
23 views -- was this typical of views from
24 Panther Mountain along the trail?

25 MR. SUNDELL: I'm not sure. I
(VISUAL ISSUE)

1 personally didn't take this photograph, but it³⁶⁶
2 is from that location.

3 MR. GERSTMAN: We will endeavor to
4 provide further information on that.

5 MR. SUNDELL: Now, that's the figures
6 that I have for you. I just very briefly
7 wanted to review from the DEC policy manual
8 what the criteria that the visual assessment
9 is to be reviewed on, and just to bear with
10 me, it's on the inventory of aesthetic
11 resources, and the visual assessment,
12 adequacy, accuracy, thoroughness, and then
13 significance of the assessment.

14 MR. GERSTMAN: And for purposes of the
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15 record, we're talking about DEC policy
16 guidance referred to as Assessing Mitigating
17 Visual Impacts, DEP-00-2; is that correct?

18 MR. SUNDELL: Right. Yes. So one by
19 one, I'll go down these criteria here.

20 The inventory of the aesthetic
21 resources. The inventory did not include
22 Simon's Rock, which is a DEC designated
23 viewpoint.

24 The inventory did not include Route
25 28. The reason I bring this up is that though
(VISUAL ISSUE)

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1 it is not yet a designated scenic byway,
2 there's several studies recommending
3 nomination for a scenic byway. I don't have
4 those with me today, but Mary Kopaskie will be
5 giving testimony on community character and
6 she'll be able to describe what those studies
7 are.

8 ALJ WISSLER: Mr. Gerstman, are you
9 going to get me that?

10 MR. GERSTMAN: Yes, your Honor, that
11 is part of the presentation tomorrow.

12 ALJ WISSLER: Okay.

13 MR. SUNDELL: The inventory did not
14 point out that Route 28 --

15 ALJ WISSLER: And copies to counsel?

16 MR. GERSTMAN: Yes.

17 MR. SUNDELL: Route 28 may be
18 considered to have a "distinctive character"
19 as described in the 2002 New York State Open

20 Space and Conservation Plan. That is attached
21 to your handout there. That plan identifies
22 resource categories whose protection is a
23 matter of concern to the state. In that plan,
24 scenic resources are described as lands that
25 possess significant scenic qualities or
(VISUAL ISSUE)

□

1 significantly contribute to scenic values.
2 And there's the citation. And I would argue
3 that Route 28 is a significant resource,
4 significant visual resource with distinctive
5 character, although it is not a designation.

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6 Also, on the inventory of aesthetic
7 resources, the inventory did not mention that
8 in the New York State Open Space Plan large
9 properties in the Catskills adjoining the
10 property have been targeted for acquisition.
11 We just reviewed that figure back there.
12 (Indicating)

13 ALJ WISSLER: 3B we're looking at?

14 MR. SUNDELL: Yes. Just to reiterate,
15 the red points on here are parcels that New
16 York State has identified that they would like
17 to acquire. (Indicating)

18 I won't go through these one at a
19 time.

20 MR. GERSTMAN: Let's go back,
21 actually, and go through them one at a time.
22 Just identify, if you would for the Judge, the
23 areas adjacent to the proposed Big Indian and
24 Wildacres projects, if you would, on 3B as we
25 go through it as it's replicated on the map.

1 MR. SUNDELL: Can I get help from
2 Chris to the extent he's familiar with that?

3 MR. GERSTMAN: Yes.

4 MR. SUNDELL: I would have to read
5 them. I have some graphics here following
6 this that are enlargements of this, and I
7 think we can read it. (Indicating)

8 MR. GERSTMAN: That will be fine, if
9 you can read the map.

10 MR. SUNDELL: I think I can do it
11 verbally.

12 MR. GERSTMAN: That would be great.

13 MR. SUNDELL: This is an enlargement
14 of the lower right, which is the southwest
15 corner of Figure 3B. And up in the upper
16 left-hand corner, we can see the Big Indian
17 Resort site. And immediately to the south of
18 it is a big red dot indicating the state is
19 interested in that property, and it's labeled
20 here as a potential New York State DEC Forest
21 Legacy Project Acquisition, targeted
22 acquisition. I've been told that there is
23 ongoing negotiations with that landowner.

24 ALJ WISSLER: That's based upon your
25 reading of the New York State Open Space Plan?
(VISUAL ISSUE)

1 MR. SUNDELL: Yes. Chris, who just
2 gave the testimony, gave me this information.
3 I didn't know he was going to present before
4 me.

5 Is there anything else you want me to
6 point out on this one?

7 MR. GERSTMAN: No.

8 MR. SUNDELL: Under the visual
9 assessment category of adequacy, there's a
10 lack of concern for community
11 character-related views from Route 28.

12 ALJ WISSLER: Are we skipping over the
13 other pages there?

14 MR. SUNDELL: Yeah. I thought they
15 were already submitted. Let me just reiterate
16 what Chris --

17 MR. GERSTMAN: Your Honor, we're
18 talking about these other subsequent pages
19 which identify --

20 ALJ WISSLER: We had areas southwest
21 of proposed development, which is what you
22 referred to. But I have area north of
23 proposed development, area southwest of
24 resort, and --

25 MR. SUNDELL: It's redundant.
(VISUAL ISSUE)

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1 ALJ WISSLER: Okay.

2 MR. GERSTMAN: Your Honor, we refer to
3 CPC Exhibit 3B for reference.

4 ALJ WISSLER: Okay.

5 MR. SUNDELL: The views from Route 28,
6 even though they were indicated as visible,
7 they were in the viewshed map that I showed
8 you; in the DEIS it states that: "In general,
9 the visibility of the project from the roads
10 was considered to be insignificant due to

11 factors of distance, screening by roadside
12 vegetation, short duration of views or the
13 viewing angle in relation to the direction of
14 travel." And I would argue that that is not
15 the case based on the photos and grading plans
16 that I showed you before.

17 MR. GERSTMAN: Is it your professional
18 opinion, Mr. Sundell, that those views would
19 be, in fact, significant and that the view
20 from the project would result in significant
21 adverse aesthetic or visual impacts?

22 MR. SUNDELL: Yes, I would agree with
23 that. It would be a visual impact to the
24 community character. You're currently looking
25 at unbroken forest and if the resort is built,
(VISUAL ISSUE)

1 it will be golf fairways and buildings. 372
2 (Indicating)

3 Also, in adequacy, views from the
4 residential areas north of Route 28 are
5 inadequately addressed. This includes views
6 of the Big Indian Resort from Red Mountain
7 Road and views of the Wildacres Resort from
8 numerous roads; Wood Road, Owl's Nest and Hog
9 Mountain Road. And again here, this is the
10 same figure that you have seen before, which
11 is the viewshed map that indicates the extent
12 of the visibility. (Indicating)

13 Adequacy of the visual assessment.
14 Descriptions of some of the views from state
15 land are inadequate since they minimize the

16 visual concerns both graphically and in the
17 descriptions. I'll get into that in a little
18 bit.

19 ALJ WISSLER: Let me back you up, one
20 slide back. With respect to the adequacy, you
21 are saying views from the residential areas
22 north of 28 are inadequate. Are they
23 inadequate because there's not enough vantage
24 points there?

25 MR. SUNDELL: When we did the on-site
(VISUAL ISSUE)

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1 tour, you could see the extent of what you
2 could see outward. However, the views that
3 were selected to show back to the resort, Wood
4 Road was one, however there was no other --
5 actually, the only other one was Owl's Nest --
6 nothing done from Hog Mountain, which you can
7 see is covered with the red color which
8 indicates the resort is visible from that
9 location. (Indicating)

10 ALJ WISSLER: It should have been
11 more --

12 MR. SUNDELL: It doesn't explain to me
13 what the views were from those locations, and
14 I felt it was inadequately addressed.

15 ALJ WISSLER: Inadequate because too
16 few numbers, or what was given was not a
17 representative sample, in your view?

18 MR. SUNDELL: There was an inadequate
19 number of figures that -- we could see that --
20 from the site we could see Hog Mountain, for
21 example, however, there was nothing from Hog

22 Mountain to indicate what you could see of the
23 resort. So it was inadequate from that
24 respect, and other locations.

25 MR. GERSTMAN: In order to perform an
(VISUAL ISSUE)

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1 adequate visual impact assessment as it
2 relates to community character, would you have
3 selected more, essentially receptive locations
4 in the field from Route 28, north of Route 28?

5 MR. SUNDELL: Yes, I would have done
6 more visual simulations, and perhaps even a
7 simpler line-of-sight profiles to indicate
8 whether or not the resort would be
9 developed -- visible from these locations.

10 MR. GERSTMAN: Is it your professional
11 opinion that viewpoints from the roads north
12 of Route 28 and from private property, houses,
13 residential developments north of Route 28,
14 has a potential impact on community character?

15 MR. SUNDELL: It does have an impact
16 on community character.

17 ALJ WISSLER: Are you saying no
18 line-of-sight analysis was done here at all?

19 MR. SUNDELL: The only thing that I
20 saw was the viewshed map, indicating that from
21 these red areas you'll be able to see the
22 resort. I don't know what you see and what
23 part of it.

24 Again, I was showing you some views of
25 the ridge line for Route 28. It's very
(VISUAL ISSUE)

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1 difficult to ascertain without access to the
2 AutoCAD modeling or field tests to indicate
3 where the resort is visible from.

4 MR. GERSTMAN: Your Honor, I'd like to
5 just refer to our visit yesterday to the areas
6 north of Route 28. At some point later today
7 we'll be able to submit additional photographs
8 identifying some of the vantage points where,
9 I believe we would submit that we could see
10 the ridge and the project from.

11 MR. SUNDELL: Adequacy. The
12 descriptions of some views from state lands
13 are inadequate since they minimize the visual
14 concerns graphically and the descriptions --
15 we've covered this one. And it's inadequate
16 because the view from Simon's Rock is not
17 included in the DEIS.

18 Under the heading of accuracy, the
19 accuracy of some of the photo simulations is
20 questionable. The graphic renderings minimize
21 the visibility of the project. I showed the
22 example of Wood Road where graphically the
23 visual impact was minimized. We saw several
24 figures where the resort will be much more
25 visible from viewing points.

(VISUAL ISSUE)

1 ALJ WISSLER: Can I ask you a question
2 about that? This view that we have here, is
3 this wildacres here? (Indicating)

4 MR. SUNDELL: This one? (Indicating)

5 ALJ WISSLER: Yes.

6 MR. SUNDELL: That's wildacres in the
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7 foreground.

8 ALJ WISSLER: But in the picture
9 that's in the DEIS, you're saying that the
10 colors of the buildings is somehow too soft a
11 pallet?

12 MR. SUNDELL: Yeah. It minimizes the
13 actual significance of the view.

14 ALJ WISSLER: Let me ask you this:
15 Having seen the pictures or the models that
16 have been shown, the color of the roof of
17 those buildings, isn't that kind of blue --
18 rather accurate reflection of what's being
19 presented?

20 MR. SUNDELL: The color of green can
21 be selected as a roof color, but the trick is
22 it's just not simply green, it's green with
23 sunlight on it from a different angle. At a
24 different time of day, it will be more
25 visible, but there will be a time of day when
(VISUAL ISSUE)

1 the reflection -- it depends on the building ³⁷⁷
2 material itself, but there will be a
3 reflection off the roof. And there will also
4 be a shadow line under the edge of the roof
5 down the side of the building.

6 MR. GERSTMAN: In order to do an
7 accurate visual photo simulation, would you
8 want to establish how the project would look
9 at different times of day?

10 MR. SUNDELL: To get the full
11 understanding of the visual impact, it would

12 probably help to see it in different light
13 conditions.

14 On accuracy, the DEIS indicated that
15 the resort is not visible from Panther
16 Mountain from the viewpoints that were
17 selected. Our photos from Panther Mountain
18 from an off-trail location contradict this.

19 ALJ WISSLER: Just go back to that,
20 the DEIS indicates the resort is not visible
21 from Panther Mountain. Mr. Gerstman, if you
22 could cite the page in the DEIS that says
23 that. You don't have to do that now.

24 MR. SUNDELL: Yeah, I can get that.

25 ALJ WISSLER: Do you have it right
(VISUAL ISSUE)

□

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1 now; we'll just put it on the --

2 MR. SUNDELL: Appendix 21. Sorry I
3 didn't have those --

4 The DEIS is to be reviewed on
5 thoroughness. And the visual impact
6 assessment does not contain a thorough
7 assessment of community character-related
8 views; for example, of the Big Indian Resort
9 from Route 28 -- we've already discussed this.
10 There are also no simulations from Hog
11 Mountain Road or from Owl's Nest towards the
12 Wildacres Resort. It's not as thorough as it
13 could have been. The DEIS does not include an
14 assessment of views from the Simon's Rock
15 viewpoint.

16 On significance. There's several ways
17 that significance of the views were

18 downplayed. The significance of visual
19 impacts of the resort from Balsam Mountain and
20 Big Indian Wilderness Area is minimized by
21 description of the view. Verbiage such as
22 "may be visible" and "limited visibility" are
23 used when the simulations, in fact, indicate
24 that -- even in the DEIS -- that the resort
25 will be visible from that. So the
(VISUAL ISSUE)

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1 significance is downplayed.

2 significance of visual impacts from
3 Balsam Mountain is further minimized by using
4 brush to obscure the view towards the resort.
5 Brush obscuring the view will likely be
6 removed in the future since the view is from a
7 mapped viewpoint and is periodically cleared
8 of vegetation by DEC.

9 Also significance is minimized,
10 significance of community character. The
11 significance of community character-related
12 visual impacts is minimized by doing photo
13 simulations from Red Mountain Road, Hog
14 Mountain Road and from the Owl's Nest -- I'm
15 sorry, the significance of the community
16 character-related visual impacts were
17 minimized by not doing photo simulations from
18 Red Mountain Road, Hog Mountain Road and from
19 the Owl's Nest toward the Wildacres Resort.
20 From Owl's Nest in the DEIS, the view done is
21 at the more distant Belleayre Heights Resort.

22 The significance of visual impacts

23 from Route 28 was dismissed without any photo
24 simulations or line-of-sight profiles. And
25 the significance of visual impacts from wood
(VISUAL ISSUE)

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1 Road are minimized by inaccurate photo
2 simulations. That concludes my presentation.

3 MR. GERSTMAN: Let me, for the record,
4 refer you to -- in connection with the Panther
5 Mountain reference, it's Appendix 21. I don't
6 believe there's a page on it, but the title is
7 "Panther Mountain". And it says, "No views
8 toward the project site were found during
9 either investigation from" -- and then, "The
10 only distant views available were to the east
11 and not in the direction of the site."

12 MR. RUZOW: Do you have a page?

13 MR. GERSTMAN: There's no page. I
14 don't see there's a page.

15 MS. BAKNER: Is there a figure number?

16 ALJ WISSLER: What figure is it?

17 MR. GERSTMAN: It's right before
18 figure PA-1.

19 ALJ WISSLER: What is it?

20 MR. GERSTMAN: Let me show you what I
21 have, your Honor.

22 ALJ WISSLER: I have it right here,
23 Panther Mountain. Just the one paragraph
24 there, starts "Views from Panther Mountain
25 were investigated"?
(VISUAL ISSUE)

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1 MR. GERSTMAN: That's correct.

2 Mr. Sundell, let me ask you, in your
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3 professional opinion, whether the Draft
4 Environmental Impact Statement adequately
5 evaluates the adverse visual impacts that will
6 result in the development of this project?

7 MR. SUNDELL: I don't think the full
8 extent of the visual impacts are explained in
9 the DEIS.

10 MR. GERSTMAN: Is it your professional
11 opinion that the development of this project
12 will result in significant adverse visual
13 impacts?

14 MR. SUNDELL: Yes, it will.

15 MR. GERSTMAN: Is it your opinion that
16 the development of this project will result in
17 significant adverse visual impacts from
18 resources of statewide significance?

19 MR. SUNDELL: It will, as I've shown.

20 MR. GERSTMAN: Is it your professional
21 opinion that this -- development of this
22 project will result in significant adverse
23 visual impacts to community character as
24 evidenced from Route 28 and those locations
25 north of Route 28 that you identified in your
(VISUAL ISSUE)

□

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1 presentation?

2 MR. SUNDELL: It is my opinion.

3 MR. GERSTMAN: Your Honor, any
4 questions?

5 ALJ WISSLER: You are just going to
6 fill in a couple things for me?

7 MR. GERSTMAN: Yes, your Honor, we

8 will provide you with the trail map after
9 lunch, the lunch break. The New York-New
10 Jersey Trail Conference Map.

11 In tomorrow's presentation from Ms.
12 Kopaskie, we will present the scenic byways
13 information.

14 If I can read my note, I can tell you
15 what else we will provide you.

16 ALJ WISSLER: That big old clock on
17 the wall, it is 9 minutes of 12. Do you need
18 some time, Mr. Ruzow, to prepare?

19 MS. BAKNER: Yeah, we would like a few
20 minutes.

21 ALJ WISSLER: Do you want to -- how
22 long are you going to be? If you want to take
23 kind of an early lunch, we can do that.

24 MS. BAKNER: That would be fine.

25 ALJ WISSLER: And start up at
(VISUAL ISSUE)

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1 1 o'clock.

2 MS. BAKNER: Noise will take some
3 time, maybe we can start at quarter of 1.

4 ALJ WISSLER: It's fine with me. I
5 want to allow you time to have lunch but also
6 time to prep your witness.

7 MS. BAKNER: We'll be fine. If we can
8 start at 12:45, we'll be great.

9 ALJ WISSLER: Okay, we'll start at
10 12:45 at the direction of Ms. Bakner.

11 (11:57 - 12:55 P.M. LUNCHEON RECESS
12 TAKEN.)

13 ALJ WISSLER: If we can go back on the
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14 record, please.

15 Mr. Gerstman.

16 MR. GERSTMAN: Okay, your Honor.

17 ALJ WISSLER: Visual impacts

18 continued. Ms. Bakner.

19 MS. BAKNER: Thank you very much, your

20 Honor.

21 MR. GERSTMAN: Excuse me, your Honor,

22 before you begin, we have what we should mark

23 as CPC 5.

24 (NEW YORK STATE-NEW JERSEY TRAIL

25 CONFERENCE CATSKILL FOREST PRESERVE MAP
(VISUAL ISSUE)

1 RECEIVED AND MARKED FOR IDENTIFICATION AS CPC ³⁸⁴

2 EXHIBIT NO. 5, THIS DATE.)

3 MR. GERSTMAN: Judge, would you

4 like --

5 ALJ WISSLER: What I'd like -- want to

6 do is to have Mr. Sundell indicate -- there

7 was a reference to a viewpoint that was not a

8 DEC viewpoint; I think on the Pine Hill West

9 Branch maybe?

10 MR. SUNDELL: Simon's Rock.

11 ALJ WISSLER: Could you point it out?

12 MR. SUNDELL: The graphic in the

13 PowerPoint presentation was a scan of this map

14 and -- do you want me to just point it out to

15 you?

16 ALJ WISSLER: Well, I'm going to have

17 you indicate for the record where that

18 -- that's the viewpoint that you spoke about

19 6-8-04 bcrossroadsf
that is not a DEC-maintained viewpoint?

20 MR. SUNDELL: Correct.

21 ALJ WISSLER: Was there one with
22 respect to Panther too?

23 MR. SUNDELL: No, but there was one
24 -- Balsam Mountain has one viewpoint indicated
25 on this map.

(VISUAL ISSUE)

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1 ALJ WISSLER: There was a viewpoint
2 from Simon's Rock that was not on the trail
3 map but is in the UMP?

4 MR. SUNDELL: Yes.

5 ALJ WISSLER: Okay. Then that is the
6 one -- that was the one, this Pine Hill west
7 Branch route.

8 MR. SUNDELL: Without marking it?

9 ALJ WISSLER: No, I want you to mark
10 it, but I want you to mark it as precisely as
11 possible.

12 You want to mark everybody's.

13 MR. SUNDELL: (Indicating.)

14 (12:58 - 1:03 P.M. DISCUSSION OFF
15 THE RECORD.)

16 MR. GERSTMAN: Your Honor, we have
17 submitted the Central Catskill Trail Map
18 produced by the New York-New Jersey Trail
19 Conferences as CPC Exhibit 5. And you have
20 asked Mr. Sundell to identify on the map the
21 approximate location of the Simon's Rock
22 viewpoint, and also the approximate location
23 of the area which he has testified was about
24 20 paces south of that on the trail. He has

25 indicated on your Honor's map a black dot, and
(VISUAL ISSUE)

1 I believe he has done that for all the parties³⁸⁶
2 as to where he believes, based upon his
3 reasonable approximation, those two locations
4 are.

5 ALJ WISSLER: Okay. Map is received
6 and the notation is indicated.

7 MR. GERSTMAN: Thank you, Judge.
8 We've also indicated during his presentation
9 that there were some parts of his presentation
10 that were from the DEIS. We would like to
11 identify for your Honor the references to the
12 DEIS, and Mr. Sundell is prepared to do that.

13 MR. SUNDELL: When I was showing a
14 slide, at the top it says, "Views of the
15 project area from state land." At the bottom
16 it's a view from Panther Mountain that the
17 DEIS indicates that the resort is not visible
18 from this location. Those DEIS figures I'm
19 referring to in that slide are figures --

20 ALJ WISSLER: In this packet in your
21 presentation?

22 MR. SUNDELL: Yes, it looks like this.
23 (Indicating)

24 MR. GERSTMAN: Says, "View of the
25 project area from state land." That's the top
(VISUAL ISSUE)

1 title. We should have numbered the pages, I'm³⁸⁷
2 sorry, your Honor.

3 ALJ WISSLER: "Views of the project

4 area from state land, view from Panther
5 Mountain - DEIS indicates resort is not
6 visible from this location."

7 MR. SUNDELL: Yes. The DEIS figures
8 that I'm referring to in that slide are part
9 of Appendix 21, Figures PA-1 and PA-2.

10 Your Honor, we would also like to --

11 ALJ WISSLER: This picture is
12 -- explain how this and PA-1 and PA-2 relate
13 to each other.

14 MR. SUNDELL: Panther Mountain is one
15 of the most heavily used trails in the
16 Catskills going up, and the figures in the
17 DEIS, as I understand it, are from viewpoints.
18 However, our photo is not from a designated
19 viewpoint, but it's from a location about
20 three paces off trail.

21 ALJ WISSLER: Now, looking at CPC
22 Exhibit 5, can you on that map --

23 MR. GERSTMAN: Excuse me one second,
24 your Honor, before we answer the question.

25 ALJ WISSLER: Yes. If you want
(VISUAL ISSUE)

□

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1 time --

2 MR. GERSTMAN: We're going to try and
3 locate the map. There's a map that shows
4 exactly the location.

5 ALJ WISSLER: And we can locate that
6 on this trail map?

7 MR. GERSTMAN: Yes. If I might, your
8 Honor, I'd also like to --

9 ALJ WISSLER: Do you want to do that
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10 now or you want to --

11 MR. GERSTMAN: While he's looking for
12 it, I'd like to present to you the photograph
13 that was taken from our site visit from Wood
14 Road. It's not as good as Dan Ruzow's
15 photographs, but it will have to do, your
16 Honor.

17 ALJ WISSLER: How is it different?
18 You're offering this?

19 MR. GERSTMAN: Yes. We can mark it as
20 CPC Exhibit 6.

21 (8 1/2 BY 11 PHOTOGRAPH OF VIEW FROM
22 WOOD ROAD RECEIVED AND MARKED FOR
23 IDENTIFICATION AS CPC EXHIBIT NO. 6, THIS
24 DATE.)

25 MR. GERSTMAN: Your Honor, Mr. Sundell
(VISUAL ISSUE)

1 can also identify now on your map and on the
2 parties' maps where the view from Panther
3 Mountain was taken.

4 MR. SUNDELL: (Indicating)

5 MR. GERSTMAN: Your Honor, let the
6 record reflect that Mr. Sundell has marked on
7 CPC Exhibit 5 the location from which the
8 photograph was taken from Panther Mountain
9 that's set forth in CPC Exhibit No. 4, the
10 title, "Views of the project area from state
11 land."

12 Your Honor, at this time I'd like to
13 take a brief moment to supplement our
14 testimony concerning the views from Panther

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15 Mountain and Slide Mountain, and I would ask
16 Mr. Olney to come up and sit down here with
17 us.

18 MR. OLNEY: (Indicating)

19 MR. GERSTMAN: Your Honor heard from
20 Mr. Olney previously today concerning CPC
21 Exhibits 3A, B and C. Mr. Olney is an
22 employee, as he mentioned, of the Catskill
23 Center for Conservation and Development.

24 Mr. Olney, are you familiar with the
25 Slide and Panther Mountain trails?
(VISUAL ISSUE)

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1 MR. OLNEY: Yes, I am.

2 MR. GERSTMAN: Can you tell me how
3 you're familiar with those trails?

4 MR. OLNEY: I've hiked on each of them
5 several times.

6 MR. GERSTMAN: Approximately how many
7 times?

8 MR. OLNEY: Approximately five or six
9 times each.

10 MR. GERSTMAN: When was the last time
11 you hiked on those trails?

12 MR. OLNEY: I was on the trail from
13 Fox Hollow to not quite the summit of Panther
14 Mountain on New Year's Eve and New Year's Day,
15 and sometime after that up to Slide from Frost
16 Valley Road probably in February, this
17 February.

18 MR. GERSTMAN: Are you familiar with
19 the proposed Crossroads Ventures project?

20 MR. OLNEY: Yes.

21 MR. GERSTMAN: Are you familiar with
22 the approximate location of where the Big
23 Indian part of the project development is
24 supposed to be located?

25 MR. OLNEY: Yes.
(VISUAL ISSUE)

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1 MR. GERSTMAN: Can you tell me,
2 Mr. Olney, whether you believe that the
3 project site is visible from part or portions
4 of the trails that you have mentioned, Slide
5 Mountain and Panther Mountain trails?

6 MR. OLNEY: I'm not aware of open
7 vistas of the ridge along those trails, but
8 both of those trails you can catch glimpses of
9 the ridge through the trees -- from the trees.

10 ALJ WISSLER: Glimpses of the ridge?

11 MR. OLNEY: Right, Belleayre Ridge or
12 Big Indian Plateau.

13 ALJ WISSLER: Not or, which it is?

14 MR. OLNEY: Whatever you were calling
15 it. This ridge where the project -- the
16 eastern component of the project --

17 ALJ WISSLER: The Big Indian site?

18 MR. OLNEY: Yes. You can see that
19 ridge line from -- you can see glimpses of
20 that ridge from the -- from those trails.

21 ALJ WISSLER: Specifically, you're
22 talking about the Giant Ledge Panther Fox
23 Hollow Trail; am I correct?

24 MR. OLNEY: Right.

25 ALJ WISSLER: Designated GP, (B) for
(VISUAL ISSUE)

1 blue, on CPC Exhibit 5?

2 MR. OLNEY: Yes. The other trail of
3 slide is not on this map.

4 MR. GERSTMAN: Can you see it from
5 that trail also?

6 MR. OLNEY: Yes. There is an open
7 vista just before the summit of Slide
8 Mountain -- I guess it would be just to the
9 west before you reach the summit. When you
10 stand on the rock on that vista, you cannot
11 see the ridge, but if you move around to the
12 edge down below that rock you can. And I
13 believe that there's other places along that
14 trail where you can just kind of make out the
15 ridge through the trees.

16 ALJ WISSLER: Is the summit of slide
17 indicated on CPC 5?

18 MR. OLNEY: It's on the next map, 43.

19 MR. GERSTMAN: Which we'll produce it
20 after lunch tomorrow. We'll get copies of it.

21 ALJ WISSLER: Mr. Olney, looking at
22 -- if you can't do this, I don't want you to
23 speculate -- but looking at CPC 5, the trail
24 map --

25 MR. OLNEY: Yes.
(VISUAL ISSUE)

1 ALJ WISSLER: -- looking at the trail
2 that comes up from Fox Hollow to Panther
3 Mountain there --

4 MR. OLNEY: Right.

5 ALJ WISSLER: -- can you, to the best
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6 you can, indicate to me where along that trail
7 you have views of the Big Indian Plateau site?

