

1 ISSUES CONFERENCE

2

3 In the Matter of the Applications of
4 CROSSROADS VENTURES, LLC
5 for the Belleayre Project at Catskill Park
6 for permits to construct and operate pursuant to
7 the Environmental Conservation Law

6

7 Margaretville Fire House
8 Margaretville, New York
9 May 25, 2004

9 B E F O R E :

10 HON. RICHARD WISSLER,
11 Administrative Law Judge

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1 (MAY 25, 2004)

2 (10:06 A.M.)

3

P R O C E E D I N G S

4

ALJ WISSLER: My name is

5

Richard Wissler, and I am an administrative

6

law judge -- can everybody hear me okay?

7

(AFFIRMATIVE RESPONSES)

8

I am an Administrative Law Judge for

9

the Department of Environmental Conservation,

10

and I will be presiding at today's Issues

11

Conference. Actually, it's going to go a lot

12

longer than just today, I'll tell you that.

13

Okay. Now, the preface to the issues

14

conference is, we've already had public

15

hearings in this matter and the public has had

16

the opportunity to comment with respect to the

17

project. Those comments are comments on the

18

Draft Environmental Impact Statement that has

19

been prepared in this case. However, the

20

Department's procedures, which is in

21

particular, Part 624 of Title 6 of the New

22

York Code of Rules and Regulations, provides

23

an opportunity for folks to file petitions

24

with the Department to argue that the permits

25

that are issued are somehow inadequate or

(OPENING REMARKS - ISSUES CONFERENCE)

□

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1 there are permits that should be issued that
2 are not being issued, or the environmental
3 impact of the project is such that it ought to
4 be modified in a -- in a particular way before
5 it can go forward, if at all.

6 During that process, folks are
7 permitted -- parties are permitted to file any
8 appropriate petitions for party status. If
9 they raise issues that are substantive and
10 significant and that finding is sustained by
11 the Commissioner, then there would be an
12 adjudicatory hearing -- which this is not --
13 would be an adjudicatory hearing which would
14 be a trial-type hearing at a later subsequent
15 date.

16 The purpose of the Issues Conference
17 is as its name implies, it's to decide what,
18 if any, issues there are that would need
19 further adjudication. Issues that would
20 require further adjudication, again, are
21 issues that are substantive and significant.
22 what does that mean?

23 Substantive means that a reasonable
24 person looking at the facts would say, you
25 know what, I can't really decide what ought to
(OPENING REMARKS - ISSUES CONFERENCE)

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1 be done here without a little bit more --
2 inquiring into this a little bit more. I want
3 to -- need to develop a little bit more
4 factual background before I make a -- make a
5 decision. That would make an issue
6 substantive.

12 petitions should be granted party status in
13 this case.

14 Now, in order to be granted party
15 status, they have to achieve two thresholds.
16 The first threshold is they have to show that
17 they have some kind of economic or other --
18 excuse me, environmental interest in the
19 project. And secondly, they have to
20 demonstrate that an issue is, as I said
21 before, substantive and significant.

22 So that issues ruling will first
23 determine who has the requisite environmental
24 interest to participate in any subsequent
25 adjudicatory hearing, number one; and number
(OPENING REMARKS - ISSUES CONFERENCE)

1 two, that they will have -- that they have ^{Vol.1- 10}
2 raised an issue that is substantive and
3 significant. The second part of that ruling
4 is, I will be examining the issues that were
5 presented to me as being substantive and
6 significant and ruling as to whether or not
7 they are, in fact, substantive and
8 significant.

9 If I find in my ruling that something
10 has been -- been raised and the factual
11 records supports that we ought to look a
12 little further and that it could -- could
13 change the position taken by the Department
14 with respect to a permit or permit condition
15 or the issuance of a permit, or the project
16 itself, then I will find and I will rule that
17 that issue is substantive and significant and

18 something that we ought adjudicate at a
19 further adjudicatory hearing. So -- and then
20 there may be issues that I'll -- that I have
21 of this record, I will say: well, you know
22 what, I think that -- that in my view, being
23 the reasonable person that I am, that I --
24 that perhaps that that issue has been pretty
25 much -- pretty clear on the record. It's
(OPENING REMARKS - ISSUES CONFERENCE)

1 resolved itself. It isn't substantive and vol.1- 11
2 significant. It's not something that we need
3 to have a subsequent hearing on. So I will
4 issue that ruling.

5 within some time after that, the
6 parties will be supplied with copies of that
7 ruling and they will have the opportunity to
8 appeal that ruling to the Commissioner,
9 saying, the judge didn't let us have party
10 status, you should let us have party status;
11 saying, the judge found that issue to be
12 substantive and significant, we don't think
13 it's substantive and significant, we don't
14 think the record supports that. It may also
15 say, we -- he found -- the judge found an
16 issue not substantive and significant in this
17 and, Madam Commissioner, we think that -- that
18 it is substantive and significant and ought to
19 be something that we have a hearing on. So
20 there will be an appeal of that issue's
21 ruling.

22 After that appeal is taken and the

23 Commissioner will review my ruling, review the
24 record, review the arguments made by folks on
25 appeal, and she will issue what is called an
(OPENING REMARKS - ISSUES CONFERENCE)

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1 interim decision. That interim decision will
2 lay out -- could lay out who has party status
3 and who doesn't, but more often that decision
4 will simply lay out what she believes to be
5 the issues that should be adjudicated at a
6 subsequent adjudicatory hearing, either
7 opposing what I said in my issues ruling, or
8 modifying what I said in my issues ruling or
9 -- or reversing me and deciding, no, I think
10 the ALJ was incorrect in this, I think the
11 record supports that we do have a hearing --
12 or perhaps the record supports that we not
13 have a hearing on a particular issue.

14 when that interim decision is
15 ultimately issued, then a -- for those issues
16 that need further adjudication, that
17 adjudicatory hearing will be scheduled. Then,
18 as a practical matter, the record in this case
19 is just not going to close until, at the
20 earliest, the end of June, so -- which would
21 mean that a -- that an issues ruling in this
22 matter will probably not be issued until the
23 late summer, appeals would be in the early --
24 in the early fall. So the earliest,
25 reasonably then, that an adjudicatory hearing
(OPENING REMARKS - ISSUES CONFERENCE)

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1 could probably happen, if there is one, would
2 be sometime in -- in the late fall or winter

3 of this year.