8 Do you understand my question?

9 MR. OLNEY: Yes.

10 ALJ WISSLER: You want some time to
11 think about that?

12 MR. OLNEY: I cannot indicate exactly
13 where, but I can indicate roughly where.

14 ALJ WISSLER: How rough?

15 MR. OLNEY: Well, just to -- on my
16 last hike on that trail, I did not go to the
17 summit of Panther. I went to -- a couple
18 of -- just slightly lower false summits to the
19 north. It's from those points where you drop
20 off some steep sections of cliffs where I saw
21 glimpses through the trees.

22 ALJ WISSLER: Looking at CPC 5, I want
23 you to show me where the false summits are, if
24 you can, and specifically where you believe
25 you had the vistas.

(VISUAL ISSUE)

1 MR. OLNEY: Probably around where the ³⁹⁴
2 letter B appears, GP(B), which is halfway
3 between the point that was just recently
4 marked on the map and the vista point that
5 shows just to the north. It looks like a
6 little circle of land. That might be one of
7 the false summits. (Indicating)

8 ALJ WISSLER: You're going to have to
9 show me.

10 Do you want to come up here?

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MR. OLNEY: (Indicating)

ALJ WISSLER: Can I have counsel up here? (Indicating)

MR. OLNEY: This is an estimation. (Indicating)

(1:17 - 1:19 P.M. - DISCUSSION OFF THE RECORD.)

MR. GERSTMAN: For the record, Mr. Olney has identified at your request, to the best of his knowledge, the approximate location of the false summits of Panther Mountain, north of Panther Mountain on the trail indicated by either GP (B), or at the approximate location, I believe, of the photograph which was taken which is shown in (VISUAL ISSUE)

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Mr. Sundell's exhibits.

Is that everybody's assessment?

ALJ WISSLER: That's what the record indicates.

MR. GERSTMAN: Mr. Olney, have you viewed the project site from any other locations which are not listed in the DEIS which provide a vantage point; for example, Hunter Mountain?

MR. OLNEY: Yes.

MR. GERSTMAN: When did you climb Hunter Mountain?

MR. OLNEY: In January. I can't say what day.

MR. GERSTMAN: Of this year?

MR. OLNEY: Yes.

17 MR. GERSTMAN: And what does the DEIS
18 indicate with respect to the view from Hunter
19 Mountain?

20 MR. OLNEY: To my recollection, the
21 DEIS talks about two vantage points from
22 Hunter Mountain in relation to the Crossroads
23 project, one of which is termed the Colonel's
24 Chair, it's a location along the trail near
25 Hunter Mountain ski area. And I believe that
(VISUAL ISSUE)

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1 looks in the opposite direction as the
2 project, it looks to the northeast, whereas
3 the project is the opposite direction from
4 that vantage point. And it says it's not
5 visible, which is understandable, it's the
6 opposite direction.

7 The other vantage point mentioned in
8 the DEIS is the Hunter Mountain fire tower,
9 and the DEIS shows the photograph taken the
10 from the Hunter Mountain fire tower. The
11 photographer that took the photograph that was
12 in the DEIS was standing on the ground at the
13 base of the fire tower, so the photograph is
14 of trees.

15 ALJ WISSLER: Can you be more
16 specific, what photographs you're referring to
17 in DEIS?

18 MR. GERSTMAN: Yes, your Honor, it's
19 Appendix 21, Figure HU-1.

20 ALJ WISSLER: That's the only picture
21 of Hunter Mountain in there. You called it

22 something chair?

23 MR. OLNEY: Colonel's Chair is
24 mentioned in the text, I believe. Maybe it's
25 the ski area itself was mentioned. I'm trying
(VISUAL ISSUE)

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1 to remember back.

2 ALJ WISSLER: The only photograph you
3 saw in the DEIS was the one that's HU-1?

4 MR. OLNEY: Correct.

5 MR. GERSTMAN: For the record, your
6 Honor, the paragraphs in the DEIS do refer to
7 Colonel's Chair. The photograph follows that.

8 MR. OLNEY: It says, "Colonel's Chair
9 Ski Lift." And the ski lifts at Hunter do not
10 look in the direction of the project area, so
11 obviously it's not going to be seen.

12 I took the liberty of climbing the
13 fire tower, which is now open to the public.
14 It may not have been open to the public at the
15 time this photograph was taken, and maybe
16 that's why they stood at the base of the fire
17 tower. But for at least two or three years
18 now the fire tower has been restored. It's
19 open to the public. People can go up to the
20 top. And there is a view from the fire tower
21 to Belleayre Ski Area and the ridge to the
22 side of it.

23 ALJ WISSLER: You can see the Big
24 Indian Plateau from that fire tower?

25 MR. OLNEY: Yes, that's right.
(VISUAL ISSUE)

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1 ALJ WISSLER: How far away is that; do
Page 95

2 you know?

3 MR. OLNEY: I'd be guessing. I don't
4 know.

5 Additionally, a few hundred yards down
6 the trail from the fire tower is a rock ledge
7 vista point that's marked on the New York-New
8 Jersey Conference Maps. There's a star symbol
9 on the map showing the vista point. And the
10 ridge -- Belleayre Ski Area and Belleayre
11 ridge are also visible from that rock ledge.

12 ALJ WISSLER: Big Indian Plateau is
13 visible?

14 MR. OLNEY: Yes.

15 ALJ WISSLER: I don't have that map.

16 MR. GERSTMAN: We will have to provide
17 that for your Honor.

18 ALJ WISSLER: Mr. Olney, tell me what
19 you do for a living.

20 MR. OLNEY: I work for the Catskill
21 Center as a director of their land
22 conservation program.

23 ALJ WISSLER: What do you do in that
24 regard? What are your duties in that regard?

25 MR. OLNEY: Most of my duties involve
(VISUAL ISSUE)

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1 working with landowners on conservation
2 easements, but I also occasionally work with
3 the State or the City on land protection
4 projects, refer landowners to appropriate
5 agencies if they're interested in land
6 conservation.

7 ALJ WISSLER: Do any of your duties
8 include analysis of viewsheds?

9 MR. OLNEY: I occasionally do viewshed
10 mapping with a GIS system, but not as
11 sophisticated as the consultants here
12 prepared.

13 ALJ WISSLER: But as part of your
14 duties, you do do that; correct?

15 MR. OLNEY: Yes. I lead hikes as part
16 of my duties for the Catskill Center members
17 and the public to different places. And as
18 far as hiking goes, I'm a co-author of a
19 regular hiking and outdoor column in the local
20 newspaper.

21 ALJ WISSLER: When you lead groups on
22 hikes, is there like an itinerary that you
23 have, spots that you would stop at?

24 MR. OLNEY: We have an event calendar
25 we send out --
(VISUAL ISSUE)

1 ALJ WISSLER: No, I mean specifically ⁴⁰⁰
2 if you take a group on a hike, are there
3 particular -- is there an itinerary for that
4 about particular spots you want to stop for
5 the sake of the view and so forth?

6 MR. OLNEY: We usually pick a
7 destination. You know, we're going to take a
8 hike to Huckleberry Point or to such and such
9 a waterfall, and we just go and see that.

10 MR. GERSTMAN: Along the way, are
11 there vistas that you point out to the group
12 that you're taking up these hikes?

13 MR. OLNEY: Yes. We're always
14 pointing out which mountains are which or
15 which valley is which.

16 MR. GERSTMAN: Have you taken groups
17 up Slide or Panther Mountains, those trails?

18 MR. OLNEY: Not recently. We did a
19 Slide Mountain hike a couple of years ago.

20 MR. GERSTMAN: Along those hikes,
21 would you have identified Belleayre Mountain
22 or the Belleayre ridge from those trails?

23 MR. OLNEY: No. These hikes that I'm
24 referring to where I was specifically looking
25 for the ridge was on my own.
(VISUAL ISSUE)

1 ALJ WISSLER: Okay. Are you going to ⁴⁰¹
2 give me another map of Hunter Mountain?

3 MR. GERSTMAN: Yes.

4 ALJ WISSLER: And Slide or what?

5 MR. OLNEY: We can get the whole set
6 of Trail Conference maps.

7 ALJ WISSLER: I'll leave the record
8 open for that.

9 If there are any questions that Ms.
10 Bakner has with respect to that, we can do
11 that.

12 MR. GERSTMAN: Any other questions for
13 Mr. Olney, your Honor?

14 ALJ WISSLER: Not that I have.
15 Are we ready?

16 MS. BAKNER: Yes, your Honor.

17 ALJ WISSLER: Miss Bakner.

18 MS. BAKNER: Thank you, your Honor.
19 First of all, I want to start out by talking
20 about the record that's been established in
21 this case with respect to visual impacts.
22 Specifically I want to direct your Honor's
23 attention to the Draft environmental Impact
24 Statement, the Executive Summary at Section K,
25 Discussion of Visual Resources, Section 3.8.4
(VISUAL ISSUE)

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1 and Appendix 21.

2 ALJ WISSLER: Specifically pages 3-141
3 through --

4 MS. BAKNER: That's correct. I want
5 to note for the record that our visual impact
6 study is not included in Appendix 21. We only
7 have a part of our visual impact study in
8 Appendix 21. The majority of it for the five
9 mile area is actually within the body of the
10 Draft Environmental Impact Statement.

11 MR. GERSTMAN: Miss Bakner, excuse me,
12 could you speak up, please. I can't hear you.

13 MS. BAKNER: The scoping document and
14 the list of mountains and trailheads where we
15 looked outside the five mile area were all
16 developed in consultation with the New
17 York-New Jersey Trails Conference, and we
18 looked at each of the mountains and vistas
19 that they identified for us outside that area.
20 We proposed a list, they proposed summits.
21 That's what we did as part of the scoping
22 process.

23 ALJ WISSLER: There's a table in
Page 99

24 there; is that what you're referring to?

25 MS. BAKNER: Yes, sir, that's correct.
(VISUAL ISSUE)

1 ALJ WISSLER: You don't have to call 403
2 me sir.

3 MS. BAKNER: Okay. The other thing
4 that we did, of course throughout this period,
5 is work both with Department staff and also
6 with the Department's designated visual
7 consultant, which was the Saratoga Associates.
8 For the record, I just want to run through the
9 list of times when we started the study, what
10 we did throughout the study and our
11 communications with Saratoga Associates.

12 MR. GERSTMAN: Your Honor, if I might
13 interrupt right now. I would object to the
14 use by the Department of Saratoga Associates
15 as a consultant in this matter. We believe,
16 your Honor, that there is a conflict of
17 interest that Saratoga Associates has with
18 respect to their viewshed and visual impact
19 analysis for this project. If I might
20 elaborate before we go further?

21 ALJ WISSLER: Go ahead.

22 MR. GERSTMAN: Your Honor, Saratoga
23 Associates is employed as a consultant by the
24 St. Lawrence Cement Company in connection with
25 an adjudicatory proceeding pending before the
(VISUAL ISSUE)

1 Commissioner and the Department's Office of 404
2 Hearings and Mediation Services. Mr. Allen is

3 an integral part of the project team that has
 4 represented the St. Lawrence Cement Company in
 5 connection with an application to construct a
 6 very significant cement plant in the
 7 Greenport, Hudson area. Mr. Allen and his
 8 -- and Saratoga Associates have stated in the
 9 EIS that they have essentially mitigated this
 10 very pervasive project under SEQRA. They have
 11 represented that the project essentially is
 12 not significant. They are pursuing permitting
 13 of that project in connection with the SEQRA
 14 determination that the impacts will be
 15 mitigated to the maximum extent practicable.

16 Likewise, this project, your Honor,
 17 represents a very significant project for
 18 evaluation by the Commissioner and Office of
 19 Hearings and Mediation Services. And we are
 20 concerned, your Honor, that the representation
 21 by Mr. Allen of viewpoints in connection with
 22 this project will be tainted by or may be
 23 influenced by his representation of St.
 24 Lawrence Cement in the department hearings in
 25 which he is an advocate for the project
 (VISUAL ISSUE)

□

1 sponsor.

2 We are very concerned that anything he
 3 has to say here has potentially the dual
 4 purpose of not only suggesting that this
 5 project may or may not be acceptable from a
 6 visual impact assessment, but ultimately, the
 7 St. Lawrence Cement project, which essentially
 8 has many of the same features in terms of its

9 dominance in the community and its impact on
10 community character, will have that kind of
11 mitigating impact upon that. So his advocacy
12 here for the Department staff can't be
13 separated from his advocacy for St. Lawrence
14 Cement. And we ask that he not be authorized
15 to continue to testify here.

16 In the alternative, your Honor, we
17 think it's a severe -- I'm sorry, it's an
18 impediment to his credibility as we're going
19 forward.

20 ALJ WISSLER: Comments?

21 MS. BAKNER: Yes, your Honor. The
22 issue here is -- first of all, Mr. Gerstman is
23 attempting to impeach Mr. Allen's credibility
24 as a witness in this matter in connection with
25 the work that he is doing in another matter
(VISUAL ISSUE)

1 before the Department. Unlike with attorneys,⁴⁰⁶
2 I am aware of no conflict of interest rules
3 that apply to professionals who look at
4 projects. So the first point is there's no
5 rule of law or anything else that Mr. Gerstman
6 has cited to you that would bar or in any way
7 inhibit Mr. Allen from acting on behalf of the
8 Department.

9 The second issue is this project, with
10 all due respect to hyperbole, is nothing like
11 St. Lawrence. It's not in the same viewshed.
12 It's not in the same county. About the best
13 that could be said is it is in the same state.

14 It is for a resort, not a WalMart, it's not an
15 industrial facility, it's not on a river.
16 There's so many things it's not, there's
17 virtually no comparison between the two
18 factually in any way, shape or form.

19 So it's the Applicant's position that
20 our client has expended enormous funds to do a
21 visual impact study that is both thorough,
22 careful and well reviewed by the Department.
23 As a part of that, we worked long and hard
24 with Saratoga Associates, various people, not
25 only Matt Allen, but other members of Saratoga
(VISUAL ISSUE)

□

1 Associates, in ensuring that we complied with⁴⁰⁷
2 the Department's Visual Impact Assessment
3 Policy, and that this project was reviewed
4 with all the attention it deserves. And we
5 would like to proceed at this time with our
6 testimony.

7 ALJ WISSLER: Staff?

8 MS. KREBS: Yes, your Honor, I would
9 agree. From Department staff's perspective, I
10 know of no rules or case laws regarding a
11 consultant's conflict of interest. There are
12 rules governing that for lawyers, but I agree
13 with Miss Bakner in that case, I don't believe
14 there are rules or case law on this subject.

15 Second of all, I agree the projects
16 are quite different. I'm not sure what the
17 relevance is of one project to another. I
18 don't think that taints Mr. Allen's
19 involvement whatsoever.

20 Third, your Honor, Mr. Allen's focus
21 is completely here on whether or not the DEIS
22 meets the DEC policy, the Visual Assessment
23 Policy. In that case I think, your Honor,
24 that he is fully qualified to look at this
25 project from that perspective.
(VISUAL ISSUE)

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1 MR. GERSTMAN: We request that -- we
2 haven't seen Mr. Allen's contract with the
3 Department on this matter, but my recollection
4 is contracts contain conflict of interest
5 provisions.

6 Not only that, the Department staff is
7 looking at this issue very narrowly. Mr.
8 Allen is standing in the stead of Department
9 staff here, and just like it would be
10 inappropriate for the Department staff to
11 represent a project sponsor in a particular
12 matter, it is inappropriate for Mr. Allen, who
13 is representing the DEC staff on this issue,
14 to do the same thing.

15 Ms. Bakner narrows the issues much
16 more than they should be. There are very
17 common themes throughout the St. Lawrence
18 Cement project and this project in terms of
19 the significance of the surrounding natural
20 resources. If you want to diminish the
21 importance of the Catskills in relation to the
22 Hudson, be my guest, but we don't, as
23 interveners in this case or in my
24 representation of the Coalition in that case,

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certainly don't diminish the importance of
(VISUAL ISSUE)

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1 either natural resource.

2 The application of the policy to
3 significant issues of visual impact evaluation
4 are very similar in both cases because you
5 have to go through the process of the visual
6 impact assessment in order to come to your
7 conclusions. That carryover from the St.
8 Lawrence Cement project and the potential
9 carryover from this project to the Office of
10 Hearings are of significance to us. We
11 believe that Mr. Allen stands in the stead of
12 the DEC employees in this context, and believe
13 that he should be -- recuse himself from this
14 process.

15 It's unfortunate that nobody
16 investigated this up until this time. I
17 sympathize with the Applicant that they had
18 every good faith and intention of working with
19 Saratoga Associates and expected that the DEC
20 would have cleared the conflict. That doesn't
21 seem to have been the case, and we ask him to
22 be precluded. If nothing else, your Honor, we
23 believe it is a significant factor in
24 evaluating the credibility of Mr. Allen's
25 testimony and his offer of proof here today.
(VISUAL ISSUE)

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1 ALJ WISSLER: Everything that Saratoga
2 Associates has done is part of the DEIS;
3 correct?

4 MS. BAKNER: Everything that they did
Page 105

5 on behalf of the Department, along with and
6 under the supervision of Department staff, was
7 review materials that we prepared and comment
8 on them. All of their comments have been a
9 part of the public record since -- really a
10 long time ago --

11 MR. RUZOW: Shortly after 2000. Since
12 the scoping, your Honor. Four years ago.

13 ALJ WISSLER: If we were at an
14 adjudicatory hearing on this issue, my ruling
15 would simply be that your argument goes to --
16 not to the admissibility of this testimony but
17 to its credibility, and I would give you lots
18 of latitude with respect to cross-examination.
19 I can tell you right now, if this issue comes
20 up for adjudication, I will give you that kind
21 of latitude.

22 At the Issues Conference stage
23 however, it seems to me, again what I said
24 this morning, we're talking about offers of
25 proof and framing issues. To that extent, I
(VISUAL ISSUE)

□

1 see no conflict, and I will permit the
2 testimony of Saratoga Associates at this
3 hearing.

4 Continue.

5 MS. BAKNER: October 6th, 1999, L.A.
6 Group did the Leaf-On Visibility Field Study.

7 December 23rd, 1999, a letter went
8 from Mr. Ruzow to Neil Woodworth confirming
9 the list of mountains from which the New

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10 York-New Jersey Trails Conference would like
11 to have the visual assessment completed.

12 In April of 2000, L.A. Group did the
13 Leaf-Off Visibility Field Study.

14 In August 30th, 2000, which is
15 actually a year earlier than we just said,
16 your Honor, we were informed via a letter from
17 Peg Duke to Bob Bristol at the Saratoga
18 Associates that they were going to be used as
19 the Department's visual consultant.

20 On September 13th, 2000, we
21 communicated with the Saratoga Associates
22 transmitting the scoping document, which
23 included the scoping for the visibility study.

24 In September also, they had a meeting with
25 Saratoga Associates to discuss the scoping
(VISUAL ISSUE)

□

1 document.

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2 Throughout October 2000, there was
3 correspondence back and forth on public
4 comment letters concerning the final scope of
5 work and the scope of the Draft Environmental
6 Impact Statement.

7 On July 31st, 2000, after we had done
8 a considerable amount of our work, the DEC
9 program policy on visual impact assessment was
10 issued.

11 On February 26th, 2002, we received
12 the Saratoga Associates' initial comments on
13 the review of our visual assessment work.
14 This is part of the pre-DEIS completeness
15 phase.

21 we did, is now that the Hunter Mountain Tower
22 is open, we had somebody go out, strap
23 themselves to the tower and take the necessary
24 photographs. We also went out and looked at
25 views of Halcott Mountain, which we'll have
(VISUAL ISSUE)

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1 here today.

2 And in an effort to try to overcome
3 what's really a technological impossibility,
4 we put together some plans showing the extent
5 of lighting visually, which we'll cover here
6 at the end. And the purpose of that is to try
7 to address the night sky issue in the way best
8 we can. And I've leave that to the experts to
9 talk about it.

10 Today I have here with me Richard
11 Weber, Stephen Davis and Kevin Franke, who are
12 all an integral part of the development of the
13 visual impact assessment. And I would like,
14 Rick, if you don't mind going first and
15 telling us what your qualifications are.

16 MR. WEBER: I'm sitting with my back
17 to someone in this room no matter what, but my
18 name is Richard Weber, I'm a landscape
19 architect. I was first registered to practice
20 in 1980. I have worked for the L.A. Group in
21 two different periods of time.

22 I have gotten a Master's of Landscape
23 Architecture at the University of Michigan in
24 Ann Arbor in 1983. I have worked abroad in
25 National Parks Planning for a number of years
(VISUAL ISSUE)

1 in Central America, and have been doing visual
2 impact assessment since around 1978, which was
3 the first project that I worked on for a
4 large-scale regional impact assessment
5 project. I'm currently employed by the
6 Adirondack Park Agency as the supervisor for
7 regional planning there.

8 MS. BAKNER: Stephen Davis, if you
9 could go ahead.

10 MR. DAVIS: My name is Stephen Davis,
11 I'm a landscape architect. I've been licensed
12 in New York State and the State of Nevada. I
13 went back to school in '94 and got a
14 Bachelor's of Landscape Architecture from
15 Cornell.

16 I've been working on visuals basically
17 ever since I left school, which has been the
18 last eight years, both in New York State as
19 well as the State of Vermont. And I'm
20 employed at the L.A. Group.

21 MS. BAKNER: Kevin Franke.

22 MR. FRANKE: My name is Kevin Franke,
23 I'm an environmental analyst with the L.A.
24 Group where I've been employed for the
25 approximate past 15 years. Not a landscape
(VISUAL ISSUE)

1 architect, instead an environmental analyst
2 with a Master's Degree in Environmental
3 Biology.

4 MS. BAKNER: Okay. Now, what we would
5 like to do --

6 MR. GERSTMAN: Excuse me, your Honor,
7 for one second. I know this is not an
8 adjudicatory process but I for the first time
9 heard Mr. Weber say that he's a current
10 employee of the APA?

11 MR. WEBER: That's correct. During
12 the course of this project, I was employed by
13 the L.A. Group, and I am now, for the last
14 year and a half, been employed by the
15 Adirondack Park Agency.

16 MR. GERSTMAN: Your Honor, I ask for
17 an opportunity to question Mr. Weber on the
18 issue of whether or not he's received
19 authorization from the APA.

20 MS. BAKNER: I can answer that
21 question. Yes, there were communications with
22 the APA, and his counsel's office signed off
23 on his participation here in the Issues
24 Conference today.

25 And if Mark has any questions, he
(VISUAL ISSUE)

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1 should speak with --

2 MR. WEBER: Barbara Rottier.

3 MR. GERSTMAN: Can we have copies of
4 the correspondence?

5 MS. BAKNER: I didn't say
6 correspondence, I said he had communications
7 with the Adirondack Park Agency staff.

8 MR. GERSTMAN: I'm sorry to direct
9 these questions, your Honor -- if you want me
10 to continue to ask the questions, I will. But
11 I'm very concerned --

12 ALJ WISSLER: The record will reflect
13 your concern. I'm going to continue with
14 their presentation today.

15 MR. GERSTMAN: I request that we be
16 provided with any correspondence from the APA
17 counsel's office.

18 MR. RUZOW: Marc, you're free -- with
19 all due respect, your Honor, he's free to
20 communicate with their counsel's office. I
21 don't see how that is relevant.

22 ALJ WISSLER: I don't know that that
23 needs to be part of the record of this
24 hearing. Go ahead.

25 MS. BAKNER: What we're going to do
(VISUAL ISSUE)

1 now is walk you through the very detailed and ⁴¹⁸
2 thorough process that we went through in
3 developing the visual assessment. I apologize
4 in advance that it may get a little tedious,
5 however, we think in light of this sort of
6 harum-scarum approach adopted by Mr. Gerstman,
7 we think it's important that we go through and
8 show you everything we did and why we did it
9 so that you can see how it applies to the
10 Visual Impact Assessment Policy.

11 ALJ WISSLER: Let's not characterize
12 each other's presentation, particularly when I
13 can't spell harum-scarum.

14 MR. GERSTMAN: I'm not sure I should
15 object here.

16 MS. BAKNER: The first part of the

17 process I would like Kevin Franke to address
18 since he was with the project from the
19 earliest and he is the one who did the first
20 stage of the process which are the
21 line-of-sight drawings.

22 MR. FRANKE: As Teresa said, we
23 initiated this process almost five years ago
24 now. And the start of the process began by
25 developing a number of line-of-sight profiles
(VISUAL ISSUE)

1 emanating from the project site throughout the ⁴¹⁹
2 five mile study area around the project site.

3 The purpose of this initial exercise
4 was just to get a general feeling for the
5 landscape of the study area, as well as a
6 preliminary indication of where the project
7 site may be visible from the viewshed
8 analysis.

9 Following this very basic and cursory
10 analysis, because of the complexity of the
11 project, the terrain that surrounds the
12 project, we went to a much more sophisticated
13 methodology that resulted in the preparation
14 of the graphic that was presented earlier,
15 which was DEIS Figure 3-25A, which is the
16 Composite Viewshed Analysis Map that you see
17 up there before you. It's a larger version of
18 the figure that is within the DEIS.

19 MS. BAKNER: Your Honor, that's figure
20 3-25A.

21 ALJ WISSLER: Okay.

22 MS. BAKNER: What I'd like to point
Page 113

23 out now is page 5 of the DEC policy -- Program
24 Policy Document on Assessing and Mitigating
25 Visual Impacts.
(VISUAL ISSUE)

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1 In particular, I would like to draw
2 your Honor's attention to page 5, and in the
3 first partial paragraph, second sentence down,
4 it says: "At a minimum, a line-of-sight
5 profile or, depending upon the scope and
6 potential significance of the activity, a
7 digital viewshed may be used to determine if a
8 significant property is within the potential
9 viewshed of the proposed project."

10 So, your Honor, we would submit that
11 by moving quickly, given the importance of the
12 project and the regionally significant
13 resources surrounding it, to a more, shall we
14 say, sophisticated methodology, we acted
15 completely within the confines of the Visual
16 Impact Assessment Policy.

17 And what I would like now, Rick, is if
18 you could please describe for us --

19 ALJ WISSLER: Meaning instead of doing
20 a line-of-sight analysis, more fully you
21 jumped to the --

22 MS. BAKNER: That's correct, your
23 Honor.

24 Rick, if you could explain how you did
25 that and how it is state-of-the-art, that
(VISUAL ISSUE)

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1 would be great.

2 MR. WEBER: If I may sit for a couple
3 of minutes here.

4 ALJ WISSLER: Just one minute. Mr.
5 Franke spoke about a line-of-sight analysis
6 that was done however?

7 MS. BAKNER: There was a point at
8 which -- and Kevin, you can describe this
9 better than I -- they took USGS maps, put them
10 all together and --

11 MR. FRANKE: Really what you do, your
12 Honor, is take your site as the centroid, or
13 central point, and you take radii extending
14 out from that central point at a regular
15 interval.

16 ALJ WISSLER: That was done in this
17 case?

18 MR. FRANKE: Yes.

19 ALJ WISSLER: Is that part of the
20 DEIS?

21 MR. FRANKE: No, it wasn't. That was
22 an initial analysis to identify potential
23 receptors. Essentially, it was a sheet that
24 was probably about the size of this table if
25 not bigger, and it looked like a pie with a
(VISUAL ISSUE)

□

1 number of slices cut through it.

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2 MR. WEBER: From the point where Kevin
3 talks about having used the line of sight in
4 the preliminary analysis, we then began to
5 look at a more specific, a more -- what we
6 felt was a more appropriate approach to
7 assessing the visibility within a mountainous

8 area of this scale of a five-mile study area
9 by using a Digital Elevation Model, which is a
10 product that's produced by the USGS. It's
11 publicly available information. It's
12 essentially a grid that is overlaid, USGS
13 topographic quadrangles, on a resolution of 10
14 meters on a side. Basically you lay down a
15 grid on top of a quadrangle of 10 meters on a
16 side, and you assign in the center of each one
17 of those grid points an elevation you pick off
18 the quadrangle.

19 So DEM is actually a model that
20 represents the quadrangles, the topography of
21 the quadrangles. And it is readily available,
22 and it is at this point in time, and through
23 my experience, been the most accurate way to
24 get a very quick handle on where the areas
25 that can be seen and cannot be seen from a
(VISUAL ISSUE)

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1 given proposal.

2 ALJ WISSLER: What does DEM stand for?

3 MR. WEBER: Digital Elevation Model,
4 DEM. So using Geographical Information
5 Software, GIS software, in this case we used
6 software produced by the Environmental Systems
7 Research Institute, otherwise known as ESRI;
8 it's one of the leading companies in software
9 development for Geographic Information
10 Systems. And we used their software and, in
11 particular, of the family of software that
12 they have, we used ArcView, it's a trade name,

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13 and it's a version that's known as 3.2. These
14 are the technical aspects of it. And used two
15 additional specialized routines inside of
16 ArcView that were produced by ESRI known as
17 Spatial Analyst and 3D Analyst.

18 Though we don't see the actual
19 practice of drawing cross sections, that is
20 what the software does in the process of
21 producing a limited visibility map. How that
22 is done is that we essentially laid all the
23 individual quadrangles of the Digital
24 Elevation Model across the study area, and
25 then clipped the Digital Elevation Model to
 (VISUAL ISSUE)

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1 the five-mile study area -- and I'll come back⁴²⁴
2 to why that's a significant number in a
3 minute -- and the software assesses each one
4 of those individual 10-meter squares and asks
5 it the question: Can you or can you not see
6 the site.

7 And the way it does that is to draw a
8 line back to the target points and then assess
9 using -- it actually draws a line-of-sight
10 profile and then determines yes, or no it
11 doesn't, and then colors that particular cell
12 either as visible or not visible.

13 And actually it can go to -- in this
14 case we had a number of, I think 13 different
15 target points that we used on the site plan as
16 the areas that we wanted to be able to test
17 the extent of visibility. And we choose them
18 to represent the extent of the project. And

19 in some of the places where we thought more
20 obvious visibility might be, we obviously
21 choose those points as well as target points.

22 So the software assesses each one of
23 those target points, and it can actually say
24 which one of the target points is being
25 visible. It can tell you from a point that's
(VISUAL ISSUE)

1 shown here, if three of the target points of ⁴²⁵
2 the 13 were visible, or if only one and which
3 one. So it's a powerful way of looking at --

4 ALJ WISSLER: Is there a list of the
5 target points in the DEIS?

6 MR. WEBER: Yes, there is.

7 ALJ WISSLER: Does that list indicate
8 the elevation of the target points?

9 MR. WEBER: I'll have to check to see,
10 but I believe discussion of target points, and
11 I need to find it -- on the copy I have, which
12 is a copy from the DEIS, I do not have page
13 numbers, but -- I may need to refer to a
14 page --

15 MS. BAKNER: Here is the DEIS. Which
16 section do you have?

17 MR. WEBER: Under Section 3.84. The
18 short answer, your Honor, is that I have the
19 points listed, but in the actual narrative, I
20 do not mention the heights of each of the
21 points, but --

22 ALJ WISSLER: Tell me where that list
23 is. Is that in one of the tables?

24 MR. WEBER: It is not in the table,
25 it's a narrative description. And I'm trying
(VISUAL ISSUE)

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1 to --

2 MR. FRANKE: While Rick is looking,
3 your Honor, the locations of the target points
4 are shown on Figure 3-25A.

5 ALJ WISSLER: I understand that. But
6 I need to know, not just the target points, I
7 want to know the elevations. And was each
8 target point at the same -- a single
9 elevation?

10 MR. WEBER: No, they were chosen as to
11 whether they were buildings -- if they were
12 buildings that we were representing, it would
13 be chosen to the proposed architectural height
14 from the plans.

15 ALJ WISSLER: So if the target point
16 was a building, it would be the top of the
17 building?

18 MR. WEBER: Correct. And in the case
19 of -- in the situations of fairways where we
20 were trying to actually see if we could see
21 the floor of the -- the ground plane of a
22 newly created fairway, we had a very low
23 target elevation so that it would -- we
24 couldn't set it at zero, but we set it at one
25 or two feet above the surface of the center of
(VISUAL ISSUE)

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1 the fairway so that that was considered to be
2 conservative in the sense that we're trying to
3 see where those locations are that are on the
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4 floor or the ground plane of the fairway.

5 ALJ WISSLER: Let me ask you this:
6 The hotel at Big Indian, was that one of the
7 target points?

8 MR. WEBER: Yes.

9 ALJ WISSLER: Was that target point of
10 the rooftop of the building?

11 MR. WEBER: Yes.

12 ALJ WISSLER: Was that target point
13 also of the ground floor of that building?
14 You understand what I'm saying?

15 MR. WEBER: Yes.

16 ALJ WISSLER: They could be at the
17 same point, but at different elevations?

18 MR. WEBER: Right.

19 ALJ WISSLER: Is that analysis in the
20 DEIS or is it just a single point?

21 MR. WEBER: Whether or not you could
22 see the top of the building is what we
23 assessed.

24 ALJ WISSLER: That's what's in the
25 DEIS. That answers my question.
(VISUAL ISSUE)

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1 MR. WEBER: So there's narrative
2 descriptions of the target points. The detail
3 of each individual height of each point is not
4 in the narrative, but it is producible if
5 necessary.

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6 MS. BAKNER: Your Honor, that's at
7 page 3-158 through 3-159 when they talk about
8 the targets in the Digital Elevation Model.

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ALJ WISSLER: I'm sorry?

MS. BAKNER: 3-158.

ALJ WISSLER: Okay. Starts -- first paragraph, "New Figure 3-25A entitled, Viewshed Analysis"?

MS. BAKNER: Right. Then the next paragraph says, "Figure 3-25A illustrates the cumulative extent of visibility to proposed project from all the target points tested in the limits of visibility model."

ALJ WISSLER: I understand. For each target point, we chose the high elevation of that target?

MR. WEBER: Yes. The intent in just about every level of decision-making about constructing the model or how we evaluated it was to try to be essentially as conservative
(VISUAL ISSUE)

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as possible, all those collective decisions.

So --

ALJ WISSLER: wait. If we're only looking at the highest points, aren't we missing the ground floor; the visibility of the --

MR. WEBER: Of the building at that point -- what we're trying -- there's two different things.

ALJ WISSLER: wouldn't it be more conservative to use the lower level? Do you understand my question?

MR. WEBER: I do understand your question. What I'm -- there's two different

15 things that we're trying to ascertain in the
16 visual assessment, in my view. The first is
17 can you or can you not see the project from
18 the study area. And that's the --

19 ALJ WISSLER: That's the high point.

20 MR. WEBER: -- limits of visibility.

21 The next effort is to define what is the
22 significance of what it is that you can see
23 from those locations. So how we use the
24 limits of visibility map is to really begin to
25 pinpoint those areas that we need to study
(VISUAL ISSUE)

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1 more deeply. And that's where, I think the
2 information that you're curious about, is
3 where the simulations come in is that they
4 allow you to see from a given vantage point
5 what the extent of building that you may see
6 from that viewpoint. But the limits of
7 visibility --

8 ALJ WISSLER: I'm not asking you about
9 how high something is or how far away it can
10 be seen, I'm also interested in -- from a
11 particular viewpoint, how much of a land
12 surface it is spread over --

13 MR. WEBER: For that part -- from the
14 standpoint that I believe that you're asking
15 about, we did put target points along the
16 fairway with a low target point so that we
17 were close to the ground, so that if those
18 were seen, we would know that essentially the
19 ground is being seen.

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Does that answer your question?

ALJ WISSLER: It does. But there is no table of a list of viewpoints and their elevations?

MR. WEBER: No, I don't believe so. So we have targets and we have all of the (VISUAL ISSUE)

cells within the study area, each 10-by-10 grid within the study area, looking back at these targets and basically assessing whether or not can we see any of the target points from each of those individual cells. That is how this map was produced, is to use that GIS software to assess that.

Now, in my experience in having -- in doing this for a while, in the -- I'm familiar with -- at the earliest stages before, in the late seventies, everything that we did was done by line-of-sight profiling.

Another project that we worked on which was during the period of the Olympics, 1980 Olympics, we had to assess potential tower sites for communications to support the Olympics in a mountainous area. And we did that all by doing cross-sectioning of a five-mile study area. And what is different about this process and that process is that this assesses each individual ten meter square. Can it or can it not be seen. When you do a series of radiant lines emanating from a target source in an -- outward to a five-mile study area, in between those

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1 radiants are areas that are not getting
2 assessed essentially. You have to look at the
3 topography, and with experience interpolate
4 basically between each individual radiant.
5 Are you following what I'm saying?

6 ALJ WISSLER: Yes, sir.

7 MR. WEBER: So in this terrain, in
8 this situation, it's my opinion after having
9 used GIS software for visual assessment,
10 having come from the previous technology of
11 using hand-drawn sections, that this is a much
12 more accurate way of trying to assess a full
13 study area of five miles in mountainous
14 terrain.

15 ALJ WISSLER: But the red shaded areas
16 of that map --

17 MR. WEBER: Yes.

18 ALJ WISSLER: -- indicate that there
19 is some target point that is visible from that
20 red shaded area?

21 MR. WEBER: Correct.

22 ALJ WISSLER: But that red shaded area
23 doesn't mean that every single target point is
24 equally visible?

25 MR. WEBER: That's correct.
(VISUAL ISSUE)

1 ALJ WISSLER: So how -- in other
2 words, if I just want to look at the top of
3 the Big Indian Hotel, how could I cull out of
4 that map only those areas that are visible

5 from the top of the Big Indian Hotel? Do you
6 understand what I'm saying? In other words,
7 the shape of that red will change?

8 MR. WEBER: That's right.

9 ALJ WISSLER: That's a cumulative map?

10 MR. WEBER: That's right.

11 ALJ WISSLER: But it doesn't mean that
12 every site is equally visible from --

13 MR. WEBER: That's correct. We chose
14 to do the cumulative map approach to just say
15 if any portion of the project was visible.

16 ALJ WISSLER: Then it qualifies to be
17 on the map?

18 MR. WEBER: Right. Which we thought
19 was, again, a conservative statement at that
20 point. You're stating if any part of the
21 project is visible -- we knew as a later step
22 we would be going out to these areas and
23 assessing the potential impact looking back
24 from these areas that became painted by the
25 limits of visibility map. So we knew that we
(VISUAL ISSUE)

□

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1 would have our opportunity to look at the
2 level of significance of these different
3 areas. So what we were trying to do was
4 identify those places where some portion of
5 the project could be seen.

6 ALJ WISSLER: I'll shut up.

7 MR. WEBER: Visual impact assessment
8 is a science that has been in practice
9 since -- well, the think the U.S. Forest
10 Service has been the one that really began

11 doing this process for large regional
12 assessment, and although some of the
13 documentation that we have is old, the
14 technology really hasn't changed and the
15 approach to evaluating the significance of
16 things really hasn't significantly changed
17 over a 25-year period.

18 So we had sited the selection of a
19 distance of five miles for our study area as
20 significant based on the commonly accepted
21 literature of the USDA for these procedures.
22 In discussing that with the DEC at the time
23 when we were the consultant for the DEC, about
24 the appropriateness of that, we had
25 concurrence from them on that selection.
(VISUAL ISSUE)

1 So using the approach that USDA forest
2 Service uses for assessment -- now, we need to
3 be aware there are no real bright lines in
4 this but --

5 ALJ WISSLER: This is guidance that
6 you followed? Is this in the DEIS?

7 MR. WEBER: A reference to the
8 document was but this document was not.

9 ALJ WISSLER: Can you give me a copy?

10 MS. BAKNER: Yes, we can.

11 ALJ WISSLER: Do you have copies for
12 everybody?

13 MS. BAKNER: We'll be happy to provide
14 that later.

15 ALJ WISSLER: Whatever the relevant

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16 pages, plus a title page that tells me what it
17 is.

18 MR. WEBER: So just to understand this
19 map a little better, there are three zones
20 that are defined within that five-mile study
21 area; the interior most zone or the closest to
22 the project site, is, using the nomenclature
23 that comes from this Forest Service document
24 which we found to be effective and useful per
25 description, this would be up to a distance of
(VISUAL ISSUE)

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1 roughly a half mile is considered to be
2 foreground. If you consider looking at
3 -- standing at a vista and looking out,
4 foreground is the vegetation that you see in
5 the immediate half mile which begins to
6 distinguish itself because you can see detail
7 in individual trees, and sometimes even leaf
8 -- there's variability in the way each person
9 sees, but this is a generalization or
10 categorization of how people see. So color
11 intensity is at its brightest and detail is at
12 its brightest. That's within a half mile.

13 Then you go to the middle ground which
14 is from a half mile to three and a half miles.
15 There are no bright lines in this but it's a
16 useful tool in breaking down how you look at
17 different aspects of the view when you're
18 trying to describe them in a narrative.
19 That's why I'm trying to introduce this at
20 this point.

21 And finally, roughly from three and a
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22 half files to five miles is what you would --
23 in this region -- look and see, well, that's a
24 distant view, that's background. So on this
25 map, just to help understand where those zones
(VISUAL ISSUE)

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1 are, we placed a half mile circle to
2 delineate, again, not a bright line, but
3 roughly where the foreground ends and the
4 middle ground begins, and then ends here and
5 then goes from middle ground to background.

6 ALJ WISSLER: What is the point chosen
7 for the center of the foreground circles?

8 MR. WEBER: It was approximate
9 geometric center of both the wildacres site
10 and the Big Indian site.

11 So I don't know if there are other
12 questions. We did, in order to better see,
13 and as it was mentioned this morning, these
14 pink areas that you see on the map are those
15 areas that were identified as cells or picture
16 elements that could have a potential view back
17 to the site; and in order for it to be a
18 little clearer, we identified those road
19 corridors within those zones where you might
20 be able to see it. So that's why the darker
21 red is just to help you really identify where
22 roads would be within the areas of potential
23 visibility on this map.

24 ALJ WISSLER: But in your analysis,
25 that's cumulative, that all potential views
(VISUAL ISSUE)

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1 are shown on that map?

2 MR. WEBER: That's correct.

3 ALJ WISSLER: So there is -- there
4 would be no map with more red than that?

5 MR. WEBER: Correct. One other
6 element that I need to add to the explanation
7 of this map is that we talked about the
8 original Digital Elevation Model which is the
9 ground surface. We also took from the USGS
10 quadrangles the limits of vegetation within
11 the study area, which is the green, darker
12 green tint here. And we projected that
13 -- those areas that were green or vegetated,
14 forested, projected up an elevation of 50 feet
15 above the ground surface at each one of those
16 individual cells that were forested to
17 simulate tree canopy, top of tree canopy
18 essentially. So that's significant because
19 what that means is that this map is an
20 assessment of limits of visibility based on
21 topography and -- both topography and
22 vegetation. So if there was a cell that was
23 forested that was cutting off a line of sight
24 between the target and the -- some observer
25 cell beyond, it would paint that observer cell
(VISUAL ISSUE)

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1 as not visible. Is that clear?

2 ALJ WISSLER: Yes. Looking at 325-A,
3 the target points are all depicted there,
4 those little black stars?

5 MR. WEBER: The stars, correct. Also
6 you will see, I believe the locations that

7 were used for the field verification work,
8 that I believe Kevin will talk about following
9 me, the actual locations of where the balloons
10 were flown are shown as well with the yellow
11 squares. And that's significant because that
12 was helping us to verify what we were seeing
13 in the field as well by being able to
14 essentially calibrate what we saw based on
15 what we saw with the balloons.

16 ALJ WISSLER: The positions that are
17 stated there, again, we have no list in the
18 DEIS of their precise locations and
19 elevations?

20 MR. WEBER: Their locations are on the
21 map but their heights are not indicated.

22 MR. GERSTMAN: What figure shows the
23 balloons?

24 ALJ WISSLER: 325-A, I think. This
25 one. (Indicating).

(VISUAL ISSUE)

1 MR. GERSTMAN: Is that the same as in ⁴⁴⁰
2 the DEIS?

3 MR. WEBER: Yes.

4 MS. BAKNER: Rick, if you don't have
5 anything else to offer right now, I would ask
6 Kevin to come up and describe what they refer
7 to as the field verification method for the
8 digitally created maps. We weren't just
9 relying on technology, however well respected
10 it is, we were actually going out into the
11 field to actually see if you can see it.

12 MR. FRANKE: With the benefit of this
13 map, we were able to perform our field
14 analysis work, which essentially was a
15 confirmation of what the computer was telling
16 us. We had areas -- what we did is, armed
17 with this map then, with the able assistance
18 of Mr. Al Frisenda from Crossroads Ventures,
19 essentially took an inventory of the existing
20 road system within the five mile limits and
21 those areas where potential visibility was
22 indicated, as well as in those areas where
23 potential visibility was not indicated. It's
24 just as important to confirm that something
25 was not visible, as it was to confirm
(VISUAL ISSUE)

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1 potential visibility.

2 Prior to conducting our survey of the
3 surrounding roads and other areas of public
4 interest, which we can talk a little more
5 specifically about later, what we did was we
6 flew four-foot diameter balloons from specific
7 locations on the project site. Typically when
8 performing visual impact assessment work, you
9 will fly such a target as a balloon typically
10 at the height of a structure that you're
11 trying to assess the visibility of. That was
12 not the intent of this field verification
13 work. Because of the large nature of the site
14 and the complexity of the intervening
15 topography, the intent of flying these
16 balloons were to orient us in the larger
17 landscape picture.

18 So as shown on 325-A, we picked a
19 number of locations at the Big Indian Plateau,
20 as well as wildacres, which basically serves
21 for orientation for our field observers. So
22 if you were out driving on a particular road
23 looking back towards the site, either with the
24 naked eye, taking photographs or even with
25 binoculars, those balloons would serve as
(VISUAL ISSUE)

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1 visible confirmation, if they were visible,
2 that you were looking at the land mass that
3 did comprise the project site.

4 The balloons, coupled with compass
5 bearings, the use of things such as
6 binoculars, allowed the field crews assessing
7 the various locations to confirm the accuracy
8 of this mapping. At those locations where
9 visibility was confirmed, photographs were
10 taken. In some instances photographs were
11 taken using a number of different lenses.
12 It's fairly standard practice in visual
13 assessment work to use a 50 millimeter lens on
14 your camera --Rick can speak better to
15 this -- it's most representative of the human
16 eye. In some instances where your views were
17 distant and not clear, we would take a shot
18 with the telephoto lens just so we could say,
19 okay, there's the balloon but now we pull back
20 to the 50 millimeter photograph that we used
21 for the simulation.

22 MS. BAKNER: How high were the

23 balloons flying? 6-8-04 bcrossroadsf

24 MR. FRANKE: Each balloon was flown on
25 a measured tether at a height of either 100 or
(VISUAL ISSUE)

1 150 feet, and they were anchored on the ground 443
2 at the place of those locations. And
3 following the actual flying of the balloon, we
4 had the project surveyor come in and locate
5 these using GPS survey. So these balloons
6 were up floating high above Belleayre ridge.

7 ALJ WISSLER: In other words, your
8 people who were out there when the balloons
9 were up, they could say: well, it lies over
10 there roughly between those two balloons; it
11 marks the eastern/western border?

12 MR. FRANKE: well, we flew one at the
13 hotel and we flew one out towards hole 3 on
14 Big Indian. Just to frame things for you, the
15 landscape.

16 ALJ WISSLER: Good.

17 MR. RUZOW: And on wildacres?

18 MR. FRANKE: wildacres, we started
19 down low by the sewage treatment plant, and a
20 series of four balloons. We even had one in
21 an open field by the --

22 ALJ WISSLER: But no attempt was made
23 to use those balloons to indicate the height
24 of a particular structure?

25 MR. FRANKE: No, not at all, your
(VISUAL ISSUE)

1 Honor. It was simply for positioning in the 444
2 landscape for our field crews. As Ms. Bakner
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3 mentioned before, this exercise was conducted
4 twice; first time being in October of 1999
5 during the leaf-on condition, and then again
6 the following spring in April of 2000 during
7 the leaf-off condition using the same
8 procedures.

9 ALJ WISSLER: Are there any
10 photographs of the balloon testing?

11 MR. FRANKE: I have some in the box.

12 ALJ WISSLER: As part of the DEIS?

13 MR. FRANKE: Those raw photographs
14 themselves were not so they may be used in the
15 simulation. I have to go back in and look at
16 the simulations and see whether we have
17 balloon photographs -- and we have a drawer
18 full of photographs -- some of them have
19 balloons, yep.

20 MS. BAKNER: The next part of this
21 process is the simulation of what you're
22 looking at, or what you will be looking at
23 when the project is actually built, and while
24 Steve's getting set up here --

25 ALJ WISSLER: Does anyone need a
(VISUAL ISSUE)

□

1 break?

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2 (NO AFFIRMATIVE RESPONSE.)

3 MS. BAKNER: There were several
4 questions about had we -- in the intervenors'
5 papers -- about had we looked at different
6 aspects of the project like clearing, had we
7 looked at clearing. What the wire frame

8 simulations show you is what it will look like
9 when it's constructed. Take it away, Steve.

10 MR. DAVIS: The first step of the
11 process, which Kevin and Rick talked about,
12 was to identify the location of where the
13 project would be. This one is Big Indian and
14 this is Figure 3-28 in the DEIS. Once points
15 were located that visual analysis were going
16 to be taken of, a set of photographs were
17 taken to get a panoramic view. When you do
18 visual simulations, you want to take the
19 project, or whatever you're doing, in context.
20 So you don't want one photo, you want a group
21 of them together to show the whole.

22 The next thing in this process is you
23 go to an AutoCAD, and we built a model of the
24 site using the DEM and the proposed site with
25 the buildings, the finished grading that would
(VISUAL ISSUE)

1 be taking place, and that was inserted in the ⁴⁴⁶
2 DEM. Vegetation was set at 50 feet above the
3 existing contours and proposed contours. Then
4 all that information was removed so what you
5 got there, if you look at some of the
6 simulations, was the white would be the canopy
7 on the top, the yellow was the ground floor,
8 red would be the buildings, and the green
9 would be the canopy edge. Once that was
10 produced, then we would go ahead and insert
11 that into the photographs. (Indicating)

12 ALJ WISSLER: Give me the color key
13 again.

14 MR. DAVIS: white was canopy, yellow
15 was the ground base, red was the building, and
16 the green was the canopy edge.

17 ALJ WISSLER: Green compared to yellow
18 was what?

19 MR. DAVIS: Green is the canopy edge,
20 like the edge --

21 ALJ WISSLER: The other was?

22 MR. DAVIS: Ground, ground plane, it
23 would be like fairways.

24 ALJ WISSLER: Okay.

25 MR. DAVIS: So once you produce that,
(VISUAL ISSUE)

1 then you would insert it in a photograph, and⁴⁴⁷
2 the way you place the grid into the photograph
3 is you use the ridge line or if there's
4 structures -- on one of them there was a
5 structure that we could help to place it --
6 and basically the grid, if you look at it, the
7 3D model follows the ridge line, and you can
8 lay it in there and place it within the
9 photograph quite accurately. And the last
10 step in there after it was placed is you would
11 go ahead and render the different -- like the
12 buildings, you show the color that what was
13 proposed, the roofs, fairways, grass, colors,
14 then the edge of the canopy which is a darker
15 color to show the shadow. (Indicating)

16 ALJ WISSLER: 3-28 here actually
17 depicts a view of what? Is that Big Indian?

18 MR. DAVIS: Yes, it is. It's just an

19 example to show the process. I'm going to go
20 through each one of those.

21 Any other questions?

22 (NO AFFIRMATIVE RESPONSE.)

23 MR. DAVIS: One of the things we
24 didn't really speak of, but it's on here, is
25 that we were also asked to look at summits
(VISUAL ISSUE)

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1 beyond the five-mile radius, so on here it
2 shows --

3 ALJ WISSLER: We need to identify this
4 document. Is that in the DEIS?

5 Let's take a moment and mark that. Do
6 you have copies of it?

7 MS. BAKNER: We'll send copies to the
8 parties who are not here today.

9 ALJ WISSLER: Thank you.

10 (VISUAL ASSESSMENT OF STATE HIKING
11 TRAILS, SUMMITS AND OTHER VIEWPOINTS BY THE LA
12 GROUP RECEIVED AND MARKED FOR IDENTIFICATION
13 AS APPLICANT'S EXHIBIT NO. 4, THIS DATE.)

14 MR. DAVIS: The reason I wanted to
15 show you this is because I'm going to talk
16 about one of the simulations we did, but this
17 ring right here, the first black ring is what
18 you see on this, that's the five-mile ring
19 -- the five-mile is this yellow one, sorry.
20 The first black one is your 10-mile, 15 and
21 20. Normally you don't go out this far but
22 because we're trying to respond to everybody's
23 concerns, we went beyond the five-mile radius.
24 (Indicating)

25

A number of the peaks you're going to
(VISUAL ISSUE)

1

see are between 10 and 20 miles. I'm going to⁴⁴⁹
talk about Plateau Mountain, which is at
15.25 miles, and the views you're going to see
from there. Kevin may want to talk about this
after I go through the simulations.

6

Figure 3-29 in the EIS --

7

MR. RUZOW: The coloration on the
larger drawing is slightly different than the
other because of the printer. Two different
printers.

10

11

ALJ WISSLER: Applicant's 4 here, the
hiking trails are solid green?

12

13

MR. RUZOW: It's clearer, darker.

14

MR. DAVIS: The first one I was
talking about, the Plateau --

15

16

ALJ WISSLER: We're looking at 3-29?

17

MR. DAVIS: 3-29 in the DEIS. We're
indicating where Balsam Mountain is on the
figure. If you look at the proposed
condition, that shows the grid, and on this
one, because of the distance, I just showed
the clearing of the site. At this distance,
you're not going to see much more than that.
If you go to figure 3-

18

19

20

21

22

23

24

25

ALJ WISSLER: 3-29 is from the summit
(VISUAL ISSUE)

1

of Plateau Mountain?

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2

MR. DAVIS: Plateau Mountain.

3

ALJ WISSLER: Which according to

4 Applicant's 4 is 15.2 miles away from --

5 MR. DAVIS: From the site.

6 ALJ WISSLER: From the site or --

7 MR. DAVIS: Big Indian. You're seeing
8 Big Indian. Any other questions?

9 (NO AFFIRMATIVE RESPONSE.)

10 If you look at figure 3-30, the top
11 photo shows realistically what the site would
12 be from this distance. If you look to your
13 right, you can just barely see the ski area.
14 It's a very light white, but that's basically
15 what you would see of the site. If you look
16 at the lower photograph, we enhanced it just
17 to show how visible the site would be, the
18 size of it. This is very conservative as far
19 as showing the amount of visibility.

20 (Indicating)

21 The next one is 3-30A. This is just
22 an enlargement of the last photograph showing
23 the site. Again, you can see off to the right
24 about an inch is the ski trails right at the
25 top of the ridge. (Indicating)

(VISUAL ISSUE)

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1 Figure 3-31 is a view from Balsam
2 Mountain, just off the trail. You're looking
3 at the upper end of the Big Indian and you can
4 just barely see -- if you look at the grid, it
5 shows the hotel, that's the red. To the left
6 of that is the edge of the canopy of the
7 green --

8 ALJ WISSLER: Can you tell me on CPC
9 Exhibit 5 where that -- where that is again,

10 running along the trail there.

11 MS. BAKNER: While Steve is looking at
12 this, one of the things we neglected to
13 mention is for these distant views, we didn't
14 use balloons because you wouldn't, of course,
15 be able to see the balloons. Instead they
16 gave instructions to people who hiked up the
17 trails and the compass bearings of the site so
18 they can see where they are. So you won't --
19 there was no intention to try to fly anything
20 big enough to see from these areas.

21 ALJ WISSLER: I'm just trying to
22 coordinate all the maps I have in front of me.
23 This is the human GIS thing. We're doing our
24 own overlay job here.

25 MR. GERSTMAN: I didn't hear what the
(VISUAL ISSUE)

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1 question was.

2 ALJ WISSLER: We're looking at a view
3 in the DEIS, Figure 3-31, view from Balsam
4 Mountain. My question is: Taking your map,
5 CPC 5, and the trail that goes up to the
6 summit of Balsam Mountain, where along that
7 trail is that photograph taken from?

8 MR. DAVIS: We're identifying both
9 points from Balsam.

10 ALJ WISSLER: Let me have counsel and
11 the experts at the table here.

12 (2:37 P.M. - DISCUSSION OFF THE
13 RECORD.)