4 Okay. To begin, I'm going to first
5 ask for the appearance of counsel for the
6 record.

7 MR. RUZOW: Representing the
8 Applicant, Daniel Ruzow and Terresa Bakner
9 from Whiteman, Osterman and Hanna.

10 MS. KREBS: For the Department staff,
11 Carol Krebs, Region 3 DEC, and
12 Vincent Altieri, Regional Attorney, DEC.

13 MS. MELTZER: For the proposed
14 intervenor, the City of New York,
15 Hilary Meltzer from the New York City Law
16 Department, with Daniel Greene, also from the
17 City Law Department.

18 MR. GERSTMAN: Representing the
19 Catskill Preservation Coalition, Marc Gerstman
20 and Cheryl Roberts, from the law firm of
21 Marc Gerstman.

22 MR. BAKER: For the Coalition of
23 Watershed Towns, Delaware County and the Town
24 of Middletown, Jeffrey Baker and Kevin Young
25 of Young, Sommer in Albany.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 ALJ WISSLER: Thank you.

2 I would note for the record that this
3 Issues Conference was announced pursuant to a
4 notice published in the Environmental Notice
5 Bulletin. Originally an Issues Conference to
6 be held earlier than this was part of an
7 original notice of this application which was

8 published in the Department's Environmental
9 Notice Bulletin on December the 10th, 2003 and
10 was subsequently published as -- as a legal
11 notice in the Ulster County Townsman and the
12 Catskill Mountain News.

13 However, because of the need to
14 reschedule public hearings in this matter and
15 so forth, and also to allow people an extended
16 time to file written comments with respect to
17 the project, a supplemental notice of this
18 hearing and revising the dates of the Issues
19 Conference and revising the date upon which to
20 submit written comments was published in the
21 Environmental Notice Bulletin -- Bulletin of
22 the Department of Environmental Conservation
23 on February the 11th, 2004. In addition, that
24 notice was published as a legal notice in the
25 Catskill Mountain News and in the Ulster
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 County Townsman, and I have copies of the Vol.1- 15
2 affidavits in the publication with respect
3 to -- for both of those papers.

4 As a matter of law, I would indicate
5 for the record that -- that that notice
6 requirement, the notice requirement of part
7 624 has, in fact, been satisfied in this
8 matter.

9 Collectively, the notice of hearing --
10 the DEC's notices of hearing for February 11th
11 and December the 10th will be marked as
12 Exhibit -- Office of Hearings and Mediation
13 Services, OHMS Exhibit No. 1.

14 (ENVIRONMENTAL NOTICE BULLETIN NOTICE
15 OF FEBRUARY 11, 2004, & DECEMBER 10, 2003, ET
16 AL. RECEIVED AND MARKED AS OHMS EXHIBIT NO. 1,
17 THIS DATE.)

18 ALJ WISSLER: Office of Hearings'
19 Exhibit No. 2 will be the Affidavits of
20 Publication in the Catskill Mountain News and
21 the Ulster County Townsman for those
22 respective dates.

23 (AFFIDAVITS OF PUBLICATION IN THE
24 CATSKILL MOUNTAIN NEWS AND THE ULSTER COUNTY
25 TOWNSMAN RECEIVED AND MARKED AS OHMS EXHIBIT
(OPENING REMARKS - ISSUES CONFERENCE)

1 NO. 2, THIS DATE.) Vol.1- 16

2 ALJ WISSLER: In addition, as part
3 of -- actually, as an addendum to Exhibit 1 is
4 a distribution list from the Department
5 indicating that the notices were sent to
6 supervisors of the Town of Shandaken as well
7 as the Town of Middletown, as required by
8 Departmental regulations.

9 Exhibit No. 3 in this matter will be
10 the Draft Environmental Impact Statement, and
11 that consists of ten bound volumes.

12 (DEIS - 10 BOUND VOLUMES RECEIVED AND
13 MARKED AS OHMS EXHIBIT NO. 3, THIS DATE.)

14 ALJ WISSLER: Office of Hearings'
15 Exhibit 4 will be three sets of plans
16 consisting of plans for the resort, a
17 conceptual plan for the water supply treatment
18 and distribution system -- the plans that I

19 first referred to is dated September 2003, the
20 conceptual plans entitled "Exhibit A" are
21 dated November the 15th, 2000. There is in
22 addition a plan set which is actually an
23 addendum to Exhibit 17B of the EIS.
24 Collectively, they will be Office of Hearings'
25 Exhibit No. 4.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 (PLANS - APPENDIX 17B, PLANS FOR
2 WATER TREATMENT AND WATER SUPPLY AND PART OF
3 APPENDIX 17 B(DEIS EXHIBIT 3) RECEIVED AND
4 MARKED AS OHMS EXHIBIT NO. 4, THIS DATE.)
5 ALJ WISSLER: Office of Hearings'
6 Exhibit No. 5 will be the comments read from
7 the public beginning, the public hearing held
8 in Margaretville on January the 14th, 2004 and
9 continuing in February of 2004 at Boiceville;
10 and in addition, the written comments that
11 were submitted by folks from the inception of
12 this project from its referral to the Office
13 of Hearings through, say, the 23rd, comprising
14 several hundreds of pages. Collectively, all
15 of that public comment will be Exhibit 5.

16 (PUBLIC COMMENTS CONSISTING OF
17 TRANSCRIPTS OF VARIOUS PUBLIC HEARINGS AND
18 WRITTEN COMMENTS RECEIVED AND MARKED AS OHMS
19 EXHIBIT NO. 5, THIS DATE.)

20 ALJ WISSLER: Exhibit 6 will be an
21 application -- a petition for party status
22 received from the Planning Board of the Town
23 of Shandaken.

24 (PETITION FOR PARTY STATUS FROM TOWN
Page 14

25 OF SHANDAKEN PLANNING BOARD RECEIVED AND
(OPENING REMARKS - ISSUES CONFERENCE)

1 MARKED AS OHMS EXHIBIT NO. 6, THIS DATE.) Vol.1- 18

2 ALJ WISSLER: Exhibit 7 is a petition
3 received from the City of New York. That will
4 be Exhibit 7.

5 (PETITION FOR PARTY STATUS FROM CITY
6 OF NEW YORK DEP RECEIVED AND MARKED AS OHMS
7 EXHIBIT NO. 7, THIS DATE.)

8 ALJ WISSLER: Exhibit 8 is a petition
9 for party status by the Catskill Preservation
10 Coalition and the Sierra Club. That will be
11 Hearing Exhibit No. 8.

12 (PETITION FOR PARTY STATUS FROM CPC &
13 SIERRA CLUB RECEIVED AND MARKED AS OHMS
14 EXHIBIT NO. 8, THIS DATE.)

15 ALJ WISSLER: Hearing Exhibit No. 9 is
16 a petition for full party status from the
17 Coalition of Watershed Towns.

18 (PETITION FOR PARTY STATUS FROM
19 COALITION OF WATERSHED TOWNS RECEIVED AND
20 MARKED AS OHMS EXHIBIT NO. 9, THIS DATE.)

21 ALJ WISSLER: In addition to the four
22 petitions that I have mentioned, is there
23 anyone who wishes to seek leave to file a late
24 petition in this matter and intervene?

25 Seeing no response, we will proceed
(OPENING REMARKS - ISSUES CONFERENCE)

1 with the four petitions before us, Shandaken Vol.1- 19
2 Planning Board, City of New York, Catskill
3 Preservation Coalition and the Sierra Club,

4 and the Coalition of Watershed Towns.

5 Mr. Baker, I would indicate for the
6 record that three of the petitions, the
7 petition from the planning board of the Town
8 of Shandaken, the petition from the City of
9 New York and the petition from Catskill
10 Preservation Coalition and the Sierra Club,
11 were received by my office on April the 23rd,
12 2004, which in fact was the date -- the filing
13 date, the final filing date for petitions in
14 this matter pursuant to the notice that was
15 published in the Environmental Notice Bulletin
16 on February the 11th, 2004. Part 624 does
17 allow for late-filed petitions; however, they
18 -- there is a particular record that needs to
19 be made with respect to that matter.

20 So, Mr. Baker, why don't you tell me
21 why the petition was late.

22 MR. BAKER: Thank you, your Honor.

23 The reasons for the -- for accepting a
24 late petition are set forth beginning at page
25 5 of our petition. I'd be happy to summarize
(OPENING REMARKS - ISSUES CONFERENCE)

vol.1- 20

1 them.

2 ALJ WISSLER: If you would do so,
3 please.

4 MR. BAKER: The role sought by the
5 three parties that we are representing, the
6 Coalition of Watershed Towns, Delaware County
7 and the Town of Middletown, is primarily to
8 protect the interest of the watershed
9 community regarding issues that are -- that

10 have been presented for adjudication and are
11 likely to be raised in this process which,
12 while clearly have an impact on the instant
13 application, also have the likelihood of a
14 significant impact on other activities in the
15 watershed and other projects, both large and
16 small.

17 The parties that we represent were not
18 planning on intervening in this process and
19 saw the necessity to do so upon the review of
20 the petitions for party status filed by the
21 intervenors, particularly the party petition
22 filed by the New York City DEP. And so the
23 reason one did not come in in a timely manner
24 in the first instance is that we did not know
25 what issues would be presented by New York
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 City until after we saw their petition and Vol.1- 21
2 comments. So we had to review that, see if
3 there were issues of broad implication to the
4 Coalition and then we -- make the
5 determination, meet with the municipal clients
6 and they had to make the determination as to
7 whether intervention was warranted.

8 The other standards under 624.5(C) of
9 the regulations relate to whether our late
10 petition will unduly delay or prejudice these
11 proceedings. I will submit that since the
12 Issues Conference is beginning today, we are
13 not going to do that. We are not raising new
14 substantive issues or new issues for

15 adjudication, just seeking to be heard on
16 issues that have already been raised by other
17 parties, not seeking delay -- to delay or
18 change a schedule that your Honor has set
19 forth for the Issues Conference.

20 We certainly don't seek to burden
21 these proceedings with numerous additional
22 witnesses. We reserve our right to call
23 witnesses should we proceed to adjudication on
24 issues that we think are relevant.

25 And finally, we believe the coalition
(OPENING REMARKS - ISSUES CONFERENCE)

1 of the watershed community will materially ^{Vol.1- 22}
2 assist in the deliberations your Honor will be
3 having and Commissioner Crotty will have,
4 because we present the perspective of the
5 watershed community.

6 Many of the issues involved here go to
7 the fundamental question of what are the
8 issues of water quality protection related to
9 New York City's water supply. The Coalition
10 of Watershed Towns was formed in 1991
11 specifically in response to New York City's
12 proposal to amend its watershed regulations
13 and develop a new Comprehensive Watershed
14 Protection Plan in response to the Surface
15 Water Treatment Rule under the Safe Drinking
16 Water Act. The Coalition fought hard through
17 six years of negotiations and litigation to
18 assure that the City's plan that was adopted
19 would be protective of New York City's water
20 quality while respecting the interest of the

21 watershed communities and recognizing that
22 responsible and sustainable economic
23 development was not inconsistent with water
24 quality protection.

25 It is the Coalition's position that
(OPENING REMARKS - ISSUES CONFERENCE)

1 this project, surely it meets the objective
2 criteria of both watershed regulations and DEC
3 regulations, and a fair application of SEQRA
4 should be approved. If you can meet those
5 objective standards, the Coalition is then
6 concerned because the City has presented
7 arguments which go beyond both the regulatory
8 authority and the -- in the spirit and letter
9 of the MOA regarding the scope of their
10 interests.