14 ALJ WISSLER: Back on the record.

15 what Kevin Franke has indicated on CPC Exhibit
16 5, the two locations from Balsam Mountain
17 which are -- the views from Balsam Mountain
18 which are depicted in Figures 3-31 and 3-32.

19 MR. DAVIS: And also if you go 3-31
20 through 3-34A.

21 ALJ WISSLER: But -- because I only
22 have two little plus marks here.

23 MR. DAVIS: But there's three pages
24 for each.

25 ALJ WISSLER: I understand, but some
(VISUAL ISSUE)

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1 of them are close-up; right?

2 MR. DAVIS: Right.

3 ALJ WISSLER: But the two viewpoints,
4 if you will, are depicted in -- with the
5 50-millimeter lens looking from Balsam are --

6 MR. DAVIS: 3-31.

7 ALJ WISSLER: -- and 32.

8 MR. DAVIS: 32 is the same point.
9 3-31 and 3-33. They're two different points.

10 ALJ WISSLER: Okay. Why don't we
11 identify which is which.

12 MS. BAKNER: Can you say north or
13 south.

14 MR. DAVIS: The north one is 3-31 and
15 the south one would be 3-33.

16 ALJ WISSLER: So that the record is
17 clear, earlier we had Mr. Sundell indicate two
18 points for us, one on the trail of Panther
19 Mountain, the other one on the trail from the
20 summit of Belleayre, and he indicated both

21 those points with kind of a dot. Mr. Olney
22 indicated a site on the trail leading to
23 Panther with a small little (X), then we have
24 a plus in references to the figures 3-31 and
25 3-33 supplied by the Applicant.
(VISUAL ISSUE)

1 MS. BAKNER: Kevin, if you could just ⁴⁵⁴
2 explain the directions people were given when
3 they went out and did these field visits.

4 MR. FRANKE: For the distant views?

5 MS. BAKNER: For the distant views,
6 yes.

7 MR. FRANKE: Prior to going out on the
8 investigation of the field view, whoever was
9 performing that particular investigation, was
10 equipped with a compass bearing for various
11 locations along the trail leading to a summit
12 or a vantage point, so they would have a range
13 within the compass to verify the distance.
14 Time was spent reviewing a USGS mapping of
15 topography between -- almost creating that
16 line-of-sight profile that we talked about,
17 but to become familiar with the intervening
18 topography, the land masses that we expected
19 to see, again, to frame your area of interest
20 within the landscape. And lastly, they were
21 also equipped with a copy of the New York-New
22 Jersey Trails map and a copy of the ADK
23 Catskill Mountain Trail Guide. That was used
24 in preparation for each of the individual
25 hikes to various peaks.

(VISUAL ISSUE)

1 MS. BAKNER: Steve, if you go ahead
2 with the simulations, that would be great.

3 MR. DAVIS: So any questions on 3-31?

4 ALJ WISSLER: No.

5 MR. DAVIS: 3-32, the top one shows
6 existing condition, and the lower photo shows
7 the proposed conditions on there. The
8 foreground vegetation basically blocks the
9 majority of the view to the site in this
10 photo. (Indicating)

11 ALJ WISSLER: I'm trying to understand
12 the difference between 31 and 32.

13 MR. DAVIS: 32 -- it's easier if
14 you -- it's just the rendered version of it.
15 It's showing what you would see of it. 31
16 shows you the grid overlay so that you can see
17 all of the site elements more clear.

18 ALJ WISSLER: 32 shows you?

19 MR. DAVIS: what you would see.

20 ALJ WISSLER: without the grid overlay
21 there?

22 MR. DAVIS: That's correct.

23 ALJ WISSLER: If we had x-ray vision
24 and could see through the brush, we would see
25 what 3-31 shows, and with the brush, we're
(VISUAL ISSUE)

1 still looking at what 3-32 shows.

2 MR. DAVIS: Correct. Then 3-32A is
3 just an enlargement of that previous one. The
4 next one is 3-33. This is the second point on
5 the Balsam Mountain. Again, this one shows --

6 in here I did black for the buildings because
7 of the color of the leaves. So the grid, the
8 lower photo shows the grid overlaid on Big
9 Indian again, and the black indicates there is
10 -- I believe there's six buildings shown.
11 (Indicating)

12 Then if you go to 3-34 and the lower
13 one, photo here shows the one building that's
14 not blocked by the vegetation, it shows the
15 canopy edge as well as a green strip for the
16 golf fairway. (Indicating)

17 MS. BAKNER: I'm not sure who is best
18 to address this but let me throw this out.
19 what's different about what you did here than
20 the average person walking out in the woods?

21 MR. FRANKE: The intent of this, and
22 the directions given to the people performing
23 the field work were to actively search for
24 views of the project site. Your average hiker
25 may be aware of a viewpoint, a map viewpoint,
(VISUAL ISSUE)

1 can seek that out, but particularly the person⁴⁵⁷
2 who did Balsam Mountain was told along that
3 whole length of trail, your job is to find
4 that from as many, many locations as possible.

5 MR. DAVIS: And both of the viewpoints
6 were off the trail.

7 MS. BAKNER: So how far off the trail
8 were they told to go? Were they told to limit
9 themselves in any way?

10 MR. FRANKE: No, basically go outwards

11 towards the project site because there's not a
12 long distance from the edge of the trail to
13 where it started to slope off.

14 ALJ WISSLER: So 3-31 and 3-33 are
15 views from Balsam?

16 MR. DAVIS: Right.

17 ALJ WISSLER: Along the trail but not
18 on the trail?

19 MR. DAVIS: Correct.

20 ALJ WISSLER: But we don't know how
21 far off the trail?

22 MR. FRANKE: You might see in some
23 places, some evidence of some herd paths where
24 other people were seeking out views.

25 MS. BAKNER: The next one is 3-35.
(VISUAL ISSUE)

1 MR. DAVIS: Yes, 3-35 is a -- 3-33 and ⁴⁵⁸
2 34 were leaf-on conditions from the second
3 -- the southern most point. 3-35 is with
4 leaf-off.

5 ALJ WISSLER: Let me stop you. 3-33.

6 MR. DAVIS: Yes.

7 ALJ WISSLER: Depicts buildings?

8 MR. DAVIS: Correct.

9 ALJ WISSLER: We go to 3-34 and 3-34A,
10 we're only showing one building?

11 MR. DAVIS: If you go back to 3-34,
12 there's only one building shown on 3-34
13 because vegetation blocks the rest of the
14 buildings from this particular view.

15 ALJ WISSLER: 3-33, the black
16 indicates buildings, but you're saying they
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17 would be hidden by vegetation anyway?

18 MR. DAVIS: That is correct. With the
19 grid, I'm showing always it with the
20 assumption of --

21 ALJ WISSLER: What's there. Assuming
22 your could see through?

23 MR. DAVIS: If you could see through.
24 If there was nothing blocking it, that's what
25 you would see.

(VISUAL ISSUE)

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1 MS. BAKNER: The reason why you do
2 that is because people get frustrated if they
3 can't figure out what they could see?

4 MR. DAVIS: It's always good to show
5 everything that's there that could possibly be
6 seen so that they can have it in context. If
7 I just did it and showed the one building
8 without showing the grid, it doesn't really
9 give you an idea of what you're looking at.

10 ALJ WISSLER: 3-35.

11 MR. DAVIS: The same as 3-33, only
12 with leaf-off. In here, I showed the
13 buildings in red because everything is brown.
14 (Indicating)

15 If you go to 3-36, there are more
16 -- there's two buildings, plus two partial
17 other buildings shown in 3-36, as well as the
18 fairway and the edge of the canopy. Then
19 3-36A is just an enlargement of the proposed
20 conditions. (Indicating)

21 ALJ WISSLER: Let me ask this: The

22 actual locations of these have to be known,
23 right, because you went there with leaf-on or
24 leaf-off conditions?

25 MR. DAVIS: That's correct.
(VISUAL ISSUE)

1 ALJ WISSLER: So it is possible to be ⁴⁶⁰
2 really quite specific about that view point?

3 MR. FRANKE: If you wanted to, I could
4 have someone show you exactly.

5 ALJ WISSLER: But the hikers that went
6 up there had to know exactly where to go --
7 what did they say? Where is it? We ought to
8 be able to locate this really quite precisely.

9 MR. FRANKE: I can probably give you
10 GPS coordinates for those. Unfortunately they
11 weren't recorded at that time.

12 ALJ WISSLER: It's something we really
13 don't have to guess on.

14 MR. FRANKE: Sure. No, absolutely
15 correct.

16 MS. BAKNER: Now you're shifting into
17 the more near views with 3-37?

18 MR. DAVIS: This one still is almost a
19 mile out, so you're still in the middle
20 ground. What's significant about 3-37 is it's
21 about 200 feet up 28 from where the firehouse
22 photo -- Firehouse Road photo was shown this
23 morning. In this one, if you look at the
24 lower photo, it shows the fairway 3 canopy.
25 You can see there's a cut in the canopy and
(VISUAL ISSUE)

1 the edge of the canopy is visible in the lower ⁴⁶¹
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2 photo on 3-37 of the grid. (Indicating)

3 ALJ WISSLER: Is this the part we went
4 through the other day on the site visit?

5 MR. FRANKE: Just down the road. This
6 is just down the road from Fire Station Road.

7 ALJ WISSLER: This isn't where we
8 walked under the bridges to get out of the
9 Esopus?

10 MR. FRISENDA: Before you went down to
11 the road --

12 COURT REPORTER: I don't know who that
13 is.

14 MS. BAKNER: This is Al Frisenda.
15 we'll spell it later. He's a employee with
16 Crossroads Ventures, and all around knows
17 where everything is.

18 Al, now you can answer the question.

19 MR. FRISENDA: Your Honor, we parked
20 in front of the post office, then we walked to
21 the entrance road to the park where the flag
22 pole was.

23 ALJ WISSLER: Yes, I got it.

24 MR. DAVIS: If you go to 3-38, the
25 lower one shows the cutting of the canopy from
(VISUAL ISSUE)

1 fairway 3. 3-38A is just an enlargement of ⁴⁶²
2 that. (Indicating)

3 MS. BAKNER: Each time you say it's an
4 enlargement, it's what a person would see
5 standing there with a telephoto lens?

6 MR. DAVIS: If you were to take this

7 3-38A and you were to hold it about arm's
8 length, that's what you would see if you were
9 out there. That's the reason behind these 11
10 by 17's. It gives you an good idea of what
11 you would see. If you were to stand there and
12 move it up and down and look at the view,
13 that's approximately what you would see.
14 (Indicating)

15 MR. RUZOW: That's the same park, it's
16 just you were closer to the area of Big Indian
17 than we were when we saw this morning with Mr.
18 Sundell who was across the road, he was across
19 28.

20 MR. DAVIS: He was across the road and
21 200 feet to the south.

22 ALJ WISSLER: 3-37 to 3-38 -- 3-38 and
23 3-38A is a cropped enlargement of that piece?

24 MR. DAVIS: It's an enlargement of the
25 lower corner.
(VISUAL ISSUE)

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1 ALJ WISSLER: But 3-38A is the
2 photograph that was taken? You cropped it and
3 enlarged the section to get to 3-38A, as
4 opposed to switching lenses?

5 MR. DAVIS: Yes, I just took that
6 photo and enlarged it.

7 MS. BAKNER: The next one is 3-39.

8 MR. DAVIS: 3-39, and that is a view
9 of Big Indian from the Owl's Nest Restaurant.
10 It shows the grid overlay, fairways, some of
11 the buildings on it, the access road. And if
12 you look at the right-hand side, Belleayre

13 Mountain Ski Center is visible as part of your
14 view. (Indicating)

15 If you look at 3-40, the lower one
16 shows basically a rendered version of it with
17 dark colors for the buildings, green for the
18 fairways.

19 MS. BAKNER: Now, this view from the
20 Owl's Nest Restaurant, why would you have
21 focused on this particular location for a
22 view?

23 MR. FRANKE: Well, from the site
24 visits, it's obviously directly across the
25 valley from the proposed development, a public
(VISUAL ISSUE)

1 restaurant. It gives you the context of the ⁴⁶⁴
2 visual environment in which you have a lot of
3 views from across the valley.

4 MR. DAVIS: There's a large clearing
5 in front of you which opens up the vista.

6 MS. BAKNER: So this is actually an
7 excellent vantage point to see the project?

8 MR. DAVIS: Correct.

9 MR. RUZOW: Is this the site of the
10 former Grand Hotel?

11 MS. BAKNER: Yes, that's correct.

12 MR. DAVIS: Again, 3-40A is just an
13 enlargement of Big Indian Plateau.

14 MS. BAKNER: Before you leave this
15 one; again, the opponents have criticized the
16 colors that have been used in these
17 simulations, and if you could address that for

18 the Judge, that would be great.

19 MR. DAVIS: If you look at the canopy
20 edge in here, 3-40 or 3-40A, it's enlarged,
21 you can see it a little better -- if you look
22 at the edge of the canopy, tried to add
23 shadows in there, darker, to give it more
24 context so that you could see the edge. The
25 fairways are a combination of greens because
(VISUAL ISSUE)

1 you have mowed areas as well as rough. The 465
2 buildings are brown, and they proposed a green
3 roof. The material on the buildings is
4 supposed to be non-reflective. That's part of
5 the reason that they're shown in those tones.

6 ALJ WISSLER: Given that you have the
7 Belleayre ski trails right there, why didn't
8 you just pick a tone from the pallet of the
9 ski trails?

10 MR. DAVIS: Because the ski trails are
11 not irrigated, the fairway would be irrigated
12 so it should be a slightly darker green -- the
13 biggest difference between them.

14 MS. BAKNER: In terms of the rough,
15 Kevin, for the golf course, would the rough be
16 more green or would it be more -- resemble the
17 ski trails?

18 MR. FRANKE: It's probably more a
19 texture issue with somewhat less importance on
20 color, but the rough itself has lower
21 maintenance areas, might be more reflective of
22 tones that you would see --

23 MR. DAVIS: They may be slightly more
Page 151

24 brown or yellow. At this scale, it's quite
25 hard to differentiate between the roughs.
(VISUAL ISSUE)

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1 It's more texture at this angle.

2 MR. WEBER: Again, going back to when
3 we were talking about the foreground, middle
4 ground and background, if you look at the
5 descriptions of how they start to distinguish
6 using the Forest Service approach, this is
7 -- this view is roughly 2.6 miles from the
8 project site. This viewpoint to the project
9 site is about 2.6 miles. (Indicating)

10 ALJ WISSLER: You're looking at which?

11 MR. WEBER: 3-40. When you look at
12 that and you look at how they define middle
13 ground, some of the things that they start
14 describe is what's happening --

15 MR. RUZOW: Do you have a page
16 reference?

17 MR. WEBER: Page 57 from the forest
18 service document, National Forest Service
19 -- I'll give you the title right now. It's
20 National Forest Landscape Management, Volume
21 1. Forest Service, USDA Agricultural
22 Handbook, Number 434, and the date is 1973.
23 And it was cited in the citations as a
24 reference.

25 ALJ WISSLER: We'll take a ten-minute
(VISUAL ISSUE)

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1 break.

2 (3:00 - 3:14 P.M. - BRIEF RECESS)

3 TAKEN.)

4 ALJ WISSLER: Going back on the record
5 here, folks. We left off at 3-41.

6 MR. DAVIS: 3-40, a couple more
7 comments about that. If you look at this view
8 in this context, you have the Belleayre Ski
9 Center on one side and then the Big Indian
10 Plateau on the other side. If you look at the
11 cuts on the Belleayre Ski Center, it has
12 vertical cuts which are very visible, as
13 opposed to horizontal cuts along the contours
14 on Big Indian. I mean, that's one contrast
15 you can see between the two; that by following
16 the contours, you minimize the impact.
17 Whereas, if you look at a ski resort where
18 you're just coming right straight down, it
19 exposes views quite significantly.
20 (Indicating)

21 I guess before we go on to 3-41, I
22 would like Kevin to talk about representative
23 views.

24 MR. FRANKE: Right. There have been
25 claims that not all the areas from which the
(VISUAL ISSUE)

□

1 project site might be visible are represented⁴⁶⁸
2 in the DEIS by a photo documentation. The DEC
3 policy statement is clear that assessment
4 should include representative views and
5 analysis of potential visual impacts. In
6 accordance with that policy statement, and
7 during the process of preparing what is
8 included in the DEIS, we sat with the

9 Department's visual consultant and laid out
10 photographs and maps of those vantage points
11 from which we documented views into the
12 project site. And using those various
13 viewpoints, we came to an agreement as to
14 which simulations would be contained in the
15 DEIS and be representative of views of the
16 project site; more specifically, what's been
17 pointed out is supposedly an
18 under-representation of views into the site
19 from northwest of the valley into the west of
20 the project site. Since we chose the Wood
21 Road site -- close to the location, from what
22 I understand the tour was yesterday -- to
23 present the nature and extent of the views
24 into the project site, simply because it is
25 the closest, it's a little bit -- about a mile
(VISUAL ISSUE)

□

1 and a quarter away, and basically because you ⁴⁶⁹
2 have a direct line of sight into the wildacres
3 portion of the project site. If you were to
4 move further to the west, over towards Hog
5 Mountain or those areas, you have more of an
6 oblique view into the project site. It's
7 quite likely because of the further distance
8 as well that you're not going to have
9 noticeable change between existing conditions
10 and the proposed conditions.

11 MS. BAKNER: Kevin, you referred to
12 these maps with the photos. Are those -- is
13 that type or level of field information

14 typically included in a Draft Environmental
15 Impact Statement?

16 MR. FRANKE: Even for something as
17 large as this, the answer, typically no. If
18 you were to include every vantage point and do
19 simulations of every area, every single
20 residence from where it could be viewed,
21 that's not typical in terms of the record
22 that's entered into the DEIS.

23 MS. BAKNER: Looking back at 3-42, and
24 this is the view from Wood Road, I may have
25 skipped the -- I'm sorry, 3-41 and 3-42.
(VISUAL ISSUE)

□

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1 Steve and Rick, if you can, tell us why you
2 feel the representation with the colors and
3 the massing of the building and everything is
4 appropriate and adequate, contrary to the
5 assertions of Mr. Sundell?

6 ALJ WISSLER: which one are you
7 looking at?

8 MR. DAVIS: 3-42.

9 MR. RUZOW: 41 and 42.

10 MR. DAVIS: 42 is the rendered one,
11 and that's what we'll address. If you look at
12 3-42, you look at the canopy edges, it's a
13 darker -- we tried to contrast that with the
14 top of the canopy. One of the things I should
15 point out here, this is very sharp edges which
16 you're not going to have when it's finally
17 developed, it's going to be softer edges.
18 They're not going to be as linear because you
19 have tree canopies that are going in and out.

20 The grass colors that we showed, I think are
21 more representative of the colors you're going
22 to have in there because you have a number of
23 different lawn types. You have your fairways,
24 you have your roughs, you also have lawns in
25 there. It's not just one single color,
(VISUAL ISSUE)

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1 there's a number of textures and types of
2 grass that are going to be planted in that
3 area. And the greening of the roof stands out
4 more than you would have in the building. We
5 made the green stand out so that you could see
6 the structures. Those are just some of the
7 comments there; to make things more visible
8 and contrast greater. (Indicating)

9 MR. WEBER: One of the things we face
10 when we try to write about this in narrative
11 is to try to find words to describe some of
12 the things you're seeing in the photographs,
13 and what I was trying to introduce as an idea
14 before the most recent break was that using
15 the Forest Service Landscape Management
16 document, that I guess is now going to be
17 shared as part of the record here, when we get
18 into looking at a view such as this, which is
19 at a distance of about a mile and a quarter,
20 this is in the area that's designed by the
21 Forest Service as being something that's in
22 the middle ground.

23 In the middle ground, some of the ways
24 that you can describe this -- this is based on

25 years of trying to deal with this issue,
(VISUAL ISSUE)

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1 trying to describe accurately the narrative
2 form -- how you characterize what's different
3 about each of these different zones. In this
4 case it starts to talk about in the middle
5 ground, the visual simplification of
6 vegetation and texture is occurring, and that
7 color is beginning to blend, that it becomes
8 more difficult to discern. Steve is talking
9 about how there's three different types of
10 surfaces that you may see in the fairway. You
11 would see the rough, you would see a lawn
12 area, then you might see a green, but at this
13 distance as a middle ground, those
14 distinctions start to go away; and as you go
15 into the background, it becomes more -- as you
16 get to viewpoints you're looking at that are
17 further away, the influence of distance really
18 begins to more reduce color distinction and
19 starts to replace these -- the sharper edges
20 of color distinction and contrast with values
21 of blue and gray.

22 MR. RUZOW: Mr. Weber, that's in the
23 three-plus mile distance, is that the one you
24 convert to background?

25 MR. WEBER: Yes, that's correct,
(VISUAL ISSUE)

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1 that's background. That's the extreme of the
2 one we were just talking about. 3-40 is
3 probably not to that level yet by this
4 methodology, but it's more in the middle

5 ground. But it's what it's moving towards,
6 and I'm just trying to explain the range of
7 transition.

8 As I said before, it's not a bright
9 line, but it helps to describe what's
10 happening as you look at this. And so I bring
11 that up because I think it's important that
12 when we are looking at how we're trying to
13 select color for simulation, that in many
14 cases we start out by being too bright, and
15 realizing that it's really by picking things
16 that are in the neighborhood of the area that
17 we're trying to assess, and finding out that
18 the values are really more blended than we
19 believe them to be. And that is our assertion
20 in the way we developed these simulations.

21 MS. BAKNER: If you look at 3-42 here,
22 I just wanted to point out with the wilderness
23 Activity Center, the former Highmount Ski
24 Center, you see this slashing vertical
25 clearing areas, and then you also see
(VISUAL ISSUE)

1 alongside it the fairways which run along the ⁴⁷⁴
2 contours; and again, you didn't use, I assume,
3 the vegetation from that area because, one,
4 it's grown up some, and two, it wouldn't be at
5 all similar to an irrigated lawn or fairway?
6 (Indicating)

7 MR. WEBER: Correct.

8 MR. DAVIS: Yes.

9 MR. WEBER: Another idea that Steve

10 had mentioned earlier was that when you're
11 looking at these particular views from this
12 sector back at the project site, thinking of
13 it in terms of context and how you see the
14 potential impact of the proposed development
15 areas in relation to what's around it, the ski
16 area -- as Steve mentioned -- is a vertical
17 set of clearing lines, whereas the proposed
18 project clearing areas are more following the
19 contour, and I think we feel that's important
20 when you're looking at the context that other
21 development in the lower portions of the
22 valley are also in that -- follow the more
23 natural landscape pattern of development in
24 that area, which is along the contour as
25 opposed to vertical as the ski area is. So
(VISUAL ISSUE)

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1 the context here of cleared areas that are
2 following the contour follow the pattern of
3 what you see in other areas of already
4 existing development in the area. And I just
5 wanted to make that point.

6 MS. BAKNER: If we could go ahead to
7 3-43, the Belleayre Sunset Lodge visual
8 simulation, and this is the one that Mr.
9 Sundell was talking about, and he was
10 directing our attention to 3-44A, I believe,
11 which didn't show the whole context, Rick, of
12 this particular area. So if you and Steve
13 could describe 3-43 and what's happening there
14 in that view.

15 MR. DAVIS: I'm going to start with
Page 159

16 3-44, that's the rendered view. It shows
17 the -- if you look at that and you look at the
18 whole view that the person is going to have --
19 on the left-hand side of the photo you're
20 looking down the ski slope. If you look
21 across 28, you can see cuts, vertical cuts up
22 through the hillside, you can see buildings
23 along Route 28. Route 28 is visible in a
24 couple spots and so you -- you have some
25 cleared areas on the left-hand side of the
(VISUAL ISSUE)

1 photo right in front of -- looks like one of ⁴⁷⁶
2 the mountains, summits there, I'm not sure
3 which one. But just to look at this -- and
4 when you look at where we're showing housing
5 as Belleayre Highlands, there is no golf
6 course there, that's a housing area -- and you
7 just look at that in the whole context. The
8 viewer, number one, is looking across the ski
9 slope itself. You have a number of other
10 items in the photo that you're looking at, so
11 I don't believe it's out of context. If you
12 looked at just this small piece by itself, it
13 does look like it's out of context but if you
14 take the whole view in, it's representative of
15 what's going on in the area. The vertical
16 cuts on the side are an old golf course.
17 (Indicating)

18 MR. RUZOW: It's across Route 28
19 valley to the Highmount -- the old Grand Hotel
20 site where there's a nine hole golf course,

21 6-8-04 bcrossroadsf
and that's what you're seeing across the
22 valley there?

23 MR. DAVIS: That's right.

24 ALJ WISSLER: We're looking at 3-44,
25 just to the left of the Route 28 line there?
(VISUAL ISSUE)

1 MS. BAKNER: Yes, that's correct. 477

2 We have some photos. These are all
3 publicly available on the website. It's
4 www.catskillarchive.com\grand\grand.htm. And
5 these are photos of the historic hotels, and
6 in particular, I just want to draw your
7 attention to the Grand Hotel.

8 MR. GERSTMAN: Are there copies of it?

9 MS. BAKNER: You don't want to go on
10 the Internet and just get it?

11 MR. GERSTMAN: No, I'd like copies
12 when the judge has copies.

13 MS. BAKNER: we'll be happy to get
14 them for you.

15 MR. GERSTMAN: Can we have them now?

16 ALJ WISSLER: Marc -- you're going to
17 show them to me now, you'll make copies and
18 then we'll put it in as an exhibit?

19 MS. BAKNER: No problem. No problem.
20 In any event, the golf course that they were
21 just pointing out was associated with the old
22 hotel, and that is representative of the views
23 looking out and across.

24 MR. DAVIS: One other thing I want to
25 point out is as you're looking at the
(VISUAL ISSUE)

1 Belleayre Highlands, you'll notice that in
2 your foreground you have two light standards
3 that are going to be there all the time.
4 They're right in your face. 3-44A is just an
5 enlargement of that view. (Indicating)

6 Unless you have some questions, we can
7 move on to 3-45.

8 ALJ WISSLER: I'm moving.

9 MR. DAVIS: 3-45 is looking to the
10 north from the same location, Sunset Lodge,
11 that's the grid. If you go to the next page,
12 you're looking through the chairlift at the
13 proposed development. As you can see, most of
14 it's blocked by existing vegetation. Route 28
15 is visible there. There's some buildings that
16 are also visible on 3-46. (Indicating)

17 MS. BAKNER: 3-46 is leaf-off;
18 correct?

19 MR. DAVIS: That's correct. Again,
20 look at the context here. You're looking
21 through the lift with its poles and a lot of
22 cut on the opposite side of the valley. It's
23 very vertical cuts right in front of you for
24 the ski area. (Indicating)

25 MS. BAKNER: Right. In the interests
(VISUAL ISSUE)

1 of saving time, we're not going to go through
2 the views that are in Appendix 21 which are
3 the far distant views because we've gone
4 through Plateau, and the rest of them are very
5 much the same. We do have two new views that

6 I would like Steve to put up. This is the
7 Hunter view and the Halcott view.

8 ALJ WISSLER: That are not in the
9 DEIS?

10 MS. BAKNER: That are not in the DEIS.
11 These were prepared in response to comments,
12 and we have copies.

13 (PHOTOGRAPH OF HUNTER MOUNTAIN
14 RECEIVED AND MARKED FOR IDENTIFICATION AS
15 APPLICANT'S EXHIBIT NO. 5A, THIS DATE.)

16 (PHOTOGRAPH OF HALCOTT MOUNTAIN
17 RECEIVED AND MARKED FOR IDENTIFICATION AS
18 APPLICANT'S EXHIBIT NO. 5B, THIS DATE.)

19 ALJ WISSLER: Okay, looking at 5A.

20 MR. DAVIS: 5A, and we're going to
21 look at -- existing conditions. Balsam is in
22 the background right about in the center of
23 the site, then Belleayre is right there. If
24 you look at the grid, just above the ridge
25 line, you can see red and yellow. Red is the
(VISUAL ISSUE)

□

1 hotel, and the yellow would be the ground
2 plane along the fairways. If you look at --
3 rendered with snow. You can see right over
4 here, it shows the clearing area, and there's
5 a small brown where the hotel would be
6 located. Then the lower one is without snow.
7 Again, it's -- picking the colors because of
8 the distance you're at, everything kind of
9 blends into one another, so unless you have
10 the dark trees with the snow, you don't get
11 very much contrast.