11 And the Coalition, Delaware County and
12 the town, can add materially to understanding
13 what is the proper context for considering
14 what is admittedly a large scale development
15 in the -- in the New York City watershed, but
16 a set of watershed rules and regulations, the
17 MOA and other associated laws, that do not
18 prohibit or presume in any way against a large
19 scale development. Those issues regarding the
20 appropriateness of a large scale development
21 are particularly issues of local concern to be
22 determined by local land use planning
23 commissions, and are not issues of New York
24 City unless there is a direct nexus to water
25 quality.

(OPENING REMARKS - ISSUES CONFERENCE)

1 ALJ WISSLER: Mr. Baker, pursuant to
2 the schedule that I -- I and the parties have
3 agreed to of the substantive -- of the issues
4 that we'll be examining this week, in addition
5 to the site visit, we'll be looking at mining,
6 a mining permit -- that issue's been raised by
7 the CPC. That's the Catskill Preservation
8 Coalition group and the Sierra Club, but I'll
9 be referring to them a lot as CPC.

10 In addition, issues have been raised,
11 particularly by the City, with respect to
12 wastewater treatment. It was our hope and it
13 is my hope that we can deal with both of those
14 issues today.

15 Are you familiar with draft SPEDES
16 permits and are you familiar enough with the
17 proceeding at this point that -- that we can
18 proceed with examination of those issues?

19 MR. BAKER: Yes, your Honor. At this
20 point, the Coalition and the parties I
21 represent are not planning on taking a
22 position on those two issues.

23 ALJ WISSLER: Okay. On Thursday, it
24 is our hope to examine the issue of traffic.

25 MR. BAKER: Again, it's not an issue
(OPENING REMARKS - ISSUES CONFERENCE)

1 that we plan on taking a position on, your
2 Honor.

3 ALJ WISSLER: Ms. Bakner and
4 Mr. Ruzow, anything you want to place on the
5 record?

6 MR. RUZOW: We have no objection to
7 the admission as a party the Coalition of
8 Watershed Towns.

9 Obviously, on the question of the
10 issues to be adjudicated, we reserve until
11 your Honor -- we have all had an opportunity
12 to address those issues. But in terms of both
13 the lateness and the -- the implications for
14 us in terms of the -- the addition of another
15 party, we have no objections.

16 ALJ WISSELER: Staff?

17 MS. KREBS: Your Honor, Department
18 Staff has no objections to the petition for
19 party status.

20 ALJ WISSELER: Okay. With respect to
21 the formal ruling in this -- in the matter,
22 that will be part of my issues ruling;
23 however, certainly for the sake of this
24 proceeding, welcome aboard, Mr. Baker.

25 MR. BAKER: Thank you, your Honor.
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 ALJ WISSELER: Okay. Part 624 requires ^{Vol.1- 26}
2 that party -- folks who petition for party
3 status demonstrate that they have an
4 environmental interest in the project as that
5 is defined in Part 624. And at this time,
6 I'll be listening to parties with respect to
7 whether or not the four petitions that we now
8 have in front of us have, in fact, met the
9 burden of -- required of them under
10 624.5(B)(1).

11 Let me have the Applicant first.

12 MR. RUZOW: Your Honor, we think we
13 can short-circuit a great deal of any concern
14 regarding the environmental interest with
15 respect to the filings. We reviewed the
16 petitions, we have a couple of questions and a
17 comment with respect to some of the filings,
18 but let me start with the Town of Shandaken in
19 terms of the position relative to the
20 environmental --

21 ALJ WISSLER: The -- okay, but the

22 MR. RUZOW: I'm sorry.

23 ALJ WISSLER: Is your position
24 essentially that they all make -- that --

25 MR. RUZOW: I have a question about
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 two of the filings within the Catskill
2 Preservation Coalition -- CPC's filing, which
3 Mr. Gerstman may be able to answer, and I have
4 a comment with respect to the City's filing,
5 and I -- and with respect to Shandaken, I have
6 a comment that I -- their filing is unlike the
7 others, their filing was not accompanied by
8 identification of witnesses, it's sort of a
9 short form and they're not here today. And
10 my -- my simple suggestion, we will address
11 their issues that they have raised in the
12 context of substantive and significant issues
13 as you have outlined in the schedule, but
14 they're -- they're not here to present what
15 their issue is.

16 Our suggestion is that they be treated

17 as an amicus in light of the way they've
18 framed their participation, but that's as much
19 as I -- I would offer. They're obviously a
20 town. They have -- they will eventually have
21 planning board site plan review. So they have
22 an interest, but the way they expressed it to
23 date, it's hard to understand what role
24 they're -- they're seeking to play in the
25 proceeding.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 ALJ WISSELER: I should indicate for
2 the record that the Planning Board of the Town
3 of Shandaken is represented by Draden Grant,
4 Esquire, and she has informed me, in fact all
5 of us, I believe, but I believe it's only been
6 by e-mail --

7 MR. RUZOW: Correct.

8 ALJ WISSELER: -- that the planning
9 board's intention in this process is to rely
10 on their submissions, and they -- the
11 submissions provided in their petition for
12 party status in this matter, and that they
13 will not be participating in the Issues
14 Conference here or -- or offering any kind of
15 colloquy or testimony with respect to the
16 issues they have raised. They're relying on
17 their papers.

18 I do need a record with respect --
19 from each of the parties with respect to their
20 requisite environmental interest. would it
21 be. If you're not going to object to their

22 status, what has been submitted to me on
23 papers will be what the record is in this
24 matter with respect to the requisite
25 environmental interest.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 MR. RUZOW: And we have --

2 ALJ WISSLER: But if there's any
3 challenge to anybody, then I'll let folks make
4 whatever presentation they want to make with
5 respect to that issue.

6 MR. RUZOW: Okay. We're not going to
7 challenge -- with respect to C -- CPC is an
8 umbrella organization for 11 groups, and then
9 Sierra Club is just part of it. With respect
10 to two of the groups under the CPC, the
11 presentation by the Zen Environmental Studies
12 Institute, we question whether they have an
13 environmental interest. They are located some
14 15 miles away from the site, and based on my
15 reading of their submission, it's -- while
16 they've expressed concern about golf course
17 pesticides and fertilizers and other things,
18 they are at such a distance, as a practical
19 matter, we're -- we're having a hard time
20 understanding what their specific
21 environmental interest is.

22 The petition doesn't identify any
23 particular experts or witnesses that they are
24 sponsoring. I've reviewed the transcript of
25 their comments, which basically parallel

(OPENING REMARKS - ISSUES CONFERENCE)

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1 the -- the very short summary that was in the

2 petition about concern about use of pesticides
3 in general in the watershed. But my -- in my
4 mind, that was not at all clear enough of a
5 showing of an environmental interest.

6 Secondly, with respect to our
7 colleagues at NYPIRG, and while I know they
8 have a general interest in watershed matters
9 because the City of New York drinks the water
10 that eventually comes through here, it's such
11 a general, broad statement that almost anybody
12 could have an environmental interest under
13 those standings. And so if that -- if that is
14 the standard, so be it, but it wasn't clear to
15 me that there was something special that they
16 were offering. Again, I couldn't tell from
17 the petition whether they were sponsoring any
18 witness that -- and their comments, again, I
19 reviewed their comments at the hearing. It
20 was a very general set of comments.

21 So with respect to those two parties,
22 if Mr. Gerstman can elucidate perhaps more,
23 and counsel to NYPIRG, NYPIRG has a
24 representative here as well, that -- that's
25 fine. But from a record point of view, I --
(OPENING REMARKS - ISSUES CONFERENCE)

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1 it just wasn't clear to me.

2 I understand that the standards for an
3 environmental interest in this proceeding are
4 different than standing for an Article 78
5 proceeding and -- and I recognize the
6 difference, but with respect to those two,

7 that looking at the papers, we -- we've had a
8 hard time trying to understanding what
9 particular interest was at risk.

10 ALJ WISSLER: Great. I'm going to ask
11 for Mr.Gerstman's comments; however, let me
12 ask -- let me just understand this, your
13 position as a matter of law. where a
14 petitioner is composed -- is an umbrella
15 organization, to use your term, are you saying
16 that if one of the component members doesn't
17 have a requisite environmental interest, that
18 the whole petition fails, that they would --
19 that every -- like if you have eight
20 organizations under the umbrella, six of them
21 clearly have an environmental interest, but
22 there's some question about two of them,
23 that -- that CPC's petition is therefore out;
24 is that what we're saying?

25 MR. RUZOW: I'm trying to understand,
(OPENING REMARKS - ISSUES CONFERENCE)

1 your Honor, the -- CPC's role. I did not
2 understand that CPC was either incorporated or
3 as an association exists as a legal entity. I
4 understand the value of having an association
5 join together with a number of groups in terms
6 of their -- how they present things. So their
7 representation -- I don't know what CPC is
8 other than a name and a -- and an umbrella, a
9 statement, with regard to how these other
10 parties that are seeking to participate here.
11 we had no objection on environmental standing
12 to any of the other parties. It's very clear

13 what their environmental interest is, and we
14 think it meets the minimal threshold for
15 purposes of participation in this hearing.
16 But that -- that's where my confusion is
17 coming from.

18 Sierra Club was a separate party, and
19 I understand in terms of Marc's representation
20 of CPC and Sierra Club, but I -- it just
21 wasn't clear to me.

22 ALJ WISSLER: Mr. Gerstman, maybe you
23 can clear some of this up.

24 MR. GERSTMAN: Thank you, your Honor.

25 First, we would offer to you that many
(OPENING REMARKS - ISSUES CONFERENCE)

□

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1 of our members of the Coalition are here
2 today, representatives, and we would offer to
3 you an opportunity for them -- for you to hear
4 from them to supplement the record concerning
5 their environmental interests. Even though
6 there may be consent by -- by the Applicant to
7 the environmental interest of some of the
8 representative organizations, you have an
9 independent responsibility, your Honor, and so
10 does the Commissioner, to determine whether or
11 not the standard under 624.5 has been met.
12 And so that -- we would, in fact, request an
13 opportunity for each of the members of the
14 Coalition to enhance their statements of
15 environmental interest.

16 with respect to the specific questions
17 that have been raised, first of all, we have

18 formed a Coalition in the interest of judicial
19 economy, essentially, your Honor. I do
20 represent each of the groups. There's an
21 understanding it's an informal coalition, but
22 there's an understanding that I will be
23 representing them with the assistance of
24 counsel from some of the groups, Mr. Goldstein
25 from NRDC and Mr. Yaggi from Riverkeeper, and
(OPENING REMARKS - ISSUES CONFERENCE)

1 other member representatives as -- as the need
2 arises. Vol.1- 34

3 Obviously this is a complex and very
4 voluminous environmental review process. For
5 citizens to participate, they are required to
6 marshal resources in order to be able to have
7 an effective and meaningful input into the
8 ultimate decision that the Commissioner has to
9 make on this process. And what we have done
10 here is to find a way for citizens and the
11 public to participate in this process; local,
12 state, regional and national interest groups
13 who are all concerned about the ultimate
14 development that might take place here. We
15 found a way for them to participate in this
16 process in what we believe is an effective
17 way, which will hopefully, your Honor, provide
18 a much more efficient process for yourself and
19 the other parties to the process.

20 With respect to ZESI and NYPIRG,
21 NYPIRG is a signatory to the New York City
22 Watershed Memorandum of Agreement. We believe
23 that, as you will hear from NYPIRG's

24 representative, they have a -- a very strong
25 interest in maintaining the quality of water
(OPENING REMARKS - ISSUES CONFERENCE)

1 that their members will be drinking, and also ^{Vol.1- 35}
2 their members use this area. They actively
3 participate in the coalition and in the
4 negotiations and following up on
5 implementation of the watershed agreement.

6 ZESI is a local -- a local group, a
7 local landowner. Zen Environmental Studies --
8 I'm sorry because I've butchered the acronyms.
9 ZESI's group is a local not-for-profit
10 environmental organization which is fairly
11 close to the proposed development. They've
12 identified issues concerning ecology,
13 wetlands, pesticides. They're also concerned
14 about community character. We would like to
15 take the opportunity to supplement that
16 statement here today in order to provide your
17 Honor with more information concerning whether
18 ZESI meets up to those standards.