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12 MR. RUZOW: Steve, how far is Hunter
13 Mountain?

14 MR. DAVIS: About 13 miles. So you're
15 definitely well out of the five-mile area.

16 MS. BAKNER: We only did this because
17 when we went up before, the fire tower was
18 closed.

19 ALJ WISSLER: These are views from the
20 summit?

21 MR. DAVIS: They're from the top of
22 the fire tower. One of the people from our
23 office strapped himself to it.

24 This one is from Halcott.

25 (Indicating)
(VISUAL ISSUE)

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1 MR. RUZOW: He's referring to 5B.

2 MR. FRANKE: Halcott is actually
3 within the five-mile study area, approximately
4 four and a half miles.

5 MR. DAVIS: You're still getting to a
6 point where colors are starting to blend
7 together, and you're getting more blues and
8 grays. Over here is Big Indian. This is the
9 Highland area. (Indicating)

10 ALJ WISSLER: Halcott; that's a view
11 from the summit or from the fire tower?

12 MR. FRANKE: It is a view from Halcott
13 Mountain, and there is a vista located on the
14 New York-New Jersey Trail Map. This is a
15 bushwhacked hike. It's not a marked trail of
16 Halcott.

17 MR. RUZOW: Between I and J.

18 MR. FRANKE: Right above the "I" in
19 Wild Forest is the vista. (Indicating)

20 ALJ WISSLER: I see it.

21 MR. DAVIS: So if you look at the
22 grid -- again, this is Big Indian, Highland
23 and wildacres over to the right on the grid
24 photo. If you look at the rendered one, you
25 can see the clearing for the fairways,
(VISUAL ISSUE)

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1 clearing around the buildings in Highland.
2 And if you look where wildacres is, there
3 is -- through the branches there's pieces of
4 it -- it's pretty filtered. I can't see a lot
5 of it. Again, like I said, you're at that
6 distance where things are starting to blend
7 into one another for this one. (Indicating)

8 Again, as you can see over here, the
9 ski area with the snow. In case there's
10 questions about this, we didn't show snow here
11 because they produced snow on the slope, and
12 there's no snow on the rest of the area around
13 here -- so if there's any question. This is
14 what you normally have, and the ski slope
15 still had snow at that time of year.

16 MR. RUZOW: Rick, again, the context
17 of this view from Halcott is -- in terms of
18 the interrelationship to the Belleayre Ski
19 Center and what you're seeing in that
20 direction?

21 MR. WEBER: Again, the point that we
22 were discussing before about the nature of

23 development in the valleys of -- in this area,
24 it's along the contour as opposed to the
25 vertical nature of the ski trail so that there
(VISUAL ISSUE)

1 is a distinction in the naturalness of the fit⁴⁸³
2 of the types of clearings that you see between
3 the two types of facilities. And the proposal
4 is much more in keeping with what you would
5 see in other areas of development and other
6 portions of valleys within this region. So it
7 fits more to the style and character of
8 development that is found in the valleys of
9 this area. (Indicating)

10 MS. BAKNER: If we could go just
11 briefly to the mitigation measures that we've
12 outlined in the document. These, again, are
13 important because they show how we've complied
14 with the visual impact assessment, and they
15 are thoroughly listed in the DEIS.

16 Kevin, could you run through them for
17 us.

18 MR. FRANKE: This is at the end of
19 section 3.8.4 of the mitigation measures. I
20 don't have the page numbers.

21 ALJ WISSLER: Like page 3-169 or 70 or
22 something like that?

23 MS. BAKNER: Yes, 3-167 is where it
24 begins, and it goes all the way to 3-169.

25 MR. FRANKE: Essentially mitigation
(VISUAL ISSUE)

1 built into the design of the project; low⁴⁸⁴

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2 building heights, essentially two-story
3 buildings or less, 35-foot or smaller,
4 specifying non-reflective glass for the
5 structures. Exterior construction with
6 natural materials such as wood, stone. Where
7 paint and/or stain are required, using
8 earthtone finishes. Probably the most
9 significant mitigative measure that was
10 incorporated from a visual standpoint was the
11 design of the Big Indian Hotel building
12 itself, which as we saw on our site visit and
13 talked about on-site, essentially will be
14 built down into the contours themselves.
15 That, combined with vegetating of the terraced
16 roofs would make the hotel mimic the existing
17 topography of the site now.

18 Underground parking both at the Big
19 Indian Hotel and also at the wildacres Hotel
20 reduces the need for site clearing and
21 grading, as well as the need for lighting.
22 Parking areas are otherwise located outside.
23 The access roadway for Big Indian Plateau was
24 constructed, or proposed to be constructed,
25 perpendicular to New York 28. There was an
(VISUAL ISSUE)

□
1 alternative access contemplated at one time
2 that would have brought it up very near hole
3 3, if people remember from our site walk,
4 coming up from near the Jake Moon
5 Restaurant --

6 MR. RUZOW: Off of Lasher Road.

7 MR. FRANKE: -- and that alternative
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8 access was abandoned due to the potential for
9 significant visual impacts.

10 MS. BAKNER: And those significant
11 visual impacts would have been off of Route
12 28?

13 MR. FRANKE: Directly on 28. As you
14 come around the westbound curve on 28 as you
15 come in from Big Indian.

16 MS. BAKNER: Before you leave that
17 thought, none of your representative views
18 here were specifically focused, as far as I
19 can see, on Route 28, other than maybe the
20 first one that we looked at?

21 MR. RUZOW: The town park.

22 MS. BAKNER: Yes, the park. Was there
23 a particular reason for that?

24 MR. FRANKE: Just by nature of the
25 topography of the site and the orientation of
(VISUAL ISSUE)

1 the road, you do not have very many locations⁴⁸⁶
2 where you have potential for views into the
3 project site. The relief is such on the side
4 of the Belleayre ridge that the topography,
5 intervening topography is actually blocking
6 your views up to the upper portion where the
7 development is proposed to occur. If you're
8 down in the valley, you can't see up on top of
9 the mountain. If people remember, if you
10 drive up a windy mountain road, it takes a
11 while to wind up the mountain to get up on top
12 where the development is proposed.

13 MS. BAKNER: Lastly, we have two plans
14 here that go with -- and these are new plans
15 and we do have copies for everyone. These
16 represent an attempt --

17 MR. RUZOW: Can we mark them
18 Applicant's 6.

19 ALJ WISSLER: Yes. How many sheets do
20 you have?

21 MR. RUZOW: We have two.

22 ALJ WISSLER: 6A and B?

23 MR. RUZOW: 6A and B.

24 MR. FRANKE: 6A is for Big Indian, and
25 6B would be for wildacres.

(VISUAL ISSUE)

1 ALJ WISSLER: what kind of plan is it? ⁴⁸⁷

2 MR. FRANKE: "Lighted Areas, Big
3 Indian Plateau" And "Lighted Areas,
4 wildacres."

5 (LIGHTED AREAS - BIG INDIAN PLATEAU
6 RECEIVED AND MARKED FOR IDENTIFICATION AS
7 APPLICANT'S EXHIBIT NO. 6A, THIS DATE.)

8 (LIGHTED AREAS - WILDACRES RECEIVED
9 AND MARKED FOR IDENTIFICATION AS APPLICANT'S
10 EXHIBIT NO. 6B, THIS DATE.)

11 ALJ WISSLER: Going on the record
12 here. 6A is the Big Indian Lighted Areas, and
13 6B is wildacres Lighted Areas.

14 Take it away, whoever.

15 MS. BAKNER: First I want to direct
16 your attention to documents that are already
17 part of the Draft Environmental Impact
18 Statement, and what these drawings are, SL

19 plan sheets that came with the DEIS, and I
20 want Kevin just to go through and show how
21 these are essentially photometric drawings
22 showing where the lights are and the types of
23 lights.

24 ALJ WISSLER: Specifically what is he
25 looking at?

(VISUAL ISSUE)

1 MR. RUZOW: Drawing SL-1 and SL-2.

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2 ALJ WISSLER: For the record, this is
3 Office of Hearings No. 4, which are plans of
4 the project, in particular, plans SL-1 through
5 14. SL-1 through SL-14.

6 MR. GERSTMAN: Where in the DEIS would
7 I find them?

8 MR. RUZOW: The L.A. Group plan
9 sheets.

10 MR. FRANKE: Site plans. Part of the
11 site landscaping and lighting plans are
12 obviously the lighting. What's shown on these
13 plans -- what these illustrate, for example,
14 in front of the Wildacres Hotel, we have a
15 small surface parking area. (Indicating)

16 MR. RUZOW: SL-1 labeled, "Landscaping
17 and Lighting Plan."

18 MR. FRANKE: Shown on the lighting
19 plans are the fixtures themselves, as well as
20 the footprint of the area to be lit, with the
21 corresponding legend on the upper part of the
22 sheet which indicates the type of fixture, the
23 wattage of the fixture and the type of cutoff

24 shield used to limit light trespass beyond the
25 immediate areas to be lighted.
(VISUAL ISSUE)

1 MS. BAKNER: How high are those poles? ⁴⁸⁹

2 MR. FRANKE: The majority of the
3 parking area lighting fixtures are 20-foot
4 high poles with 250 watt bulbs in them. The
5 outline you're seeing on the parking area is
6 equivalent to three-quarters of a foot candle.
7 You see in other areas more removed for, say,
8 the individual detached lodging units, each of
9 those will have a lamp post, if you will, at
10 the driveway, which will be a six-foot fixture
11 with a 70 watt light bulb. (Indicating)

12 ALJ WISSLER: Taking a look at SL-1.
13 I'm looking here, specifically at the
14 Children's Center. We have a light fixture
15 right there. Now, that little outline you're
16 just going around now is the spread of the
17 light?

18 MR. FRANKE: The limit of light at
19 three-quarters of a foot candle. The
20 intensity of the light. You see in this
21 parking area, you have these overlapping
22 fixtures that provides coverage for the
23 parking area. What we have done on the
24 exhibits is to translate this more detailed
25 information on to a site-wide basis to show
(VISUAL ISSUE)

1 the areas that are proposed to be lighted. ⁴⁹⁰

2 MR. RUZOW: In effect, the sources of
3 the light on-site viewed from overhead.

4 MR. FRANKE: And Mr. Gerstman had a
5 question as to the legend and the exhibits
6 themselves. The legend indicates in the
7 middle a yellow box. Those are the parking
8 areas with the 20-foot tall fixtures and the
9 250 watt bulbs. You see the parking area down
10 at -- down behind the Jake Moon Restaurant --

11 MR. RUZOW: We're looking at 6A.

12 MR. FRANKE -- two employee parking
13 lots and a surface lot outside the Big Indian
14 Hotel, a small area around the Turner mansion
15 at Belleayre Highlands. The orange dots on
16 here, somewhat over-represent those six-foot
17 high lampposts that will be in front of the
18 detached lodging units, along their driveways.
19 (Indicating)

20 MR. RUZOW: On the smaller drawings
21 which we distributed, the color of the dots
22 are closer to -- sort of a chrome yellow, less
23 orange. The larger drawing has a different
24 color. They're circular dots, however, to
25 distinguish them from the square areas.

(VISUAL ISSUE)

1 MS. BAKNER: Kevin, can you explain
2 for us sort of the purpose or the public
3 comment that this was meant to provide
4 additional information in connection with?

5 MR. FRANKE: One of the concerns that
6 was raised back early in the scoping process
7 was the topic of the site lighting and night
8 sky glow, reflection and refraction of light

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9 such that when viewed from a distance, it
10 would appear to be, for lack of better term,
11 an aura of light above the project site. So
12 the intent here was to illustrate
13 schematically the potential sources of light
14 in the context of the overall site.

15 ALJ WISSLER: Are you suggesting that
16 the night glow will be eliminated by the
17 lighting plan?

18 MR. FRANKE: I wouldn't say they would
19 be one hundred percent eliminated, I would say
20 with the lighting plan and mitigation measures
21 that include rapid cutoff features that focus
22 the light downward and onto the ground are
23 going to minimize to the maximum extent
24 practicable any light trespass beyond the
25 immediate areas to be lighted.

(VISUAL ISSUE)

1 ALJ WISSLER: what about reflection of ⁴⁹²
2 light from the light sources off parking lots,
3 off cars; things like that?

4 MR. FRANKE: That's why I'm saying
5 it's not going to be a hundred percent
6 avoided. There's going to be cars in the
7 parking lots that have reflective surfaces.
8 To say it would be a hundred percent would not
9 be a true statement. To put it in a regional
10 context, at least during the winter months,
11 people who have been down 28 at night have
12 seen the light coming off the ski center
13 during snowmaking operations. Kind of put it
14 in the context like we do of the actual

15 daytime visual as well.

16 MR. RUZOW: Your Honor, this is an
17 effort -- there's relatively few tools, and
18 maybe Mr. Allen wants to talk to you, that are
19 available to illustrate what might happen. In
20 addition to the photometric drawings which
21 illustrate that on the ground from the plans,
22 we felt that this was at least an effort to
23 try to reflect on-site and give people a
24 context of where light sources would be in the
25 overall site.

(VISUAL ISSUE)

1 ALJ WISSLER: On looking at 6A, down ⁴⁹³
2 to the lower right -- the creek of Birch
3 Creek, there's a very large lighted area
4 there. What is that?

5 MR. FRANKE: That's an employee
6 parking lot. Employees would park there and
7 be shuttled to various points on the resort.
8 Right behind the Jake Moon Restaurant, right
9 now that has exterior lighting -- at one point
10 that was used for the overflow parking the
11 Jake Moon Restaurant.

12 MS. BAKNER: I think the last point we
13 want to address that I can recall -- and if
14 any of you gentlemen have anything else,
15 please jump in -- was the allegation that this
16 should have been looking at the Open Space
17 Plan, properties that might someday be
18 acquired by the state but aren't currently
19 owned by the state. And I wanted to direct

20 your Honor to, again, the Visual Assessment
21 Policy where it has a fairly specific
22 inventory of aesthetic resources. And this is
23 under Section 5, page 3. If you look in
24 there, the closest you get to what they're
25 suggesting is Bond Act properties purchased
(VISUAL ISSUE)

1 under exceptional scenic beauty or open space
2 category, emphasis on purchased. And that's
3 number 15. Of course we did supplement our
4 record even before the DEIS was considered
5 complete by looking at the farm that had been
6 purchased with Bond Act funds.

7 So there's no indication in here that,
8 you know, one should speculate in terms of the
9 assessment of aesthetic resources, but I will
10 say, your Honor, had someone suggested it to
11 us earlier, we probably would have gone and
12 looked. We sure looked everywhere else.

13 So Rick, Steve, anything else?

14 MR. WEBER: I just want to -- on a
15 technical point about something that I
16 presented earlier when we were talking about
17 targets and the limits of visibility map --
18 and I had forgotten this -- that we had
19 actually produced three figures for limits of
20 visibility analysis. The one that we had up
21 for the presentation was the composite but we
22 had also done a limits of visibility of what
23 you can see from the proposed Big Indian Hotel
24 site only. So we had isolated that as a
25 variable just to see what the extent of

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1 visibility is, and that is included in the
2 DEIS.

3 ALJ WISSLER: Where?

4 MR. WEBER: Figure 3-26.

5 MR. RUZOW: And wildacres was

6 figure --

7 MR. WEBER: 3-27. I had forgotten
8 that detail when you were asking about it.

9 MS. BAKNER: Your Honor, do you have
10 any questions for us?

11 ALJ WISSLER: No.

12 Staff.

13 MS. KREBS: Yes, your Honor. We have
14 with us today Matt Allen, A-l-l-e-n, who is
15 acting as a consultant for the DEC to assist
16 the Department staff in our SEQRA review of
17 the project since we don't have a visual
18 expert on staff.

19 Mr. Allen, if you could state your
20 name and where you're employed.

21 MR. ALLEN: My name is Matthew Allen,
22 I'm an Associate Principal with The Saratoga
23 Associates, Landscape Architects, Architects,
24 Engineers and Planners, P.C. My role with the
25 Saratoga Associates is -- I'm sorry, I'm a
(VISUAL ISSUE)

1 Registered Landscape Architect in New York
2 State. I've been registered since 1987. My
3 role with Saratoga Associates is as a project
4 manager in charge substantially of visual

5 assessment projects. I've been working in the
6 specialized discipline of visual assessment
7 for nearly all of my 20-year career. I have
8 probably two dozen projects, visual assessment
9 projects within the realm of SEQRA on my
10 resume, ranging from -- everything from
11 transmission towers, industrial facilities,
12 mines, landfills, transportation projects and
13 housing projects, things of that sort.

14 MS. KREBS: Can you comment on your
15 background regarding the DEC Visual Assessment
16 Policy we've been talking about that's dated
17 July 31st, 2000.

18 MR. ALLEN: Yes, I am very familiar
19 with the DEC policy. I was asked by the
20 Department staff to be one of five peer
21 reviewers looking at the policy during its
22 development stages, and providing independent
23 comment on that policy.

24 MS. KREBS: In turning to -- I guess
25 if you could perhaps comment on what is
(VISUAL ISSUE)

1 assessed under the DEC policy and perhaps what⁴⁹⁷
2 is not.

3 MR. ALLEN: Under the -- the DEC
4 policy largely looks at impact on resources of
5 state-wide significance. Those are points
6 within the public domain, areas where the
7 general public has access that rise to the
8 level of a -- of aesthetic significance.
9 They're places designated as resources of
10 state-wide significance because of their

11 aesthetic significance or their destination
12 for aesthetic purposes by the general public.

13 What is not considered in the policy
14 are non-areas -- areas not in the public
15 domain; private properties, areas in the
16 public domain that are not known to have
17 aesthetic significance, such as local roadways
18 that people travel day-to-day but don't
19 necessarily stop to take in the view or don't
20 recognize there is any aesthetic significance.
21 So there is a clear distinction between the 15
22 items on the -- the policy lists as being
23 potential categories of resources of
24 state-wide significance and all other areas.

25 The purpose of the policy is to focus
(VISUAL ISSUE)

□

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1 the evaluation of aesthetic impacts on the
2 truly relevant resources or the resources that
3 are truly relevant to the Department. The
4 policy is clear that that does not completely
5 relieve the Applicant of considering resources
6 of local significance, however, that
7 evaluation is generally driven by local
8 jurisdictions to the extent that a local
9 jurisdiction has a policy on aesthetics or
10 expresses an interest in reviewing a project
11 from the perspective of aesthetics, but local
12 resources typically are not within the
13 jurisdiction or not of interest to the
14 Department.

15 MS. KREBS: Turning to CPC's petition,

16 they raised three separate issues, matters.
17 The first one concerns the methodology used by
18 the DEIS, and whether or not it complied with
19 the Visual Policy regarding line-of-sight
20 profiles, if you could comment on that.

21 MR. ALLEN: Regarding line-of-sight
22 profiles, the policy is very clear, and I
23 believe Ms. Bakner quoted the policy directly.
24 The policy says: "At a minimum, a
25 line-of-sight profile, or, depending upon the
(VISUAL ISSUE)

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1 scope of potential significance of an
2 activity, a digital viewshed may be used to
3 determine if a significant property is within
4 the potential viewshed of a project."

5 In my opinion, the Applicant has
6 exceeded the line-of-sight requirement by
7 including both a digital viewshed, as well as
8 photo simulations. Photo simulations are a
9 higher technology, and a more revealing way of
10 illustrating visual impact than a
11 line-of-sight profile could. In my opinion,
12 if the Applicant provided line-of-sight
13 profiles from all of the locations that the
14 intervenor group suggests, or any location for
15 that matter, they would not provide as much
16 information as has already been provided by
17 the photo simulations.

18 MS. KREBS: Turning to CPC's petition,
19 point number two, they raised a question
20 concerning the worse case scenario and visual
21 impacts from five separate different places.

22 MR. ALLEN: We talked extensively
23 today about locations that the Applicant did
24 not study. Examples are Simon's Rock, Route
25 28. The Applicant has just provided some
(VISUAL ISSUE)

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1 additional information from Hunter Mountain,
2 Halcott Mountain. I'm losing track of some of
3 the other places that have been mentioned.
4 First, the Department has no opinion on
5 locations outside of the public domain, or
6 locations that do not meet any one of the 15
7 criteria spelled out in the DEC policy; places
8 of local importance, local roadways, those are
9 simply places where the project can be seen.
10 They may or may not be recognized by the local
11 population as being significant places, but
12 from the Department's point of view, they have
13 no relevance to our review. They don't rise
14 to the level of state-wide significance.

15 Moving to areas within -- that may
16 meet the criteria for state-wide significance
17 such as Simon's Rock or some of the other
18 areas on state forest land mentioned by the
19 intervenor group, those I would prioritize
20 based on importance. I think the Applicant,
21 based on scoping, based on my review of the
22 points that the Applicant would do photo
23 simulations from, are representative of views
24 that a hiker would have traveling these many
25 miles of trails within and outside of the
(VISUAL ISSUE)

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6-8-04 bcrossroadsf
1 five-mile study area.

2 I don't know that there is a great
3 deal of value in requiring the Applicant to do
4 more in those areas. There may, in fact, be
5 other views from those many miles of trails,
6 and having done this type of evaluation, I
7 know it can be very difficult to find every
8 particular location along a trail where there
9 might be a view documented and conduct a
10 simulation, and have a great deal of surety
11 that you've covered them all. The policy does
12 not require that every place be evaluated.
13 The intent is to cover representative views,
14 and I think the Applicant has done that.

15 They've picked two different locations
16 on Balsam Mountain, locations on other
17 mountains, fire towers. That was all
18 carefully scoped before they began their
19 evaluation. I don't know that there is a
20 great deal to be learned by doing additional
21 simulations from Simon's Rock or other
22 locations that Mr. Sundell has evaluated.
23 They may, in fact, exist but I think at the
24 end of the day, you would find that those
25 impacts are very -- or those photo
(VISUAL ISSUE)

1 simulations reveal a very similar impact to
2 what the Applicant has already evaluated. I
3 think that's the answer on that.

4 MS. KREBS: Turning to CPC petition's
5 third point, they had listed the six points of
6 view they thought should have been evaluated

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7 in the DEIS but were not; five of them concern
8 visual impacts of blasting, erosion of
9 stockpile areas, impacts of clear-cutting
10 forest land, and panaramic views and vistas
11 along 28. Can you comment on that.

12 MR. ALLEN: I'll very quickly mention
13 each one. Visual impacts of blasting, I would
14 be interested in knowing what those impacts
15 are. Typically, the end of construction or
16 long-term impact of the project that is
17 simulated by the Applicant generally is worse
18 case. It's the maximum clearing, the maximum
19 construction of structures. Although the
20 intervenor group mentions it, I did not hear
21 any evidence that there would be an impact,
22 they simply suggest that there might be. I
23 would be interested in hearing some evidence
24 that there would, in fact, be an impact. I
25 don't know that there would be one way or the
(VISUAL ISSUE)

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1 other.

2 MS. KREBS: I guess I was just looking
3 for a general conclusion -- I know our time is
4 running short. Do you have an opinion as to
5 whether or not how a visual impact of this
6 nature would be measured?

7 MR. ALLEN: I don't know that there is
8 a measure of the impact of blasting or the
9 impact of erosion or clear-cutting. The true
10 measure is in the photo simulation. You can
11 clearly see -- and I think the Applicant has

12 done what's being asked here -- the loss of
13 vegetation coming from clear-cutting. I think
14 that's exactly what the Applicant shows in all
15 of their photo simulations. It is what it is,
16 and I think they -- in a technically accurate
17 manner -- they've determined what the degree
18 of cutting along the fairways and along the
19 areas to be graded around the structures would
20 be. I don't know that there's any more of a
21 measure than that. The impact of erosion or
22 blasting, I don't know that that impact would
23 be any greater than the maximum area of
24 clearing and topographic change that they've
25 shown.

(VISUAL ISSUE)

1 MS. KREBS: Lastly, light pollution 504
2 including night glow, can you comment on that?

3 MR. ALLEN: Light pollution is a
4 difficult thing to measure or simulate, and
5 I've done a great deal of research on this
6 because that question is becoming a very hot
7 topic in the field of visual and aesthetic
8 impact evaluation. It's becoming more and
9 more common for review agencies to ask for
10 photo simulations of what a facility will look
11 like at night.

12 I've researched it with software
13 manufacturers, experts in the field, and the
14 consistent answer is, you can't accurately
15 simulate what something will look like at
16 night. The reason for that is twofold. One,
17 you would have to build every light source

18 within a proposed project into a digital
19 model; that includes parking lot lights,
20 driveway pole lamps, as well as floodlights
21 mounted on the back of buildings, and internal
22 lights within a structure if you desired to be
23 truly accurate.

24 The second point is software does not
25 simulate light as it would actually occur in
(VISUAL ISSUE)

1 nature. You can plug in a particular fixture,⁵⁰⁵
2 whether it's a 75 watt incandescent bulb, or
3 400 watt full cutoff halite fixture. The
4 software does give you the opportunity to pick
5 those fixtures, the pole heights -- all of
6 that data you can put into the system, but at
7 the end of the day, the way the computer
8 renders the light projection is not accurate
9 or true to nature. At the end of the day, it
10 would still be an artistic interpretation of
11 what that light would look like, albeit the
12 computer's interpretation.

13 ALJ WISSLER: But from the data that
14 we have here, we know the location of all the
15 lights, we know the proposed power of all the
16 lights, we know the height of all the lights,
17 so all the raw data you would need to pump
18 into one of these programs exists; correct?

19 MR. ALLEN: If they have all the
20 locations, the pole lights, parking lot
21 lights --

22 ALJ WISSLER: Is there some reason to

23 believe looking at these plans that such data
24 does not exist?

25 MR. ALLEN: No, they look like they
(VISUAL ISSUE)

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1 have identified all of the external light
2 sources. Don't forget, part of what you see
3 in the distance at night would be some
4 lighting from the interior of a structure; you
5 know, lights from somebody's living room as
6 they're reading or watching television --

7 ALJ WISSLER: So in your view, it
8 comes down to reasonable minds could differ
9 over how bright the aura is depicted in the
10 program; in the same way that reasonable minds
11 may differ about what color accurately depicts
12 the fairway?

13 MR. ALLEN: The program is going to
14 render the lights, the light bounce, the light
15 reflectivity off the ground, off of cars, the
16 illumination on the ground plane, is all going
17 to be factored into whatever you programmed
18 into it, which can never be as accurate as
19 what happens in nature. A light projected
20 from a computer onto a flat ground plane,
21 which is nothing but a computer generated
22 surface, is going to be very different than
23 how that light would behave if it hit an
24 asphalt pavement surface, or a lawn, or an
25 area of vegetation. In nature, it's going to
(VISUAL ISSUE)

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1 behave very differently than a computer could
2 render. So you'd be giving a false impression

3 of accuracy if you attempted it. Now, it
4 would be a yeoman's effort, but at the end of
5 the day you couldn't rely on it to say: This
6 is exactly what it's going to look like.

7 ALJ WISSLER: But there are programs
8 that can do this?

9 MR. ALLEN: Absolutely, off-the-shelf
10 programs.

11 ALJ WISSLER: And in other analyses,
12 are those programs used professionally?

13 MR. ALLEN: They're used largely in
14 the architectural discipline to create an
15 artistic impression of a structure or a site
16 at night. Mostly for artistic purposes, not
17 to portray what it would exactly look like for
18 visual impact assessment.

19 ALJ WISSLER: I understand that, but
20 such programs, such techniques are generally
21 accepted within the profession?

22 MR. ALLEN: Within the architectural
23 profession. I've never seen one in the visual
24 impact assessment profession.

25 ALJ WISSLER: Name me a program that
(VISUAL ISSUE)

1 does this.

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2 MR. ALLEN: Autodesk-Viz has a
3 component of lighting to it. The program used
4 to be known as Lightscape, is now incorporated
5 into Autodesk-Viz.

6 ALJ WISSLER: Autodesk, V-I?

7 MR. ALLEN: V-I-Z.

8 ALJ WISSLER: Is that in your view the
9 most popular?

10 MR. ALLEN: It's the most common in
11 the profession. I also use a program called
12 Accu-Render, which is a simpler, easier to
13 use architectural and lighting rendering
14 package.