19 With respect to witnesses, again, your
20 Honor, I represent a coalition of
21 environmental groups. We have been able to
22 pool our resources so that we can effectively
23 represent the interests of those groups.
24 Witnesses are being provided on behalf of the
25 Coalition, not necessarily on behalf of any
(OPENING REMARKS - ISSUES CONFERENCE)

1 one group. We're not going to get into who's ^{Vol.1- 36}
2 providing what witness, I would imagine, as

3 long as the witnesses both qualify as experts
4 and provide and offer proof necessary for you
5 to find that there are substantive and
6 significant issues for adjudication.

7 So with that, your Honor, I would ask
8 your -- your permission to allow members of
9 the Coalition to make those statements that
10 would enhance the record in order to establish
11 very clearly that we meet the criteria of
12 624.5.

13 ALJ WISSLER: We're going to let you
14 do that, but on the issue of -- the legal
15 issue as to the entity that CPC is, I gather
16 from Mr. Ruzow's position -- correct me if I'm
17 wrong -- that what he finds problematic is
18 that CPC isn't some not-for-profit
19 corporation, some entity of its own. Is
20 that -- am I getting that right?

21 MR. RUZOW: Yeah, it's -- it's the
22 fact that all of those organizations -- it's a
23 question, your Honor. I'm trying to
24 understand how that organization participates
25 as a party in the proceeding.

(OPENING REMARKS - ISSUES CONFERENCE)

1 ALJ WISSLER: Are you saying that it Vol.1- 37
2 must have some legal status of its own in
3 order to participate?

4 MR. RUZOW: I'm raising the question,
5 yes, your Honor. I mean, it -- the fact that
6 it is representative -- Mr. Gerstman is the
7 representative of one organization, and I just
8 don't understand -- it says a party. It

9 doesn't have a legal standing that I'm -- that
10 I can understand what it is. I mean, if it's
11 an unincorporated association, then I can
12 understand what it is, but that -- it doesn't
13 sound like that's what it is either.

14 ALJ WISSLER: So you're saying that it
15 would not, within the -- where 624 defines a
16 party as a person, you're saying that CPC's
17 not arguably a person?

18 MR. RUZOW: If Marc -- if Marc says
19 that they're an unincorporated association,
20 then fine, then I can understand that, because
21 there aren't many other bells and whistles
22 that attach to unincorporated associations,
23 but it's not clear to me. To say a group gets
24 together and we're going to be a party and
25 proceed, it seems to me, lacks some sort of
(OPENING REMARKS - ISSUES CONFERENCE)

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1 structure.

2 ALJ WISSLER: Before I let you respond
3 to that, Mr. Gerstman, if, however, all the
4 folks within the Coalition have -- the record
5 indicates that they --

6 MR. RUZOW: No, it doesn't.

7 ALJ WISSLER: -- do individually have
8 the requisite environmental --

9 MR. RUZOW: Standing --

10 ALJ WISSLER: -- standing -- then they
11 wouldn't have --

12 MR. RUZOW: Then we wouldn't have an
13 objection.

14 ALJ WISSLER: Then we don't -- then
15 we've got this. We don't even have to reach
16 that legal argument --

17 MR. RUZOW: Right.

18 ALJ WISSLER: -- is that what you're
19 saying?

20 MR. RUZOW: That's what I'm saying.

21 MR. GERSTMAN: Well, we're an
22 association. We've come together in the
23 interests, again, of judicial economy in order
24 to make the lives of the participants to this
25 hearing much easier. If the alternative is
(OPENING REMARKS - ISSUES CONFERENCE)

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1 that Mr. Ruzow would like to serve papers and
2 documents on 11 different parties that would
3 otherwise be represented by the Coalition, we
4 should talk about the logistics of achieving
5 that. There is precedent for -- for
6 coalitions appearing in DEC administrative
7 hearings. St. Lawrence Cement hearing with
8 Hudson Valley Preservation Coalition, which is
9 a similar coalition made up of a group of
10 local environmental organizations, local
11 interest groups, citizens, community groups
12 that have, again, for the same reasons, come
13 together to represent the interests of local,
14 state and regional and national environmental
15 community interests for the purposes of
16 providing judicial economy.

17 There -- I don't believe there's a
18 requirement here that the Coalition have any
19 legal status, per se, if all the member groups

20 have legal status as potential parties. Each
21 of our groups meets the criteria of 624.5. If
22 we would like to say that I represent 11
23 groups every time I get up, I can -- we can
24 say I appear for Riverkeeper, NRDC, Catskill
25 Center, Trout Unlimited, Theodore Gordon Fly
(OPENING REMARKS - ISSUES CONFERENCE)

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1 Fisher, Friends of Catskill Park, Pine Hill
2 Water Coalition -- I can go on -- the Sierra
3 Club, NYPIRG, Zen Environmental Studies
4 Institute, I'd be glad to do that, your Honor,
5 but I'm not sure there's a difference in terms
6 of practical effect. And there certainly is a
7 very big difference in terms of logistics. So
8 I would request that the objection of the
9 Applicant be dismissed, that we move on with
10 statements of interest of the members of
11 representative groups of the Coalition.

12 ALJ WISSLER: Was this Coalition
13 argument raised in St. Lawrence Cement?

14 MR. GERSTMAN: I don't believe there
15 was an objection to it, your Honor.

16 MR. RUZOW: Well, your Honor, then --
17 I guess, then why is Sierra Club separate? I
18 didn't --

19 MR. GERSTMAN: Sierra Club has its own
20 internal reasons for being separate.

21 ALJ WISSLER: But you represent them?

22 MR. GERSTMAN: Yes. Those are
23 national policy reasons that the Sierra Club
24 has advanced.

25

ALJ WISSLER: What I'd like you to do
(OPENING REMARKS - ISSUES CONFERENCE)

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1

now, Mr. Gerstman, is to make your record with

2

respect to the parties that Mr. Ruzow was

3

concerned about as to their requisite

4

environmental standing with respect to this

5

proceeding.