15 ALJ WISSLER: Did you base it on the
16 data that's in the DEIS; did you do any
17 analysis yourself?

18 MR. ALLEN: No, I reviewed what the
19 Applicant did. I didn't try to replicate the
20 work or do anything that they did not do.

21 ALJ WISSLER: Okay. Ms. Krebs.

22 MS. KREBS: Turn to CPC's
23 presentation, the PowerPoint discussion, and I
24 guess just overall, there are, I think, four
25 different requirements in the DEC policy. One
(VISUAL ISSUE)

1 is the inventory of aesthetic resources; can
2 you comment -- I guess you have commented on
3 that.

4 MR. ALLEN: Yes. The Department's
5 area of interest are those resources that meet
6 any one of the 15 criteria listed in the
7 policy. If any resources recommended by the
8 CPC fall outside of the domain of those 15
9 criteria, the Department has no opinion on
10 them.

11 MS. KREBS: Turning to the visual
12 assessment of adequacy, accuracy and
13 thoroughness; based on your review of the DEIS
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14 and what was presented today, do you have any
15 opinion on that?

16 MR. ALLEN: It has been my opinion
17 that the work done by the Applicant's
18 consultant is thorough and accurate. I have
19 not heard anything today that changes that
20 opinion.

21 MS. KREBS: The third criteria is the
22 significant assessment -- assessment of
23 significance?

24 MR. ALLEN: I heard Mr. Sundell state
25 that he concludes that this would be -- this
(VISUAL ISSUE)

1 project represents a significant adverse 510
2 visual impact. That's an interesting
3 observation. I would be -- I did not hear
4 from Mr. Sundell by what criteria he drew that
5 conclusion. It sounded to me like a personal
6 and somewhat professional conclusion, but he
7 didn't offer any technical criteria that would
8 lead to a determination of significant adverse
9 impact. I don't share that opinion but I
10 would be looking for Mr. Sundell to offer more
11 on how he can document that that, in fact,
12 -- that the residual impact, in fact, rises to
13 that level.

14 MS. KREBS: I think the final category
15 is mitigation; if you could comment or you
16 have an opinion on that.

17 MR. ALLEN: I think the Applicant has
18 offered a number of mitigation strategies to

19 minimize visual impact. What the policy
20 requires is that a project sequentially look
21 at how to minimize visual impact. The first
22 strategy is to avoid visual impact; is there
23 anything that the project can do to not be
24 seen from off-site locations. Can they reduce
25 the height of structures, can they tuck it
(VISUAL ISSUE)

1 behind trees, can they locate it in a valley,
2 things of that sort.

3 The second criteria is absent the
4 ability to make the project invisible from off
5 site, what else can they do to minimize
6 impact. This is the most common method of
7 mitigation, which is using professional site
8 and architectural design to -- let me point
9 directly to the policy. The policy includes
10 what's called -- what's been loosely called
11 the universal list of mitigation strategies.
12 It talks about things like relocating the
13 facility to a less visible location using
14 camouflage or disguise, which is a fancy way
15 of saying use colors and textures that are
16 compatible with the landscape in which it's
17 located or viewed against; using low profile
18 techniques, making the buildings as low as
19 possible.

20 ALJ WISSLER: What are we looking at?

21 MR. ALLEN: DEC policy starting on
22 page 6 and continuing on 7. Things of that
23 sort. And I believe the Applicant has done
24 that. They include a list in the DEIS of

25 things that they have done, including color
(VISUAL ISSUE)

1 selections of structures that are compatible ⁵¹²
2 with the background landscape against which
3 they're viewed, using a design of their hotels
4 that matches the -- that terraces into the
5 topography, that avoids excessive height, and
6 again, using color to avoid excessive
7 contrast.

8 In my opinion, I cannot think of
9 anything else that we could ask the Applicant
10 to do that would further mitigate any residual
11 visibility of this project. The intent of the
12 policy -- this is where I differ from Mr.
13 Sundell in his opinion that this is a
14 significant adverse visual impact -- I don't
15 think the policy really has a provision to
16 draw a conclusion that a project must be
17 denied based on a certain threshold of visual
18 impact. What it does is requires the
19 Applicant to identify impact, and then go
20 through the universal list of mitigation
21 strategies to minimize that impact to the
22 maximum extent practicable. If the Applicant
23 can demonstrate that they have mitigated to
24 the maximum extent practicable, then they have
25 satisfied the policy, and the project is
(VISUAL ISSUE)

1 approvable within the discipline of ⁵¹³
2 aesthetics. And I think the Applicant has
3 done that here. I, as landscape architect and

4 a design professional, I can't find anything
5 else to ask the Applicant to do to further
6 mitigate. And I did not hear from the CPC
7 anything that they think the Applicant could
8 do to further mitigate. Their conclusion is
9 simply it's big, it's visible, therefore it's
10 significant, and I don't share that
11 conclusion.

12 MS. KREBS: Thank you.

13 ALJ WISSLER: Is that a wrap on
14 visual?

15 MR. GERSTMAN: Judge, we would like an
16 opportunity to provide some rebuttal. In
17 terms of the timing, it's quarter after 4, I
18 need a couple minutes to go over some of the
19 issues that have been raised. Some of them
20 are legal argument. Mr. Allen's last
21 statement concerning his viewpoint of the
22 policy in SEQRA differs from what I believe
23 the law is on the issue; that's certainly an
24 issue that's been advanced in St. Lawrence
25 Cement by his client in that case. But I
(VISUAL ISSUE)

□

1 would like to have an opportunity to talk to
2 Mr. Sundell and go over some of the issues and
3 probably provide a rebuttal. In terms of our
4 noise presentation, it will likely be very
5 short. We could do it first thing in the
6 morning or we could do it tonight.

7 ALJ WISSLER: I'll give you a short
8 rebuttal, and if your noise presentation is
9 that short, we'll do it tonight.

10 MR. GERSTMAN: Can I have five
11 minutes?

12 ALJ WISSLER: Absolutely. We will
13 break until 4:25.

14 (4:20 - 4:25 P.M. - BRIEF RECESS
15 TAKEN.)

16 ALJ WISSLER: My intention at this
17 point is to allow Mr. Gerstman his opportunity
18 to reply to what's been said here today and
19 complete visual, and we will start tomorrow
20 morning at 9 o'clock with noise. I think the
21 schedule calls for, what, tomorrow?

22 MR. GERSTMAN: Community character.

23 ALJ WISSLER: Community character.
24 And we will take the City's witness first.

25 MR. GREENE: I'm a little concerned
(VISUAL ISSUE)

1 about pushing back the schedule. Our witness⁵¹⁵
2 is only here for one day. I would like our
3 witness to be able to hear the other expert's
4 testimony from the Applicant and from DEC, and
5 if it's pushed back again, he has to leave
6 tomorrow night. I would prefer pushing back
7 noise to another day and carry out on
8 schedule. We have our experts all set up for
9 tomorrow. It's going to be a long issue. Mr.
10 Gerstman has proposed a number of witnesses,
11 as I'm sure the other parties have as well. I
12 would really prefer to stay on schedule and
13 push back noise to another day.

14 MR. GERSTMAN: Well, let me ask this,

15 if we can go off the record about scheduling?

16 ALJ WISSLER: Yes.

17 (4:32 - 4:33 P.M. - BRIEF RECESS

18 TAKEN.)

19 MR. GERSTMAN: Judge, we have several
20 points we want to make. In terms of the
21 policy itself, your Honor, we refer you to the
22 policy, we believe that's an appropriate area
23 for briefing.

24 MR. RUZOW: Marc, I didn't hear what
25 you said.

(VISUAL ISSUE)

(STATEMENT REPEATED BY THE REPORTER.)⁵¹⁶

1 MR. RUZOW: I agree.

2 ALJ WISSLER: I agree.

3 MR. GERSTMAN: But your Honor, we
4 believe that limiting the evaluation to only
5 those inventory resources that are identified
6 is not the intent of the policy, it's
7 certainly not the intention of SEQRA. We
8 believe that, for instance, Simon's Rock, as
9 we've identified, and some of the views from
10 Panther Mountain, are absolutely essential to
11 be evaluated. They don't fall into the
12 category of those which should be dealt with
13 through representative locations, but
14 certainly should be dealt with in terms of
15 worse case scenarios as the policy dictates.

16 The other aspect of the policy is
17 that, while it indicates that five miles is a
18 safe distance to use, it certainly suggests in
19 this kind of environment, in this context

21 where there's forest preserve lands
22 throughout, hiking, fishing, and other types
23 of outdoor recreational activities, that five
24 miles isn't necessarily the distance that is
25 appropriate for visual impact evaluation.

(VISUAL ISSUE)

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1 I'm going to allow Mr. Sundell to go
2 through some of the more technical issues and
3 I will, as you might imagine, chime in during
4 the presentation.

5 MR. SUNDELL: And I'll try not to be
6 redundant. We'll do some quick flipping
7 through our visual figures there. Let's start
8 with 3-25A which is the viewshed map. I would
9 like to just reiterate what was brought up
10 earlier, that the red areas are views allowed
11 by vegetation, and that views from trails,
12 small locations like that or snippets of views
13 from roadways, are not mapped on here. You
14 get a brief view, and it's the way the site is
15 perceived in a lot of cases.

16 MR. GERSTMAN: I'm going to interrupt
17 you for a second. Is it your opinion that the
18 evaluation shown in 3-25A essentially
19 eliminates -- uses vegetation as a block to
20 eliminate the view; is that how you
21 characterize it?

22 MR. SUNDELL: It blocks out all the
23 areas that were indicated to have dense tree
24 cover in the USGS quadrangle maps. No views
25 through those trees were allowed on this map.

(VISUAL ISSUE)

1 I also want to point out on this map that
2 Route 28 is indicated to be red and is
3 indicated to have a view of the resort areas.
4 I would also like to point out --

5 MR. GERSTMAN: Before you go off to
6 Route 28. Just take notice, your Honor, you
7 have the map, you have 3-25A, that there's a
8 significant portion of Route 28 that is, in
9 fact, shaded red.

10 MR. SUNDELL: Particularly below the
11 Big Indian Resort. At the Big Indian Resort,
12 I want to call your attention to the target
13 points. Those are the black stars that run
14 down the ridge line. Notice that none of the
15 target points go down slope. When we were
16 on-site, we looked at the driving range, it
17 goes down slope 200 feet, and then beyond that
18 there is another fairway below that that is
19 approximately 75 feet of additional drop. So
20 none of that -- it seems to be modeled based
21 on those target points. Also, the yellow
22 points there are the balloon target locations.
23 They also are at the ridge crest and not at
24 the extreme edges of the fairways. So that
25 tells me that the edges of the golf course,
(VISUAL ISSUE)

1 the visibility from those have not really been⁵¹⁹
2 accounted for.

3 If you flip to 3-26, this is the
4 figure that was brought up earlier. This
5 shows in red the areas that the Big Indian

6 Hotel will be visible from. But you'll see on
7 the right column that it says, "Big Indian
8 Resort Hotel site." That doesn't indicate the
9 visibility to golf fairways. Again on 3-27,
10 this is the visibility in red to the hotel
11 site.

12 Figure 3-33.

13 MR. GERSTMAN: Before you go to 3-33,
14 I would like to refer your Honor to 3-31 which
15 is the view from Balsam. Your Honor, just as
16 an example of the disconnect between some of
17 the photo simulations that have been presented
18 and the text in the description of what is
19 being seen, I refer you to the description in
20 3-144 which describes the Balsam Mountain
21 view, and basically says: "In short, views of
22 the proposed project from the trail along the
23 summit ridge of Balsam Mountain are very
24 limited." We believe, your Honor, the
25 evidence has shown -- even the Applicant's
(VISUAL ISSUE)

□

1 evidence has shown -- that they're, in fact, 520
2 much more widespread. We believe that because
3 of its status as an inventory of state-wide
4 concern -- and the Department certainly has
5 the responsibility for the care and custody of
6 the forest preserve, and that circumstance
7 here is going to prove crucial in our
8 continuing presentation -- that that's an area
9 that needs to be heightened. There are other
10 discrepancies which we can also brief.

11 MR. SUNDELL: Figure 3-33. In the
12 lower right corner, we'll see the wire frame
13 generation of the proposed development, and
14 we'll see six building sites there; but on
15 3-34 in the photo simulation, we only see one
16 of the buildings, and it occurs to me that
17 simply two steps to the right would make those
18 buildings visible. (Indicating)

19 Figure 3-37, this is the visual
20 simulation of the park off Route 28. You can
21 see the grid there showing the area of
22 disturbance. The area of the photo that I had
23 taken was about 200 feet to the rear of where
24 this photo was taken. (Indicating)

25 ALJ WISSLER: 3-37?
(VISUAL ISSUE)

1 MR. SUNDELL: 3-37, yes. This is of ⁵²¹
2 the park off Route 28. As you approach the
3 base of the mountain, the plateau becomes less
4 visible, and as you step away, as the plateau
5 rounds out, you get a greater view. I
6 presented a line-of-sight profile that was
7 done at a location about 200 feet to the rear
8 of where this photo simulation was done. A
9 line-of-sight profile is a very rudimentary
10 tool, but it does demonstrate in a quick
11 manner whether or not the development will be
12 visible.

13 Turn to Figure 3-42. I want to point
14 out that in the center of that figure is a
15 building, and it's further enlarged on 3-42B.
16 You can see that in that figure, that building

17 from the roof to the building wall is very low
18 in contrast. And the tree lines, the proposed
19 tree line, is also somewhat low in contrast.

20 On 3-42B, if you look slightly to the
21 right, you'll see the ski runs and you'll see
22 the edge of the vegetation there, and you'll
23 see a level of contrast there that doesn't
24 exist in the more foreground views shown for
25 the Wildacres Resort. (Indicating)
(VISUAL ISSUE)

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1 If you'd like to hold that page and
2 flip back to 3-40A. 3-40A is the enlargement
3 of the Big Indian development as seen from the
4 Owl's Nest. To my view, that's a more
5 accurate photo simulation of a golf course
6 development. I want you to take a look at the
7 contrast that you see at the tree lines, and
8 take a look at the color of the golf course
9 and the contrast. This is at a distance of, I
10 believe, 2.6 miles. (Indicating)

11 Then flip back to 3-42B, which is a
12 more middle ground view that has significantly
13 less contrast and visibility than the more
14 distant view, leading me to believe that the
15 accuracy that depicts the visual significance
16 of the resort depicted in 3-42A and B is not
17 accurate.

18 MR. GERSTMAN: Mr. Sundell, you've
19 heard the Applicant's consultants and Mr.
20 Allen talk about the color simulations. Can
21 you testify about the colors you selected

22 which you believe, in your opinion, more
23 accurately represent what the project will, in
24 fact, look like, after hearing what the
25 Applicant's consultant said and Mr. Allen
(VISUAL ISSUE)

1 said? Do you have anything you want to add to ⁵²³
2 that? Is it still your opinion that what you
3 said earlier is accurate?

4 MR. SUNDELL: Yes, I would agree with
5 what I said earlier after hearing the
6 rebuttal. This is kind of a -- as we
7 discussed -- an art and a science, and I would
8 have you take a look at 3-42B. In your own
9 impression, if that looks like a golf course
10 and a resort more than the other one. It
11 doesn't look like it to me is the point I'm
12 making. (Indicating)

13 with that, I'd like you to flip to the
14 new figures that we just received.

15 MR. GERSTMAN: Crossroads 5A and B.
16 You're referring to 5B?

17 MR. SUNDELL: Yes, 5B. 5B is the view
18 from Halcott Mountain, existing conditions.
19 The back, or third page of that series is
20 labeled, "View from Halcott Mountain
21 rendered." I want to point out the fact that
22 the ski runs are glowing with snow and the
23 fairways are less visible. And we heard that
24 it would be likely that the resort would have
25 snow and perhaps not the golf greens; just
(VISUAL ISSUE)

1 pointing out that the golf greens from this ⁵²⁴
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2 view are on the north side of the slope and it
3 might be shaded, hence making the distant
4 resort a bit more visible than we're seeing
5 here.

6 MR. GERSTMAN: Would you expect a
7 different view to be seen in -- this looks
8 like it would be the winter season. Would you
9 expect a view to be seen in the spring, summer
10 and fall seasons?

11 MR. SUNDELL: Yes. The most
12 pronounced view will be when the fairways are
13 covered with snow and the tree cover is still
14 dark, branches of the trees.

15 I just wanted to talk a little more
16 about mitigation measures. We heard the Big
17 Indian Resort and Spa would be utilized
18 -- state-of-the-art as far as camouflage and
19 screening. I would like to point out that the
20 plantings that are proposed on the building
21 are grasses, shrubs no more than six feet in
22 height, and they will not replicate the native
23 maple beech forest making -- it just wouldn't
24 blend in as if it's part of the forest.

25 On the lighting figure, I wanted to
(VISUAL ISSUE)

1 mention that from the locations where you can
2 see the proposed resort areas, particularly
3 locations such as Simon's Rock or Panther
4 Mountain, where you can see buildings and
5 roads from, you'll see lighting, lighting from
6 buildings and cars and street lighting and,

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7 you know, that would be a significant change
8 from an existing tree canopy.

9 MR. GERSTMAN: Mr. Sundell, would you
10 say that you heard the Applicant, and I guess
11 Mr. Allen, both say that the lighting impacts
12 would not be eliminated -- lighting off site
13 would not be eliminated. We have no
14 information concerning what level of
15 mitigation there would be since no photo
16 simulation has been offered. Is it your
17 professional opinion that lighting impacts in
18 this context in the forest preserve and
19 forested environment are more significant and,
20 in fact, are more sensitive than you might
21 find in a more concentrated development or
22 rural area?

23 MR. SUNDELL: It has to do with the
24 significance of the view, the significance of
25 the change from the existing conditions. You
(VISUAL ISSUE)

1 can say that to see lighting where there was
2 once forest is a significant visual impact.

3 Towards the end, we heard Matt Allen
4 discuss the fact that the intent of the visual
5 assessment and simulations are to cover
6 representative views. However, I would argue
7 that there has been no representative view
8 presented of the impacts from Route 28,
9 particularly the fairway or golf course.

10 On his argument of significance, I
11 earlier stated that I believed that the
12 proposed resort would be a significant visual

13 impact, and to explain that a little bit, I
14 just wanted to mention that the views from
15 locations that we've presented, Simon's Rock,
16 Panther Mountain, as well as from Route 28,
17 are going to change significantly over what
18 the existing condition is. To see a resort
19 and fairway and lighting backdrop against
20 wilderness area is a significant change.

21 The last point I wanted to make was on
22 Mr. Allen's argument about visual mitigation.
23 The design includes appropriate colors, and I
24 would argue, however, that though the fairways
25 follow the contours of the land, this is a
(VISUAL ISSUE)

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1 departure from the normal -- from what a
2 viewer would expect to see if it occurs on the
3 top of a mountain. You would expect to see
4 this on farmland, and it is clearly a
5 unnatural looking condition.

6 As far as other measures to provide
7 visual mitigation, I would suggest that the
8 resort could be significantly scaled back and
9 there would be quite a bit less visual impact.

10 MR. GERSTMAN: You heard Mr. Allen
11 talk about the notion of tucking the resort in
12 a valley. In your opinion, is that something
13 that would mitigate the impacts?

14 MR. SUNDELL: Yes.

15 MR. GERSTMAN: Let me ask you a
16 question about the notion of mountaintop
17 development versus development in a valley.

18 Is it your professional opinion that
19 mountaintop development in the context in
20 which we find this proposed development is
21 much more significant than you would find in a
22 valley development, and can you explain why?

23 MR. SUNDELL: In central New York,
24 we've come to expect views of farmland and
25 open areas in the low lying valleys, but not
(VISUAL ISSUE)

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1 breaks in trees up on the hills, up on the
2 slopes that for many years was -- technology
3 didn't allow us to do significant development
4 on ski slopes, so it's a significant departure
5 from what I would call the vernacular style of
6 landscaping in central New York.

7 MR. GERSTMAN: By central New York,
8 you're including the Catskills?

9 MR. SUNDELL: Including the Catskills.

10 MR. GERSTMAN: Let me ask you about
11 the issue of skiing. You heard mention a
12 couple of times that there's -- the visual
13 aesthetic value of the location is somehow
14 impaired by the existence of the ski slopes
15 and the light stanchions -- actually there
16 aren't that many of them -- for the snowmaking
17 facilities. How would you contrast the
18 recreational opportunity represented by skiing
19 on the mountainside versus, for instance,
20 mountaintop development that includes a golf
21 course and a hotel which is obviously visible
22 from many locations in the countryside?

23 MR. SUNDELL: Well, skiing for many
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24 years has been part of ski -- ski slopes have
25 been part of the landscape in this area, as
(VISUAL ISSUE)

1 have some clearings and golf courses, but not⁵²⁹
2 on steep slopes or at the top of mountains.

3 MR. GERSTMAN: Your Honor, we also
4 point out that the Applicant's consultant
5 failed to use and identify locations where
6 some of these photo simulations were done
7 from. A GPS system would have been
8 appropriate, and I think feasible to
9 accomplish, and should have been presented as
10 part of their case so that we can understand
11 exactly where the views are being taken from
12 and looked at from.

13 In terms of the policy, your Honor, I
14 believe that that is appropriate for briefing.
15 We would like an opportunity to do that post
16 Issues Conference, both in terms of the nature
17 of the legal issues regarding whether or not
18 once the Applicant claims they have mitigated
19 to the maximum extent practicable, that's the
20 final effort that has to be made here -- I
21 think that's not, in fact, the law. I believe
22 that's not what the Commissioner has said in
23 other decisions. Also in terms of the local
24 -- alleged local impacts or even the
25 state-wide resources which are not included on
(VISUAL ISSUE)

1 the inventory, and what the purpose of SEQRA⁵³⁰
2 is with respect to those, but that's

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3 appropriate for briefing.

4 ALJ WISSLER: Are we done with visual?

5 MS. BAKNER: A little sur-rebuttal.

6 First of all, just to look at the most
7 obvious thing here with the visual
8 simulations. You can see there's snow on the
9 ski trails because they make snow and there
10 isn't snow anywhere else. I want to stress
11 that we have done all these simulations in
12 good faith and we have provided more
13 information than anyone typically does,
14 including going 20, 30 miles out, almost to
15 Kingston to look back at the site and deal
16 with these views. So for Mr. Sundell or for
17 Mr. Gerstman to maintain that somehow we have
18 shirked our obligations or we haven't looked
19 at everything we were supposed to is
20 ridiculous.

21 If we went to Simon's Rock or Panther
22 Mountain, we would see the same filtered views
23 that we've done simulations of other places.
24 Right now we couldn't even know where to go in
25 those places because we don't have, as you
(VISUAL ISSUE)

1 said, we don't have a GPS location of where
2 Mr. Sundell was, just a point on a map. Now,
3 we have offered to give that information to
4 the Judge that we have and we're happy to do
5 that. It's not required to be presented in
6 the DEIS. If somebody had asked for it in the
7 scoping process, when frankly it should be
8 asked for, we would have been happy to give

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9 it.
10 The Applicant has bent over backwards
11 here to look at every representative view.
12 You've asked that we look at views that don't
13 show any view into the site, particularly
14 Route 28. We've explained why we were at the
15 town park, why we looked at it at those
16 locations. We've explained -- no, we're not
17 looking at doing a visual impact of blasting
18 the site of the hotel and the irrigation
19 ponds. What would be the point of that? It's
20 going to be that way for about a month. When
21 we're done with this whole thing, we have a
22 project. The project is what you do the
23 visual simulation of. That's what's going to
24 be left on the landscape, that's what we're
25 trying to assess here.

(VISUAL ISSUE)

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1 I mean, if you look at this in terms
2 of the quantity of information that we have
3 provided and the care with which the
4 information has been put together, and the
5 fact that it far exceeds the requirements in
6 the Department's policy, and moreover looks at
7 views that aren't of state-wide significance
8 frankly, so we can assess community impacts.
9 whether or not DEC chooses to look at that
10 issue -- we looked at that issue in the Draft
11 Environmental Impact Statement -- and we're
12 proposing a project that is approvable at
13 these locations based on the local community

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14 plans, which we'll go over at great length
15 tomorrow, your Honor.

16 So we fundamentally disagree with the
17 comments that Mr. Sundell has made, but we're
18 more than happy to rest on the record that
19 we've created here, and feel we can brief it
20 quite adequately and show that the comments
21 that have been made here today are by and
22 large inadequate, or inaccurate.

23 MR. RUZOW: With respect to the
24 additional piece of information that Mr.
25 Sundell mentioned about the landscape of this
(VISUAL ISSUE)

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1 particular region of the Catskills, we will
2 have copies of the Catskill Archive website
3 photos -- they're postcards, historical
4 postcards -- they show the Grand Hotel and
5 vistas of this particular location, and I
6 suggest that you look further to the west, as
7 you head towards Margaretville, and both the
8 Pepacton watershed as well as that part of the
9 region that is part -- that we have looked at
10 in the context of our visits between
11 Margaretville and Mount Tremper -- the
12 landscape changes dramatically.

13 All you have to do is look across the
14 valley, and what you see now as carve-outs of
15 what were former farms were, in fact, denuded
16 forest, and this entire slope was all denuded
17 a little over -- less than a hundred years
18 ago. And it took a long time to achieve the
19 level that it is here today. But it is not an

20 area that is like central New York or anywhere
21 else, it is an area that has historically had
22 a changing landscape over time, and one that
23 continues to change, with the exception of the
24 state lands that have been acquired and left
25 forever wild. That is much different as a
(VISUAL ISSUE)

1 context than you have suggested; and I believe⁵³⁴
2 that the Department, in judging both the
3 visual impacts as well as the community
4 character, has to take into account those
5 issues in reaching a judgment on whether or
6 not a potential significant adverse impact
7 will still arise from this project. That
8 should be considered by the Department in
9 issuing a decision to deny or to impose some
10 form of, yet to be heard, additional
11 mitigation on this project that would
12 materially affect permit issuance.

13 MR. GERSTMAN: Your Honor, to briefly
14 close, I have gifts for everyone. The next
15 set of trail maps -- I actually only have four
16 of them.

17 MS. KREBS: If we could have one
18 minute for a point of clarification from
19 Department staff.

20 ALJ WISSLER: Sure.

21 MR. ALLEN: A point of clarification.
22 Mr. Gerstman indicated that in my discussion
23 of representative viewpoints I did not mention
24 Route 28 as a representative viewpoint, and it

25 is a fact that the Applicant did not do a
(VISUAL ISSUE)

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1 simulation from Route 28. From the
2 Department's position, we are not concerned
3 that a simulation was not done because in our
4 opinion, Route 28 doesn't rise to the level of
5 state-wide significance. So when I talked
6 about receptors that were of concern to the
7 Department versus those that are not, that was
8 one of those resources. That does not mean
9 we're not curious about that view, but I think
10 the application contains enough information to
11 tell us that there will be some visibility
12 from there. That visibility will not include
13 the hotel. It most likely will include some
14 degree of visibility of the golf course, and
15 considering that's not a resource of
16 state-wide significance, that's sufficient for
17 the Department to understand what's happening
18 along Route 28. If the local jurisdiction has
19 a question on that, that's for them.

20 ALJ WISSLER: Okay.

21 MR. GERSTMAN: One final note. I have
22 exhibits and -- they're not really gifts, your
23 Honor, they're exhibits.

24 ALJ WISSLER: Put them in.

25 MR. GERSTMAN: CPC Exhibit 7 which
(VISUAL ISSUE)

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1 will be just a photograph from yesterday's
2 site visit being Red Kill Road.

3 MR. RUZOW: Is that Little Red Kill or
4 Big Red Kill?

5 MR. GERSTMAN: I believe it's Big Red
6 Kill.

7 (PHOTOGRAPH OF SITE VISIT - BIG RED
8 KILL ROAD RECEIVED AND MARKED FOR
9 IDENTIFICATION AS CPC EXHIBIT NO. 7, THIS
10 DATE.)

11 MR. GERSTMAN: CPC Exhibit 8. This is
12 the package of maps that we referred to
13 earlier, including trail map 41, trail map 40,
14 trail map 44; including western Catskill
15 trails, Northeastern Catskill trails, North
16 Lake area, one insert that says -- don't worry
17 about that.

18 ALJ WISSLER: The Catskill trail maps
19 except for 42 which is already in evidence?

20 MR. GERSTMAN: Yes.

21 (PACKET OF CATSKILL TRAIL MAPS 40,
22 41, 43 & 44 RECEIVED AND MARKED FOR
23 IDENTIFICATION AS CPC EXHIBIT NO. 8, THIS
24 DATE.)

25 MR. GERSTMAN: Your Honor, I would
(VISUAL ISSUE)

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1 like to introduce Mr. Peter J. Smith.

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2 Mr. Smith, would you give your name
3 for the record.

4 MR. SMITH: My name is Peter J. Smith.

5 MR. GERSTMAN: Where are you employed?

6 MR. SMITH: I'm employed at Peter J.
7 Smith and Company. I am president of the
8 company. We are a landscape architecture,
9 urban design, urban planning and economic

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development consulting firm with offices in
11 Canada and in Buffalo, New York.

12 My education, I have graduate degrees
13 in both landscape architecture and in urban
14 planning. I have approximately 20-some years
15 experience. I am registered both as a
16 landscape architect and a professional planner
17 in Canada and in the United States.

18 MR. GERSTMAN: For the record, your
19 Honor, we would like to submit to you CPC
20 Exhibit No. 9 which is entitled, "DEIS
21 Evaluation" dated June 8th submitted by Peter
22 Smith.

23 (DEIS EVALUATION BY PETER SMITH
24 RECEIVED AND MARKED FOR IDENTIFICATION AS CPC
25 EXHIBIT NO. 9, THIS DATE.)
(NOISE ISSUE)

1 MR. GERSTMAN: Your Honor, we have
2 indicated that -- in our petition that we
3 believe that the evaluation of the noise
4 impacts in the DEIS was not consistent with
5 the DEC policy concerning the evaluation of
6 noise. Mr. Smith will proceed to tell you in
7 several areas why that is the case. Mr.
8 Smith.

9 MR. SMITH: I have evaluated the noise
10 impacts of the SIS, basically from the
11 position of an analyst, a policy analyst, and
12 from the position of having encoded some noise
13 regulations in various zoning ordinances.

14 Basically I have found what I feel are
15 four conflicts with the DEC policy. what I

16 have done is I've outlined -- basically four
17 simple conflicts. I have outlined the policy
18 statements, excerpts from the policy
19 statements and excerpts from the SIS, and then
20 shown what the conflict is in each case. The
21 first conflict is the sound impacts -- the SIS
22 does not employ DEC criteria to determine
23 significance. Very simply, the significance
24 that the SIS uses is a sound level of 9
25 decibels. The policy states that: "Some
(NOISE ISSUE)

1 pressure increases of more than 6 decibels may⁵³⁹
2 require a closer analysis of impact
3 potential." It also states that: "Human
4 reaction to increases in sound pressure level
5 of between 5 to 10 decibels is considered
6 intrusive." The SIS states that increases --

7 MR. GERSTMAN: Everything you're
8 referring to is in the DEIS?

9 MR. SMITH: Yes -- no, the SIS, Sound
10 Impact Statement.

11 MR. GERSTMAN: I'm sorry, the SIS.

12 ALJ WISSLER: Which is part of
13 Appendix 22 of the DEIS.

14 MR. GERSTMAN: Appendix 22, your
15 Honor. I'm sorry I misspoke.

16 MR. SMITH: So the SIS states that:
17 "Increases in existing sound level at the
18 nearest residential receptor due to
19 construction of 9 decibels or less will
20 indicate an insignificant temporary

21 construction noise impact." So they're
22 saying less than 9. The DEC says basically
23 between 6 and 10. Therefore, the resolution
24 is that the DEC criteria, the sound pressure
25 increases of more than 6 decibels should be
(NOISE ISSUE)

1 employed as a level of significance requiring⁵⁴⁰
2 analysis of alternatives as well as
3 mitigation.

4 The second conflict is in respect to
5 the location of receptors. The receptors
6 placed to evaluate construction noise should
7 be located adjacent to property lines. The
8 SIS inappropriately locates these receptors at
9 a greater distance. Policy states: "In the
10 first instance, the solid waste regulations at
11 6 NYCRR established A-weighted decibel levels
12 that are not to be exceeded at the property
13 line of a facility." It also states:
14 "Appropriate receptor locations may be either
15 at the property line or at the location of
16 use; and third, the most conservative approach
17 utilizes the property line."

18 The SIS states that: "Residences
19 within a half mile of the project boundaries
20 were selected as specific receptors."
21 Specifically ML-3 and ML-4 are not located at
22 the property lines. Therefore, the resolution
23 is the receptors should be located at the
24 property lines to do the noise evaluation.

25 The third conflict is that mitigation
(NOISE ISSUE)

1 techniques are not specific enough to enable
2 the measurement of noise levels during
3 construction. Policy states that: "The
4 permit conditions contain specific details for
5 such mitigation measures." It also states
6 that: "The Applicant shall assess noise
7 impacts, avoidance and mitigation measures in
8 a Draft EIS using methodologies acceptable to
9 this Department;" and further states, "The
10 Applicant should demonstrate that the specific
11 mitigation measures proposed will be effective
12 in preventing adverse noise effects on
13 receptors."

14 Finally it states that:
15 "Implementation of hours of operation does not
16 reduce the SPL, the sound level, emanating
17 from a facility." The SIS states that:
18 "Access road construction can be partially
19 mitigated by using minimum required
20 construction equipment." Basically the words
21 "partially" and "minimum" are not a mitigation
22 method. They really don't mean anything.

23 Secondly, it also states: "A
24 reduction can be expected by reducing on-site
25 equipment usage by 50 percent." How it's
(NOISE ISSUE)

1 going to reduce on-site construction equipment
2 by 50 percent, it doesn't say. And the only
3 way one could reduce that is by doing
4 50 percent of the construction. So that the
5 specificity of the mitigation in the plan is

6 not there in requirement to DEC policy.

7 Conflict number four is that the SIS
8 does not comply with Level 1 Noise Evaluation
9 Procedures in the calculation of dynamiting
10 impacts. I selected dynamiting impacts
11 because it's only one of a number, but
12 probably one that could be one of the most
13 intrusive. And the DEC stipulates there are
14 two levels of measurement, Level 1 and 2, and
15 both should be completed. Level 1 is not
16 completed for the dynamiting.

17 Policy states that: "The first level
18 determines the potential for adverse noise
19 impacts based on noise characteristics and
20 sound pressure increases solely on noise
21 attenuation over a distance between the source
22 and the receptor of the noise." It also
23 states: "This calculation should first
24 consider the straight line distance between
25 the point of noise generation and the point of
(NOISE ISSUE)

1 noise reception, with the presumption that no⁵⁴³
2 natural or man-made features exists along that
3 transect between the two points."

4 The SIS states: "In the case of
5 dynamite, first of all, that the size of the
6 explosive charges have not been determined;
7 and the secondly, the nearest blasting to
8 receptors will be shielded from the blast by
9 terrain and woods, which is 40 decibels below
10 existent ambient daytime sound level." They
11 also define existing ambient daytime sound

12 level as the sound of the babbling brook, and
13 the sound of the wind in the trees. So
14 they're saying that the dynamiting will
15 actually be below those levels.

16 The resolution is that: "Level 1
17 calculations, according to DEC guidelines,
18 need to be prepared for all construction
19 activities." Summary: "The Sound Impact
20 Study for the Belleayre Resort at Catskill
21 Park does not comply with DEC policy.
22 Construction noise will have significant
23 impacts on the surrounding communities with
24 respect to community character, social
25 well-being and enjoyment of land use rights.
(NOISE ISSUE)

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1 Comprehensive and unbiased noise impact
2 evaluation needs to be prepared for all
3 construction activities."

4 MR. GERSTMAN: Mr. Smith, you're not a
5 licensed noise acoustic engineer; are you?

6 MR. SMITH: I am not.

7 MR. GERSTMAN: What qualifies you then
8 to do this DEIS-SIS evaluation on the adequacy
9 of the Draft Environmental Impact Statement's
10 consideration of noise impact?

11 MR. SMITH: As I gave in the first
12 instance, the two things that really qualify
13 me are the years of writing and evaluating
14 policy and policy compliance; and second, the
15 work we have done in incorporating performance
16 standards, especially specifically noise

17 levels, in urban and rural zoning ordinances.

18 MR. GERSTMAN: You're not making any
19 engineering findings here, you're taking the
20 DEC policy and doing what a programmer, permit
21 analyst would do in evaluating noise impacts?

22 MR. SMITH: Yes.

23 ALJ WISSLER: Mr. Smith, did your
24 evaluation just really focus on the
25 construction of the project, the noise levels
(NOISE ISSUE)

1 generated?

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2 MR. SMITH: Yes.

3 ALJ WISSLER: Did you do any analysis
4 at all with respect to noise levels, assuming
5 the resort gets built and is operational and
6 the wedding is there Saturday night in the
7 middle of June and there's a band, cars and
8 that kind of stuff?

9 MR. SMITH: No, it's not contained in
10 here.

11 ALJ WISSLER: You just answered the
12 SIS that was in the DEIS?

13 MR. SMITH: Yes.

14 MR. GERSTMAN: That's it. Thank you.

15 ALJ WISSLER: Go.

16 MS. BAKNER: First of all, your Honor,
17 we have an extensive record here on noise and
18 our evaluation of noise. I want to point out
19 for the record that the CPC has not provided
20 an expert that is capable or has demonstrated
21 that they're capable of criticizing the report
22 that we have done here, nor have they done any

23 kind of sound analysis themselves or presented
24 anything whatsoever that could be construed as
25 a substantive and significant issue in
(NOISE ISSUE)

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1 relation to their offer of proof.

2 In fact, what the CPC's expert just
3 indicated is, he doesn't have any more
4 expertise than DEC would have in evaluating
5 whether or not their policy has been met. So
6 first as a matter of law, I submit that they
7 have not met their burden of proof in
8 establishing a substantive and significant
9 issue, having failed to provide any expert
10 evidence that the information that we have in
11 here is inaccurate or somehow insufficient to
12 evaluate the potential sound noises in the
13 construction for the project. However, your
14 Honor, in the interests of having a complete
15 record for the Commissioner to make a decision
16 upon, I want to have our expert, who is
17 qualified and who did conduct a study, to go
18 through what they did, why they did it, and
19 what mitigation measures have been proposed.

20 First, I have with me Scott
21 Manchester, he's an acoustical engineer from
22 ENSR, and ENSR is well qualified on these
23 issues, having done studies for power plants
24 and other industrial facilities, as well as
25 numerous commercial facilities.
(NOISE ISSUE)

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1 so if you could just run through your

2 qualifications.

3 MR. MANCHESTER: I work with ENSR
4 Corporation. I have a Bachelor's Degree in
5 Meteorology out of Cornell, and have 15 years'
6 experience in working with -- on acoustical
7 consulting projects, including sound level
8 measurements, identification of receptors and
9 assessing noise impacts.

10 MS. BAKNER: Your 17 years of
11 experience, have you reviewed any projects or
12 worked on any projects similar to this during
13 that time?

14 MR. MANCHESTER: I have worked on
15 numerous projects which involve assessing
16 noise from construction, and also noise from
17 equipment. That requires modeling that noise
18 to various receptors, similar to this program,
19 and assessing levels of impact, and also
20 recommending mitigative measures for those.

21 MS. BAKNER: I misspoke, I apologize
22 you're not an acoustical engineer; that is
23 correct?

24 MR. MANCHESTER: Yes, I work in -- I'm
25 a program manager in an air measurements
(NOISE ISSUE)

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1 group, and have training in ambient air
2 quality monitoring as well as acoustical
3 monitoring.

4 MS. BAKNER: Thank you for clarifying
5 that. The record that we have on sound can be
6 found in the Draft Environmental Impact
7 Statement, primarily at pages 2-53 through

8 2-64. That relates to a construction schedule
9 which provided the phases for the sound impact
10 study. Then we also have a section on sound
11 resources, which is 3-170 to 3-176. In
12 addition to this, the Sound Impact Study can
13 be found at Appendix 22. It covers
14 construction equipment, construction traffic
15 and blasting.

16 I just want to note for the record
17 that Creighton Manning, who is our specialist
18 on operational traffic who prepared the
19 information for us in the DEIS, is not here
20 and should the issue arise, could be addressed
21 on the 18th when they will be here for
22 traffic.

23 ALJ WISSLER: Noise impacts associated
24 with traffic?

25 MS. BAKNER: Associated with traffic
(NOISE ISSUE)

1 once the facility is built, your Honor. So I⁵⁴⁹
2 guess where I'd like to start with Scott, is
3 if you could describe for us exactly -- well,
4 forgive me. Kevin, we need you to go first
5 and describe the construction schedule,
6 because that's what informs how the Sound
7 Impact Study was done.

8 MR. FRANKE: We'll start with the Big
9 Indian Plateau portion of the project, DEIS
10 Figure 2-28. What is represented on this
11 figure is a color-coded construction phasing
12 program; areas in yellow being constructed in

13 6-8-04 bcrossroadsf
14 phase 1 or first year of construction, green
15 being year 2 or phase 2, brownish color being
16 year 3 or phase 3, and areas shown in red are
17 areas of detached lodging units which are
18 projected to be constructed on demand as
19 projected in years 4 through 8.
(Indicating)

20 A synopsis of what is proposed to
21 occur in each of those phases is as follows:
22 For Big Indian Plateau, the first year or
23 phase 1, focus mainly on constructing access
24 to the property and beginning construction on
25 the hotel site, as well as the blasting for
(NOISE ISSUE)

1 the irrigation ponds. Our assess road off of⁵⁵⁰
2 Friendship Road, secondary access point off of
3 Winding Mountain Road. Essentially this will
4 be built, working from both ends towards the
5 middle. While the bridge is being constructed
6 on that Friendship Road, the access road will
7 be built in a downhill fashion ending down at
8 the bridge. (Indicating)

9 Also being constructed, our connection
10 to the Belleayre Highlands portion of the
11 project. As I mentioned, site work
12 preparation, blasting for the hotel and the
13 irrigation ponds. (Indicating)

14 The second year of construction on Big
15 Indian Plateau will focus on the first portion
16 of the golf course, which is shown in green.
17 I believe we have nine holes as well as the
18 practice range. (Indicating)

19 Year 3 will see the remainder of the
20 golf course being constructed, as well as
21 employee parking, both at the golf maintenance
22 area and also off Lasher Road. Similarly,
23 we'll have a few of the detached lodging units
24 at Belleayre Highlands constructed in years 2
25 and 3; with the remainder shown in red will be
(NOISE ISSUE)

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1 built out in years 4 through 8.
2 (Indicating)

3 wildacres is similar from the
4 standpoint in that golf course construction
5 will occur over two phases. Because access
6 to the site is much easier --

7 ALJ WISSLER: 2-29?

8 MR. FRANKE: Yes, your Honor, Figure
9 2-29. Because access to the site is much more
10 convenient than it is for the Big Indian
11 Plateau, it's not necessary to dedicate that
12 first year of construction simply to provide
13 access for subsequent years of construction.
14 What you see here for wildacres is, again,
15 half of the golf course, nine holes, and the
16 hotel site will be under construction in year
17 1. The hotel construction in year 1 is mainly
18 site work. The actual building work happens
19 in subsequent years. (Indicating)

20 The second year or second phase of
21 construction at wildacres will involve the
22 remainder of the golf course, as well as the
23 Children's Activity Center. Again, similar to

24 the Big Indian Plateau, a great majority of
25 the detached lodging units will be built as
(NOISE ISSUE)

1 they sell out for phases 3 through 8. That, 552
2 in essence, is the sequence in the
3 construction. (Indicating)

4 MS. BAKNER: The length of the period
5 of construction is primarily driven by what
6 concern?

7 MR. FRANKE: The length of
8 construction and the majority of sound-related
9 issues for construction is the earth work and
10 construction of the golf course. In the DEIS,
11 we very specifically spelled out an even more
12 detailed subphasing of phase 2 of Big Indian,
13 we broke it into smaller pieces. Essentially
14 what that equates to is for an individual golf
15 hole or adjacent golf holes, we're looking at
16 a period of construction of approximately one
17 month's time from the beginning of the
18 clearing to implementing final stabilization
19 measures.

20 As part of our assessment of not only
21 construction sound requirements but
22 construction timing, which is reflected in
23 this phasing program, we enlisted the
24 assistance of two firms, both experienced in
25 construction of different aspects of the
(NOISE ISSUE)

1 project. Clark Companies is a local company 553
2 out of Delhi, New York which has experience in
3 constructing golf courses throughout the

4 northeast, including some courses fairly
5 locally here in New York State. We requested
6 from Clark Companies, and they provided to us,
7 specific machinery types and numbers that
8 would be required to perform various
9 construction activities in building the golf
10 course, all the way from clearing, through
11 earth work, through final stabilization. So
12 it was types of equipment, horsepower,
13 numbers, et cetera.

14 we also enlisted the assistance of
15 Creighton Engineering, who is not only a
16 traffic consultant, but they also have a
17 construction division. And they provided us
18 with similar information for road and bridge
19 construction, types of equipment and numbers,
20 as well as their size. And that type of
21 information was given to Scott to input into
22 his projections of construction noise.

23 MS. BAKNER: Let me ask you one more
24 question, Kevin. Was the golf course
25 architect consulted also on construction
(NOISE ISSUE)

1 issues?

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2 MR. FRANKE: Yes, I should not have
3 slighted -- Paul Calli [sic] was the golf
4 course architect, he sat in the same room with
5 the construction folks, and we worked through
6 the specific construction sequence for the
7 project.

8 MS. BAKNER: Again, the construction

9 sequencing and what equipment is used when is
10 critically important to the analysis that
11 Scott Manchester does of sound impact.

12 One last issue before you go away; the
13 receptors. If we could just go over the
14 receptors and the receptor locations, that
15 would be helpful.

16 MR. FRANKE: As you may remember, your
17 Honor, from our site work, the adjoiners, if
18 you will, or the sensor receptors that abut in
19 the general vicinity of the project --
20 primarily is a residential area.

21 MS. BAKNER: These are Figure 2-1 and
22 Figure 3-1 in the Appendix 22 if anyone wants
23 to follow along.

24 MR. FRANKE: Starting at wildacres
25 where we started our site visits. For
(NOISE ISSUE)

1 orientation purposes, the entrance road to 555
2 Belleayre Ski Center where we parked and
3 accessed the hotel site, Gunnison Road and
4 VanLoan Road [sic] where we accessed the waste
5 water treatment plant, the Leach farm and the
6 Leach subdivision is up in this area here.
7 (Indicating)

8 The receptors that were identified and
9 used in ENSR's modeling included the Digness
10 [sic] residence located next to the property.
11 To the east, we have the Janice parcel, the
12 Bernstein parcel located to the north of
13 Gunnison Road, as well as the doctor's
14 residence that's located on the corner when

15 you make the turn to go into the existing
16 wildacres Hotel. Also selected were those
17 residences that you saw along VanLoan Road
18 when we went into the waste water treatment
19 site, as well as those along County Route 49A,
20 at various locations in proximity to the
21 property site. (Indicating)

22 Similarly for Big Indian Plateau --

23 ALJ WISSLER: Where is this Figure
24 3-2?

25 MR. FRANKE: This is within Appendix
(NOISE ISSUE)

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1 22.

2 MR. MANCHESTER: They're within the
3 text of Appendix 22.

4 MR. FRANKE: Similarly at Big Indian,
5 we identified those residential areas closest
6 to the project site. Since we haven't seen
7 Belleayre Highlands, we will see it shortly,
8 there is a residence on woodchuck Hollow Road
9 as you approach Belleayre Highlands, the
10 nearest residential construction to the Big
11 Indian Resort and Spa. We have the three
12 seasonal residences, which we passed the
13 entrance to the side road off of winding
14 Mountain Road -- if you couldn't see the
15 houses themselves, it was a side road near the
16 beginning of winding Mountain Road.
17 (Indicating)

18 we also have some residences off of
19 Lasher Road which is down in the eastern part

20 of the project site, and we also have one
21 residence located here on Lost Clove Road.
22 This particular residence at the terminus of
23 Lost Clove Road, while closer to the project
24 site than some of the other receptors, was not
25 analyzed because that is the project sponsor's
(NOISE ISSUE)

□

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1 residence. (Indicating)

2 MS. BAKNER: Now we have seen the
3 construction schedule and the receptors. Now
4 I would like you to, Scott, take us through
5 how you undertook the sound study for this
6 project, starting with establishing the
7 background reading locations.

8 MR. MANCHESTER: Yes. To understand
9 what sound impacts will be, first we have to
10 understand what the existing sound levels are
11 in the area. So I visited the site in
12 February of 2001 to review the site. I spoke
13 with Crossroads Ventures. We went around and
14 identified the nearest receptors, which in
15 this case receptors are homes and residences
16 in the area. Receptors can also be things
17 like churches and schools, though there aren't
18 any nearest to the construction area here.
19 But these are areas that are potentially
20 sensitive to increases in noise.

21 So we did a survey of the site and
22 identified these noise sensitive receptors and
23 chose monitoring locations within each area to
24 identify what the -- determine what the
25 existing sound levels were for the area. We

1 choose -- within the wildacres, we choose
2 monitoring locations at the northwest of the
3 facility near a number of receptors over in
4 this area. Then we also choose a monitoring
5 location north of where the wildacres Resort
6 would be to typify the sound levels in the
7 areas which are closer to Route 28, and not
8 quite so remote for wildacres. There are a
9 number of receptors located in this area as
10 well as this area. This would also typify
11 receptors that were in this area due to
12 similar exposure due to noise sources from
13 Route 28. (Indicating)

14 Over at Big Indian, we identified
15 monitoring locations at the north side,
16 monitoring location 3, monitoring location 4
17 in the Pine Hill community here, and also
18 monitoring location 5 to represent receptors
19 that would be south and east of the project
20 site. (Indicating)

21 These were -- at each of those
22 receptors, at each of those monitoring
23 locations, we measured sound locations during
24 eight different periods; during the weekday
25 days, during the weekday nights, during the
(NOISE ISSUE)

1 weekend days and nights, two 20-minute periods
2 for each of those locations, to try to
3 understand the sound levels, the day and
4 nighttime sound levels, as well as the

5 changing sound levels that might occur during
6 the week as opposed to weekends. Sometimes
7 weekend sound levels vary due to traffic or
8 maybe even during the week.

9 ALJ WISSLER: Did you develop a single
10 number ambient sound level for each of the
11 sites?

12 MR. MANCHESTER: Yes.

13 ALJ WISSLER: Was that an LAQ or L --

14 MR. MANCHESTER: We did both. We used
15 a data logging sound level meter, a Larsen
16 Davis 824, it's a fairly sophisticated Type I
17 meter. We calibrated it before and after each
18 set of measurements using a certified sound
19 level calibrator out in the field. The sound
20 level meter itself is also calibrated within
21 the last year of the measurements.

22 That continuously records -- during
23 each measurement period, it continuously
24 records at 32 samples per second the sound
25 level, and then generates these descriptors
(NOISE ISSUE)

1 such as the residual sound level, or the L-90⁵⁶⁰
2 sound level, which is exceeded 90 percent of
3 the time. It also generated the LEQ, that's
4 the equivalent sound level and that's the
5 steady state sound level that includes all of
6 the time varying, long and short-term noises,
7 during the measurement period; whereas an L-90
8 would only indicate the sound levels that
9 occurred 90 percent of the time period or
10 more.

11 MS. BAKNER: I just want to note for
12 the record, Scott, that your Sound Level
13 Survey Field Forms are included in Appendix
14 22, as well as, it appears, the data
15 printouts.

16 MR. MANCHESTER: The data printouts,
17 with a summary of all the sound level measured
18 for each period, as well as our notes,
19 operator notes. I was there personally for
20 the first set of measurements, and then our
21 staff, another person from our staff recorded
22 measurements for the remaining seven periods.
23 He was trained in taking background sound
24 level measurements as well, is familiar with
25 that.

(NOISE ISSUE)

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1 we recorded the weather conditions
2 during the measurements, wind speeds, wind
3 directions. Part of the criteria we use is
4 based on ANSI 1.3, and that's -- gives
5 guidance on how to record sound levels during
6 a sound level survey, and to avoid taking
7 sound level measurements during high winds,
8 over 32 miles an hour. So all of our sound
9 level measurements were taken during periods
10 of light or light winds, under 13 miles per
11 hour. We didn't record any sound levels
12 during periods of rain since that can also
13 artificially increase the sound levels that
14 you're measuring.

15 We use a wind screen and measured at a

6-8-04 bcrossroadsf
16 height of five feet in each location.

17 ALJ WISSLER: What was the ambient
18 level that you found for each of the sites?

19 MR. MANCHESTER: That -- I don't
20 believe we have a chart of that. There's a
21 summary of the sound levels in our sound
22 impact survey on Table 3.2, and that presents
23 the daytime and the nighttime sound levels.

24 MR. RUZOW: What page?

25 MR. MANCHESTER: Page 3-9 of Appendix
(NOISE ISSUE)

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1 22. That presents the average of the
2 measurements. In this case, the LD would be
3 the -- LD would be the daytime LEQ, the LN
4 would be the nighttime LEQ, and LDN is called
5 the day/night sound level, and that's a single
6 descriptor that uses the LD and the LN,
7 applying a 10 decibel added penalty to the
8 nighttime -- and that's kind of used in the
9 industry to evaluate typical sound levels so
10 you can put those -- take one sound level and
11 describe the type of community or type of
12 setting that you have. (Indicating)

13 In this case, in the following table
14 -- it might be the -- there's another table
15 that describes what type of community is for
16 that LDN. All four of the -- four out of five
17 of the monitoring locations were typical of a
18 rural community, and one was typical of a
19 small town, it was ML-4 right here in Pine
20 Hill. It's typical of the LDN for a small
21 town, a rural town. (Indicating)

22 MS. BAKNER: You have on page 3-10 and
23 3-11 -- I note you have a table going over the
24 daytime sound sources and notes, and nighttime
25 sound sources and notes. Is there anything at
(NOISE ISSUE)

1 all unusual about wind being a dominant noise⁵⁶³
2 or creeks being a dominant noise?

3 MR. MANCHESTER: Not at all. In this
4 type of setting, that's what you would expect.
5 You would expect to hear tree noises any time
6 there is a wooded situation. If you have any
7 brooks, they can be heard for quite a
8 distance. We also heard -- not
9 continuously -- but we heard at most of these
10 sites traffic on Route 28. Those are noted on
11 the field forms where we were able to hear
12 traffic. So it wasn't a continuous sound from
13 Route 28, but you could hear traffic when it
14 was occurring.

15 MS. BAKNER: As far as -- you now
16 have your background readings representing the
17 ambient noise. Did you find anything unusual
18 about the ambient noise at that location, or
19 is that what you would have expected?

20 MR. MANCHESTER: That's what I would
21 have expected to hear in that area. It's
22 typical in a rural area, sound levels we
23 measured.

24 MS. BAKNER: Now if you could just
25 take us through the way in which you predicted
(NOISE ISSUE)

1 noise, construction noise for the project,
2 that would be most helpful.

3 MR. MANCHESTER: We collected the
4 background sound levels, and then we were
5 given -- we talked to the project engineer and
6 obtained information on the construction
7 equipment that would be used, and also
8 information on the duration of construction,
9 the phases, when it would occur, and used that
10 to evaluate noise for several different parts
11 of the project. We evaluated noise for the
12 traffic, off-site traffic; that would be
13 trucking traffic, construction traffic. That
14 would be bringing in materials for the access
15 roads and for the golf courses. That would be
16 occurring over the first three years.

17 We evaluated the access road
18 construction itself. Different phases of that
19 or aspects of that construction were evaluated
20 individually since they happen one after
21 another, so we evaluated those individually,
22 special pieces of equipment.

23 Then we also evaluated the golf course
24 construction. Parts of the golf course
25 construction -- there's many phases of the
(NOISE ISSUE)

□

1 golf course construction. They all pretty
2 much can happen at any given time. We took
3 the worst case scenario of all the
4 construction of the golf course occurring, all
5 the aspects of each hole occurring at the same
6 time. So we used that as a worst case

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7 scenario, that all the equipment was in there
8 and they were doing all the different types of
9 construction for each hole at the same time.