6

MR. GERSTMAN: With your permission,

7

your Honor, we'd also like to briefly

8

represent and supplement our statement of

9

interests with respect to the other member

10

groups of the Coalition.

11

ALJ WISSLER: Floor is yours.

12

MR. GERSTMAN: Start with NYPIRG, New

13

York Public Interest Research Group, Kathleen

14

Green is here.

15

ALJ WISSLER: Yeah, we need to -- the

16

court reporter is having a little trouble

17

hearing, so we -- maybe we can go through

18

them.

19

MR. GERSTMAN: I'll do it.

20

THE COURT REPORTER: I don't know who

21

you represent.

22

UNKNOWN SPEAKER: I don't know who you

23

represent either.

24

MR. GERSTMAN: Kathleen Green from the

25

New York Public Interest Research Group.

(OPENING REMARKS - ISSUES CONFERENCE)

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1

MS. GREEN: Thank you. I'm the

2

watershed protection coordinator for NYPIRG,

3

acronym for New York Public Interest Research

4

Group.

5 As Mr. Gerstman pointed out, NYPIRG is
6 one of the signatories to the 1997 Watershed
7 Memorandum Agreement. We were negotiators and
8 ultimately signatories to that agreement. We
9 have long been active in watershed protection
10 efforts throughout the watershed, including
11 the Catskill area. We have close involvement
12 with many of the communities in the Catskills,
13 and again, throughout the watershed.

14 As a representative of the nine
15 million drinking water consumers, NYPIRG feels
16 they have a strong standing in this case here
17 and we feel that not only as the signatory,
18 but also as an active participating member of
19 the Watershed Protection Partnership Council,
20 which was the body that convened within the
21 watershed agreement to negotiate issues within
22 the watershed area, that we have the complete
23 right to be here.

24 MR. GERSTMAN: On behalf of the Zen
25 Environmental Studies Institute, I've asked
□ (OPENING REMARKS - ISSUES CONFERENCE)

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1 Bethany Saltman to speak.

2 MS. SALTMAN: Bethany, B-E-T-H-A-N-Y,
3 Saltman, S-A-L-T-M-A-N. I have a written
4 statement. Zen Environmental Studies
5 Institute is a 501.3(C) not-for-profit
6 environmental organization with training
7 facilities on Raquette Lake in the Adirondacks
8 and the Esopus River in Mt. Tremper. Our Mt.
9 Tremper facility is a 35-acre site that

10 contains approximately 15 acres of
11 ecologically fragile wetlands. Much of our
12 training sessions take place in these
13 wetlands, and we feel their economic character
14 is in danger with the advent of the resort
15 creation of the Belleayre Resort at Crossroads
16 Ventures.

17 We are concerned with large areas of
18 nonporous surfaces creating substantially more
19 runoff than we currently experience when the
20 Esopus River is in flood stage. They will
21 almost certainly overrun our wetlands in ways
22 much greater than we've experienced over the
23 past 23 years.

24 We are also concerned that golf course
25 pesticides and fertilizers, chlorinated
(OPENING REMARKS - ISSUES CONFERENCE)

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1 hydrocarbons and phosphorous-containing
2 chemicals may find their way into the Esopus
3 in spite of the detention pond infiltration
4 test station -- station proposed by the
5 developer.

6 As far as we've been able to
7 ascertain, much of what is being proposed is
8 based on speculation rather than
9 experimentally verifiable data.

10 MR. GERSTMAN: Your Honor, if I might
11 supplement the statement as well for the ZESI
12 group. Many of their members use and take
13 advantage of the forest preserve, the natural
14 resources in and around the site in question
15 for the development. They are active

16 participants in community activities with
17 respect to natural resource protection and
18 they are members of the -- of the Catskill
19 community who have all the responsibilities
20 and obligations of citizens of this community
21 to help steer its future.

22 With that, your Honor, I'd like to
23 move to the Catskill Center for Conservation &
24 Development, Mr. Tom Alworth.

25 MR. ALWORTH: Thanks. Tom Alworth,
(OPENING REMARKS - ISSUES CONFERENCE)

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1 A-L-W-O-R-T-H.

2 Thank you, your Honor. I represent
3 the Catskill Center for Conservation &
4 Development. And rather than read what we
5 submitted, I'll just summarize that. We are a
6 501(C)(3) organization founded in 1969. We
7 have been committed to this region both in
8 terms of community and economic development,
9 as well as conservation and resource
10 protection. We are also a signatory to the
11 MOA and feel that we bring an objective and
12 important voice to this process, and in fact
13 are -- are delighted to be here. I don't
14 -- I'll stand on what I've handed in.

15 MR. GERSTMAN: Next member of the
16 Coalition to supplement the statement of
17 issues is Rich Schaedle from the Pine Hill
18 Water Coalition.

19 MR. SCHAEDLE: Rich Schaedle,
20 S-C-H-A-E-D-L-E. The PHWDC had its roots in

21 an ad hoc committee formed by then supervisor,
22 Neil Grant, in 1997. The purpose was to
23 negotiate terms for the purchase of the water
24 company by the town from then owner,
25 Ben Odierno. A draft contract was written by
(OPENING REMARKS - ISSUES CONFERENCE)

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1 which the town would purchase all assets of
2 the water company, contingent upon the town
3 securing grant money. Because of a delay in
4 securing these funds, the seller lost patience
5 and was being prodded to sell by the Ulster
6 County Department of Health.

7 Early in 2000, as it became apparent
8 that the buyer was going to be Dean Gitter and
9 that he was going to use the water sources
10 that had historically been used to supply
11 water for Pine Hill for his project, the PHWDC
12 was officially formed. It is a 501(c)(4)
13 corp. dedicated to the preservation of Pine
14 Hill's water source and the reconstruction of
15 its infrastructure.