10 ALJ WISSLER: What kind of increased
11 decibel level or ambient did you predict?

12 MR. MANCHESTER: For the golf
13 courses -- that's on some tables we will put
14 up in a minute -- the Big Indian, there was
15 maybe a two decibel increase in noise for the
16 golf course construction. They're relatively
17 distant, but for --

18 MR. RUZOW: Distant to the receptors?

19 MR. MANCHESTER: Distant to the
20 receptors. The wildacres, which is in Tables
21 5-1-2 -- wildacres especially in 5-2, the
22 Highmount Golf Club at wildacres could see
23 sound levels, maximum sound levels of
24 79 decibels when they're very near in a
25 proximal location for certain parts of certain
(NOISE ISSUE)

1 holes. And that's something I would like to ⁵⁶⁶
2 talk about as far as how we did these analyses
3 to determine what the maximum sound levels
4 would be.

5 MS. BAKNER: I think what Scott would
6 like to explain is how they used the manuals
7 -- how they used their manuals to determine
8 based on the horsepower of the equipment, so
9 if you could just address that briefly.

10 ALJ WISSLER: It's my understanding
11 that you got this data from the project

12 6-8-04 bcrossroadsf
engineers for the specific equipment?

13 MR. MANCHESTER: Yes, we did.

14 ALJ WISSLER: This isn't just out of
15 some sound decibel level text?

16 MR. MANCHESTER: Where we had
17 equipment and -- depending on the type of
18 construction -- for instance, the project
19 engineer supplied us with the equipment for
20 each phase of the access roads, and all the
21 equipment for the access road and when that
22 was occurring for each -- what equipment would
23 be there for each aspect of construction of
24 those. So we had that information for the
25 access roads.

(NOISE ISSUE)

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1 For the golf courses, we were also
2 supplied a list of the types of equipment,
3 horsepower to use. If it was incomplete, if
4 they didn't know -- if they knew they were
5 going to be using a bucket loader and they
6 didn't know the horsepower, then we would use
7 a typical horsepower. Generally we used -- in
8 the assessment, we used three different
9 resource manuals for that.

10 MS. BAKNER: In any event, they used
11 manuals, they used the standard manuals to the
12 extent they needed to fill in any holes.

13 MR. MANCHESTER: These are
14 construction noise guides developed in -- and
15 they're referenced in our Sound Impact
16 Statement. They're used often. They're
17 developed by Bolt, Barranick & Newman. [sic]

18 Two of these noise guides -- BBN are leaders
19 in the noise field, have been for many, many
20 years authorities. And also a--we also
21 referenced a Hoover & Keith Manual for Noise
22 Control for Buildings and Manufacturing Plants
23 is the name of it. But the two BBN
24 construction guides, we referenced those and
25 the manual to determine how much noise the
(NOISE ISSUE)

□

1 equipment would make for -- depending on its
2 size and horsepower. And we used that
3 information, along with corrections depending
4 on whether -- typically the equipment would
5 generally operate at a certain given amount of
6 time -- maybe it's a compressor that operates
7 all the time at 100 percent, or whether it's a
8 piece of equipment that may be used very
9 sporadically -- and there are corrections that
10 are in these guides to correct the sound level
11 based on the frequency of use and also how
12 much it's used off-load. Because the sound
13 levels that we initially generate are based on
14 full horsepower-rated capacity. Most things
15 don't operate at their rated capacity so
16 there's guidelines on how to correct the sound
17 levels based on certain equipment which they
18 know operates at off-load capacity. All that
19 gave us a sound level for each piece of
20 equipment that we could add together for that
21 phase at a certain distance, which typically
22 is 50 feet.

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23 MS. BAKNER: Then you took the
24 distance at 50 feet and you applied it to the
25 particular receptors?
(NOISE ISSUE)

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1 MR. MANCHESTER: That's right.

2 ALJ WISSLER: Allowing for the
3 distance between the equipment and the
4 receptor?

5 MR. MANCHESTER: Yeah, that's the 75
6 cent question is how far it is to the
7 receptor. There's some things that come into
8 play. There's the distance attenuation, and
9 the DEC recommends using 6 decibels every time
10 you double that 50-foot distance. Every time
11 you double it, you drop it down another 6
12 decibels, so there's attenuation due to
13 absorption in the air.

14 There's other reductions that occur
15 due to it going through vegetation and trees,
16 as well as going over terrain where there's no
17 line of sight and the terrain intervenes and
18 reduces sound levels.

19 MS. BAKNER: As far as the DEC policy,
20 it allowed you to take a 3 to 7 decibel level
21 reduction each time you went through a
22 100 feet of trees?

23 MR. MANCHESTER: That's right.
24 Typically the range is 3 to 7 feet of
25 decibels, an average of 5, but to be
(NOISE ISSUE)

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1 conservative, we took the 3 decibel reduction
2 in our calculations for every 100 feet of
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3 trees and dense foliage we went through.

4 ALJ WISSLER: You took a reduction for
5 the hemispherical spreading?

6 MR. MANCHESTER: The hemispherical
7 spreading first, and then --

8 ALJ WISSLER: Then for the vegetation?

9 MR. MANCHESTER: Then for the
10 vegetation; and we measured where there would
11 be vegetation, the distance of that
12 vegetation. We capped it at 25 decibels
13 because after 25 decibels, my experience is
14 that it's better not to go way over
15 25 decibels. If you have 2000 feet of
16 vegetation, you want to cap it at a certain
17 amount, because it could find other ways to
18 go. It could go over the vegetation, so we
19 cap it at 25.

20 We also took a reduction when there
21 was a terrain barrier, so when it was over the
22 mountain and there was no line of sight. That
23 can be -- that depends on the height, height
24 of the barrier. The higher the barrier, the
25 longer the path to get over the barrier,
(NOISE ISSUE)

□

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1 reduces the sound better and better as the
2 barrier gets higher. Barriers work from
3 anywhere from 6 decibels for a line-of-sight
4 barrier that just breaks off the line of
5 sight, to 20 to 25 decibels, maximum amount
6 for a very, very tall barrier. To be
7 conservative, we simply used 6 decibels.

8 whenever there was a reduction due to terrain
9 barrier, we took a 6 decibel reduction and
10 capped it at that.

11 MS. BAKNER: Turning our attention to
12 Table 5-1, this is the Big Indian Plateau
13 Construction Noise Impacts and Mitigation.

14 MR. RUZOW: These are Tables 5-1, 5-2
15 and 5-3 from the SIS report.

16 MR. MANCHESTER: And this is straight
17 out of the SIS report.

18 MS. BAKNER: The thing to focus on at
19 Big Indian, just to help move things along, is
20 that the only area where you found a
21 substantial increase in noise was associated
22 with the access road because of the proximity
23 of the receptors to the access road; is that
24 correct?

25 MR. MANCHESTER: That's correct. All
(NOISE ISSUE)

□

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1 the others -- the locations are remote from
2 the receptors which are on the outside of the
3 development area. However, the access road
4 does go by -- in coming in, does go right by
5 some receptors. So we evaluated the maximum
6 sound level that could happen. If they're
7 going right in front of somebody's house, we
8 modeled it right in front of their house. We
9 modeled that level to their home, so there's
10 essentially very little or no reduction. If
11 they're 80 feet away from the road, we took
12 very little reduction in sound. Typically at
13 that point there is little or no vegetation.

14 Generally though, those sound levels, they're
15 maximum, they're the worst case. Those will
16 reduce as it moves by either way.

17 MS. BAKNER: Scott, if I could have
18 Kevin interject for a second on the method of
19 the access road construction. We're starting
20 at the top and building the access road down.
21 And we're building it in a very short period
22 of time, but in pieces essentially in order to
23 control soil erosion and sedimentation. So in
24 terms of the timing, how long would you
25 expect, Kevin, to be within proximity to that
(NOISE ISSUE)

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1 receptor?

2 MR. FRANKE: The distance Scott was
3 talking about, we're probably looking at two
4 weeks or less to be in the immediate vicinity
5 of those residences, and then moving out from
6 there.

7 MS. BAKNER: We're doing it as sort of
8 a continuous operation to control -- to
9 control soil erosion, sedimentation control.

10 And we looked at a number of
11 mitigation measures, and Scott, if you could
12 just briefly address why mitigation measures
13 for that type of activity are less than
14 optimal.

15 MR. MANCHESTER: Normally when you see
16 a high impact, even if it's at the nearest
17 location, like you're building a building or
18 something like that at the nearest location,

19 you will want to put some intervening barrier
20 in, or something like that, or other types of
21 mitigated measures where it's taking a long
22 period of time. In this case, within 500 feet
23 of the receptor -- they're supposed to be
24 within 500 feet for a period of a couple
25 weeks -- that sound level may change from --
(NOISE ISSUE)

1 it may be as little as 2 decibels over ambient⁵⁷⁴
2 when they're 500 feet away and there's
3 vegetation, up to -- well, if they're right in
4 front and you have 85-decibel pay loaders
5 operating, it's going to be about 85 or
6 83 decibels in this case.

7 To construct a barrier in front as you
8 go long and you're moving along at such a
9 rate, not only would be impracticable and not
10 feasible in this case, but it would increase
11 the length of time we're actually going to be
12 moving along in that area. We want to
13 minimize the amount of time that we're causing
14 that increase nearby that residence. So we
15 want to move through and move by. So we
16 rejected using a barrier type of approach to
17 reducing the sound levels.

18 We did, however, recommend to the
19 Applicant to use the minimum amount of
20 equipment necessary and to keep equipment off
21 site. It's difficult, and the DEC guidance,
22 that's one of their best management procedure
23 policies is to reduce the amount of equipment.

24 MR. RUZOW: If you have a staging area
Page 241

25 somewhere else?
(NOISE ISSUE)

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1 MR. MANCHESTER: Yes, keep the
2 noisiest equipment at a further away point if
3 you can. Don't wait and stage trucks right in
4 front of somebody else's house while they're
5 being loaded and unloaded if they're not
6 actively being done -- and that's quite often
7 the case. The trucks will line up and wait
8 there right near where they need to unload or
9 be loaded, and then that creates additional
10 noise. That's assumed that is going to occur,
11 but to reduce the amount of equipment is one
12 way to mitigate the noise and reduce the
13 noise.

14 In this case if you can keep half of
15 the noise sources away, and this is almost a
16 guideline, you'll reduce the sound level in
17 half. It will drop it by 3 decibels, a
18 halving of noise. It will reduce it. That
19 will drop it by 3 decibels. That's a
20 guideline.

21 I have seen other construction
22 activity where they recommended minimum sound
23 levels for construction of homes and
24 construction of buildings, for instance, where
25 sound levels have been 6 or 8 or more decibels
(NOISE ISSUE)

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1 down lower when they have reduced the amount
2 of equipment they have used on-site to what
3 they really needed to use on-site. So we

4 thought just as a guideline, you can drop it
5 somewhat, but we want to indicate that you're
6 not going to drop it by 30 decibels just by
7 reducing the amount of noise.

8 MS. BAKNER: In your professional
9 opinion, is this a fair assessment and fair
10 approach to dealing with reducing impacts to
11 the maximum extent practicable?

12 MR. MANCHESTER: I think so, along
13 with other best management practices that the
14 Applicant is planning on using to dissolve
15 noise issues. Those would also be employed,
16 and those are detailed in the DEC guidance as
17 well.

18 MS. BAKNER: If we can move on to
19 Table 5.2. I understand the situation at
20 Wildacres is a little different because we
21 have some closer receptors?

22 MR. MANCHESTER: In Wildacres, there's
23 a little bit different issues because the
24 receptors are located within the project area
25 more, and therefore, golf course holes are
(NOISE ISSUE)

□

1 abutting up against receptors. So in this
2 case, again, the access roads are the same
3 issue that they were with Big Indian. The
4 access roads are going to cause increases in
5 sound level. They're going to be moving by
6 -- I think there's -- they'll be by residences
7 slightly more. I think we estimated a month
8 and a half within the 500 feet that they would
9 be by a given residence. This is a similar

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10 situation to Big Indian.

11 MS. BAKNER: Scott, that's for the
12 golf construction, not the access road?

13 MR. MANCHESTER: The access road goes
14 by right here. (Indicating)

15 MS. BAKNER: We would still be
16 building it within a condensed time frame
17 still?

18 MR. MANCHESTER: Yes. Other issues,
19 mainly to just note, the Highmount Golf
20 Course, we took a worst case of the closest
21 part of the nearest hole to, in this case it's
22 receptor w-8, which is here, and there's holes
23 going right nearby. A number of receptors
24 have pieces of the holes going by them.

25 (Indicating)
(NOISE ISSUE)

□

1 Kevin, you said that to do the whole
2 hole area is going to take?

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3 MR. FRANKE: Approximately a month.

4 MR. MANCHESTER: A month for a hole.
5 So when they're at the nearest portion of that
6 is when the sound level is going to increase.
7 That's going to be a substantive piece of that
8 month that they're going to be right in front.
9 But in order to address the increase in noise
10 due to the golf hole construction, when
11 they're within 500 feet, we recommended
12 mitigated measures. That was to reduce --
13 again, to reduce the equipment on-site as
14 practical, but also to put a barrier -- we

15 specified a barrier that would reduce the
16 sound levels by an estimated 20 decibels to
17 reduce sound levels. And that would be built
18 using fill that they would be using in that
19 hole and would be staged. They would put the
20 fill up in front of the residence to maintain
21 that barrier while they're constructing those
22 holes. So when they're within 500 feet, we
23 recommended to use this barrier and to
24 extend -- in the case of this barrier, to a
25 height of 10 feet above the line of sight to
(NOISE ISSUE)

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1 the home.

2 when they're over 500 feet -- a
3 barrier will still be effective near the home
4 but just maintaining a vegetative --
5 vegetation and trees between -- if that's
6 practical to maintain -- over 500 feet to
7 maintain a vegetative buffer would reduce
8 sound levels by a similar amount. So that's a
9 mitigated strategy when they're further away
10 from the holes to reduce impacts at the
11 receptors.

12 MS. BAKNER: Let me just point out one
13 thing here. In your column entitled,
14 "Mitigative action, estimated reduction
15 dBa" -- Scott has proposed for us, as part of
16 our construction, to use a suite of mitigative
17 measures depending upon the amount of
18 reduction that we need to achieve, again
19 practically. Obviously we're not going to
20 build barriers along as part of our access

21 roads, but with respect to the construction of
22 golf holes or specific buildings, we do have
23 the ability to construct barriers and to
24 insure that we are reducing impacts on
25 receptors.

(NOISE ISSUE)

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1 Even if you look at the bottom of
2 Table 5-2, he has a list of how large the
3 barrier has to be in order to achieve the
4 goals that we need. So we have, in effect,
5 incorporated those mitigative measures into
6 our plans in how we're dealing with things.

7 Looking at Table 5-3 at the Cumulative
8 Construction Noise Impacts and Mitigation,
9 what does that tell us about what we're doing
10 here?

11 MR. MANCHESTER: Again, the cumulative
12 impacts describe what would happen if certain
13 activities were phased together, and what is
14 the potential worst impact. Again, we would
15 take the worst impact of the closer hole and
16 say -- for instance, at wildacres if they were
17 building the Highmount Golf Club at the same
18 time rock crushing was going on, the
19 Children's Center was being built, and the
20 clubhouse is built, this is what the potential
21 would be for increased sound. And we
22 determine whether that would require a
23 mitigative measure to reduce that. There are
24 a number of mitigative measures that can be
25 used for those situations.

(NOISE ISSUE)

6 construction. Building construction is very
7 similar from construction site to construction
8 site. It uses a given number of equipment.
9 And for this project, the specific building
10 equipment was not known and is not specified
11 for the housing units and the different types
12 of building construction. So we in our guides
13 have sound levels, LEQ sound levels at
14 50 feet, that certain phases of the
15 construction of a building would result in.
16 So I think there's about five phases of
17 construction, and they give sound levels for
18 each phase, and that's what we used for the
19 construction estimates of the buildings.

20 MS. BAKNER: As far as the blasting,
21 we've been criticized for somehow
22 under-estimating the decibel level of the
23 blasting. Are you comfortable in your
24 professional opinion that we've estimated
25 those numbers correctly?
(NOISE ISSUE)

1 MR. MANCHESTER: Yes, I'm comfortable⁵⁸³
2 with that. I know there was an issue raised
3 about potential amphitheater effect. In
4 response to that, we took a closer look at the
5 profile from the blasting areas, especially at
6 wildacres where it's the nearest -- I believe
7 at wildacres. We took cross-sections from the
8 area of blasting down to the three nearest
9 receptors. What we found was that there's no
10 line of sight from the blasting area to the

11 receptors, with the exception of one receptor
12 which has just a partial line of sight at the
13 top of the blast area -- I think 25-foot line
14 of sight to the top 25 feet of what they're
15 blasting. This is an example of the contours
16 that -- the elevation drawings that we used
17 for three different receptors. This tells me
18 that the -- (Indicating)

19 ALJ WISSELER: Is that in the -- part
20 of Appendix 22?

21 MS. BAKNER: Excuse me, your Honor,
22 that is not. That is not, and I do believe --
23 Kevin, you brought copies of that?

24 MR. FRANKE: No.

25 MS. BAKNER: We don't have copies.
(NOISE ISSUE)

□

1 ALJ WISSELER: You'll provide them;
2 that's all.

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3 MS. BAKNER: Okay.

4 MR. MANCHESTER: We looked at the line
5 of sight to the receptor, found that there's
6 intervening terrain for all or most of the
7 blast area. And for amphitheater effect, you
8 really need a wide opening, large vertical
9 walls, hard reflective walls. They need to be
10 in a curved nature so there's focussing. If
11 you have big, big tall walls that are flat,
12 they don't reflect sound. They may increase
13 it 2 to 3 decibels, but unless they focus, it
14 really isn't achieving that amphitheater
15 effect. So most of the noise is going to be
16 directed up and away from the receptors.

17 There's no situation where the receptors are
18 facing an opening in that blast area, so I
19 really don't see that the amphitheater effect
20 really applies here.

21 MS. BAKNER: Scott, are you satisfied
22 that the proposed mitigation conditions will
23 be effective in the -- associated with this
24 construction project?

25 MR. MANCHESTER: I'm satisfied that
(NOISE ISSUE)

1 the mitigation will reduce the sound levels to ⁵⁸⁵
2 acceptable levels. Now, again, the DEC
3 guidance does indicate that a 6 to 9 decibel
4 increase can result in some complaints. We've
5 really looked at this, and the maximum sound
6 levels are really over short periods of time.

7 The DEC guidance does a really good
8 job of addressing noise issues for operations,
9 plant operations. If a power plant or a
10 co-gen facility goes in next to someone, you
11 really don't want to increase the sound levels
12 10 decibels, or 9 or 8 or 7. Those are
13 instances where that is going to create a
14 significant permanent impact.

15 However, these are during the day, and
16 in many cases the impact may be two weeks or
17 less, or a very short period of time.

18 However, to address the concern, I have talked
19 with the Applicant and we've -- I guess the
20 Applicant has proposed to conduct, have a
21 noise hotline set up for the first two years

22 for the -- I guess the blasting, as part of
23 the blasting.

24 MS. BAKNER: And also for the sound.
25 We presented proposed draft conditions a while
(NOISE ISSUE)

1 ago to the Department to deal with these
2 issues, and we'll just mark them for the
3 record. And we do have enough copies of this.

4 (BLASTING CONDITIONS RECEIVED AND
5 MARKED FOR IDENTIFICATION AS APPLICANT'S
6 EXHIBIT NO. 7, THIS DATE.)

7 MS. BAKNER: Just note for the record
8 that in the draft conditions, we propose
9 Condition 15 which has to do with the noise
10 complaint procedure. We've taken this from
11 sort of standard DEC language -- admittedly
12 it's mostly from mining permits which is
13 clearly overkill in this case -- but we want
14 to stress that the last thing we want to do is
15 cause any discomfort to the neighbors. And we
16 want to make sure that our mitigating measures
17 are working, and getting feedback from the
18 people that live out there is the best method,
19 I think, of getting that.

20 Also in here is the blasting
21 conditions. Again, these are standard
22 conditions that the Department imposes on
23 people who seek to blast for whatever reason.
24 I'm not aware of it ever being used in a
25 construction type project before; these do
(NOISE ISSUE)

1 come from mining type projects. And we've
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2 also included a well arbitration provision as
3 well for consideration and comment. I don't
4 know if that will be necessary or not when we
5 get to water supply, but it didn't make sense
6 to hand it out piecemeal.

7 Scott, have you ever seen anybody do a
8 Sound Impact Study this thorough for the
9 construction phase of a project?

10 MR. MANCHESTER: No. This is actually
11 the -- because of the size of the project,
12 this is quite thorough. It's using -- it's
13 using the recommended procedures from a
14 construction noise guide of corrections to
15 sound levels and how to handle traffic
16 increases from construction traffic. So it's
17 been used, but this is fairly rigorous in that
18 it's not just an access road construction,
19 it's not just construction of a golf course,
20 it's construction of homes, it's construction
21 of hotels. So it's the same procedures that
22 are typically used, it's just a larger scale
23 than is generally used. And when we had the
24 available information to use specific pieces
25 of equipment, we used those to try to refine
(NOISE ISSUE)

1 the analysis as opposed to using a standard
2 construction noise sound level that may not be
3 applicable to golf course construction, for
4 instance, and we tried to use that to refine
5 it.

6 MS. BAKNER: Thank you very much.

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7 There is two more things I would like to point
8 out; one is the language in the document that
9 the Department put out, the Noise Impact
10 Assessment, and --

11 MR. RUZOW: The policy we've been
12 referring to.

13 MS. BAKNER: -- the policy document at
14 page 13. It says: "Appropriate receptor
15 locations may be either at the property line
16 of the parcel on which the facility is
17 located, or at the location of use or
18 inhabitants on adjacent property." And we
19 feel strongly that we have followed the policy
20 in that regard.

21 we also would note that it is a
22 policy, and any sort of arbitrary statement
23 that anything over 6 dB requires mitigation in
24 all circumstances, where in fact, you have
25 temporary construction noise where it would
(NOISE ISSUE)

□

1 cause more noise to try to mitigate, simply
2 doesn't seem to be required by the policy or
3 mandated by the policy. It's just a policy,
4 it's just providing guidance, and it shouldn't
5 be used in sort of an inappropriate fashion.

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6 Lastly, there are some predicted noise
7 increases related to the construction of the
8 21-lot residential subdivision, which is the
9 Highmount Estates, and I would just note that
10 the policy provides on page 16 that: "No
11 noise evaluation at all is necessary if the
12 site is contained within an area in which

13 local zoning provides for the intended use as
14 a right." Couple that statement with the
15 provision that, you know, the residential
16 construction has really been sort of over-
17 estimated in these circumstances because
18 typically the guy comes and digs the
19 foundation and you hope he comes in two weeks
20 and starts. We maintain that we have done a
21 thorough, careful job, which in the opinion of
22 our expert is a good job and one that's
23 slightly overkill for the project at hand.

24 MR. MANCHESTER: I guess the
25 take-away that I would like to point out is
(NOISE ISSUE)

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1 that wherever possible, we tried to be
2 conservative in the reductions we use for
3 vegetation and barriers. We also tried to
4 take the maximum impact which, when you have a
5 golf hole that you may be a couple weeks near
6 somebody's house, that a maximum impact --
7 that's what we showed. We showed the maximum
8 impact. Most of the time they're going to be
9 away, so it may look bad at that point to show
10 that, but that's what we tried to do to show
11 what potentially happens so that we can apply
12 appropriate mitigation when it's feasible.

13 I know even for -- you said you have
14 set forth that hotline so people can get in
15 touch with the project personnel for the first
16 two years. That's going to be extended to the
17 entire response to any noise issues on the

18 property, and should impacts from 6 to 9
19 decibels become a problem, we want to know
20 about it, we want to address it. And through
21 that method, we will be able to immediately
22 address those impacts that maybe they are 6 to
23 9 decibels, and maybe it is creating an
24 adverse impact on someone, or maybe it's more
25 than we estimated. We'll address that with
(NOISE ISSUE)

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1 the hotline and put up practical best
2 management practices, including berms,
3 stockpile materials as part of that, reduced
4 equipment, to correct that immediately.

5 MS. BAKNER: Thank you very much, your
6 Honor.

7 ALJ WISSLER: Other than construction,
8 did you do any analysis of potential noise
9 impacts after the resorts are built?

10 MR. MANCHESTER: I didn't, no.

11 MS. BAKNER: Your Honor, that question
12 would be appropriately directed to Wendy
13 Cimino of Creighton Manning when we meet on
14 the 18th to talk about traffic.

15 ALJ WISSLER: Staff.

16 MS. KREBS: Your Honor, thank you.
17 Department staff -- we do not have a noise
18 expert on staff, your Honor, so basically our
19 position is that we accepted the DEIS as
20 meeting the scope of work. We don't have an
21 expert to delve into the specifics of the
22 noise studies, and we think the record is
23 adequate on both sides from the Applicant's

24 and from the CPC's perspective on that.

25 To the extent that our staff person
(NOISE ISSUE)

1 did review it, he did evaluate the noise and ⁵⁹²
2 he did propose mitigation, but since he's not
3 a noise expert, Department's position is we
4 accept the DEIS as meeting the scope of work.

5 ALJ WISSLER: But again, your review
6 dealt with the construction phase of this
7 project?

8 MS. KREBS: Yes.

9 ALJ WISSLER: City, anything?

10 MR. GREENE: No, your Honor.

11 MR. GERSTMAN: One final comment, your
12 Honor.

13 ALJ WISSLER: Keep it short please.

14 MR. GERSTMAN: Your Honor, just to
15 qualify the issue of expert qualifications, we
16 note that Mr. Manchester, in fact, is not an
17 acoustic engineer, as he pointed out. We did
18 not represent Mr. Smith to be an acoustic
19 engineer, but in fact, essentially an
20 environmental analyst who is capable of
21 analyzing the policy and whether or not the
22 SIS meets the DEC policy.

23 we believe that the Applicant has
24 essentially conceded that there will be
25 significant noise impacts here based upon the
(NOISE ISSUE)

1 DEP policy levels, and that mitigation has not ⁵⁹³
2 been proposed that will address that.

3 Finally, I just want to note your
4 Honor's -- Ms. Bakner has identified the
5 policy as just that, a policy. This will be a
6 theme which you will hear further about as we
7 brief the issues concerning, for instance, the
8 visual impact policy and whether or not the
9 Department ought to go beyond that or comply
10 with it in terms of the visual impact
11 assessment.

12 ALJ WISSLER: Okay. That's it.

13 MS. BAKNER: I would just like to
14 note, I did correct my misstatement that Scott
15 is not an acoustical engineer. We do have his
16 resume here and he has enormous experience in
17 doing these types of studies well beyond the
18 capacity to undertake some sort of policy
19 review.

20 ALJ WISSLER: Is this a curriculum
21 vitae?

22 MS. BAKNER: Yes.

23 MR. GERSTMAN: It's not anywhere else?

24 MS. BAKNER: It's in the DEIS.

25 ALJ WISSLER: Do we need to take it
(NOISE ISSUE)

1 in?

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2 MS. BAKNER: No, I don't think so.
3 Contrary to what Mr. Gerstman has said, we
4 certainly do not concede that we have
5 significant adverse impacts that have not been
6 mitigated. Clearly, we spent all that time so
7 we could show you we analyzed them and we
8 mitigated them.

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ALJ WISSLER: We are adjourned until tomorrow morning at 9 o'clock.

(6:29 P.M. - WHEREUPON, THE ABOVE PROCEEDINGS CONCLUDED FOR THE DAY.)

(NOISE ISSUE)

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C E R T I F I C A T I O N

I, THERESA C. VINING, hereby certify and say that I am a Shorthand Reporter and a Notary Public within and for the State of New York; that I acted as the reporter at the Issues Conference proceedings herein, and that the transcript to which this certification is annexed is a true, accurate and complete record of the minutes of the proceedings to the best of my knowledge and belief.

6-8-04 bcrossroadsf

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THERESA C. VINING

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18 DATED: July 5, 2004

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