16 The reason we seek party status as
17 part of the Catskill Preservation Coalition is
18 that the Big Indian Resort is proposing to get
19 its water supply from sources within the
20 hamlet of Pine Hill. It is our opinion that
21 the taking of this water jeopardizes the
22 existing supply of Pine Hill and limits future
23 growth for Pine Hill.

24 MR. GERSTMAN: Next, Mr. Adam Nagy
25 from the Catskills Heritage Alliance to make a
(OPENING REMARKS - ISSUES CONFERENCE)

1 statement.

2 MR. NAGY: Good morning, your Honor.
3 Adam Nagy, Chairman of the Catskill Heritage
4 Alliance. Good morning.

5 The Alliance is a grassroots
6 organization formed for the purpose of
7 preserving the harmony between the villages of
8 the central Catskills and the surrounding
9 wilderness through community revitalization,
10 open space conservation and environmental
11 protection. The Alliance has hundreds of
12 members and supporters, most owning property
13 or residing in Shandaken, New York, and others
14 frequenting the Catskill Mountain region for
15 recreational or business purposes.

16 The Alliance has analyzed and
17 critiqued multiple aspects of Crossroads
18 Ventures' proposal, and we believe the
19 economic interests of the communities
20 involved, particularly Shandaken, are not
21 served by the proposed resort, and that the
22 fiscal impacts and changes in community
23 character engendered by the resort would harm
24 the communities involved by draining resources
25 needed for more sustainable forms of tourism
(OPENING REMARKS - ISSUES CONFERENCE)

1 and hamlet revitalization. We also believe
2 that the DEIS does not adequately describe and
3 quantify potential environmental adverse
4 impacts, including impacts to protected open
5 space, and that the DEIS does not adequately

6 identify and describe potential alternatives.

7 The Alliance joins with the Pine Hill
8 Water District Coalition and other members of
9 the Catskill Preservation Coalition in
10 objecting to use by the project of water
11 assets located within Pine Hill and
12 historically utilized by the hamlet and to any
13 other water uses that harm current water users
14 or limit the natural and anticipated growth of
15 the hamlet.

16 According to Alf Evers, in his
17 definitive book on the area, The Catskills,
18 each summer 10,000 boarders came to Pine Hill,
19 which was labeled the "Saratoga of the
20 Catskills." Annual guidebooks published by
21 the Ulster & Delaware Railroad indicate that,
22 in it's heyday, Pine Hill provided
23 accommodations for over 1800 people in its
24 numerous hotels and guest houses alone. Based
25 on an analysis of this historical development
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 pattern and current water usage statistics, Vol.1- 49
2 it's very clear that it would be impossible
3 for Pine Hill to return to the prosperity and
4 prominence of its past if the hamlet's access
5 to one-third of the available water supply
6 were denied.

7 The watershed Memorandum of Agreement
8 recognized the need to provide reasonable
9 opportunities for growth in and around
10 existing population centers, and that the
11 local communities have an interest in policies

12 that affect local land use. Contrary to this
13 notion, the special interest of a single
14 developer could impose limits on Pine Hill's
15 revitalization and growth.

16 Thank you.

17 MR. GERSTMAN: For the Sierra Club,
18 Jim Mays.

19 MR. MAYS: Good morning, your Honor.
20 Jim Mays representing the Sierra Club, a
21 501(c)(4) organization incorporated in
22 California, but with 40,000 members in New
23 York State.

24 We have a very long history of support
25 and concern for the forest preserve system of
(OPENING REMARKS - ISSUES CONFERENCE)

1 New York State, both the Catskills and the
2 Adirondacks, and a -- and an ongoing concern
3 for the water quality and the stream quality
4 as we have 15 to 20,000 members in New York
5 City who are water consumers.

6 Our concerns are principally with
7 the -- during construction, the runoff that
8 will occur, the turbidity in an already
9 threatened stream system and reservoir system.
10 After the -- after this -- if this project
11 were approved and constructed, the toxic
12 runoff of pesticides, as well as the nutrient
13 overload from the other materials that are put
14 on the greens typically and notoriously are
15 very dangerous with -- with golf courses. So
16 we feel that the statements do not adequately

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17 address these concerns so that -- we are also
18 concerned with the nonpoint runoff from the
19 parking lots, the other chemicals that will --
20 that come into the aquatic ecosystem from
21 those sources.

22 We do have a concern for the trout
23 fisheries, more because we would like to see
24 the trout as a healthy stream, as an indicator
25 of the general quality of it. We're not a
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 fishing organization per se. And for the same Vol.1- 51
2 reason, we are interested in the -- the safety
3 of the forest preserve in general, not because
4 we are a hunting organization, although we are
5 neutral in that position, but because of the
6 added people load to the area would be a
7 threat to the ecosystem of the forest
8 preserve.

9 Thank you very much.

10 ALJ WISSLER: Thank you.

11 MR. GERSTMAN: For Riverkeeper,
12 Marc Yaggi.

13 MR. YAGGI: Good morning. My name's
14 Marc Yaggi. It's M-A-R-C, Y-A-G-G-I, senior
15 attorney for Riverkeeper. Riverkeeper is a
16 not-for-profit -- nonprofit environmental
17 organization organized under the laws of New
18 York State. Riverkeeper is dedicated to
19 protecting the Hudson River, its tributaries
20 and the New York City drinking water supply
21 watershed. The proposed project here is
22 located in the Catskill and Delaware

23 watersheds. Together these watersheds provide
24 up to 90 percent of the unfiltered drinking
25 water supply for nearly nine million New
(OPENING REMARKS - ISSUES CONFERENCE)

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1 Yorkers.

2 Riverkeeper was a negotiator of and
3 signatory to the 1997 New York City Watershed
4 Memorandum of Agreement, and we've worked to
5 protect the New York City Watershed for more
6 than 15 years. As part of our
7 responsibilities as signatories to the
8 watershed agreement, Riverkeeper serves as a
9 watchdog over the implementation and
10 enforcement of the watershed agreement, and we
11 further participate in the public review of
12 projects that may adversely impact the New
13 York City Watershed.

14 Riverkeeper supports environmentally
15 sensitive economic growth; however, industrial
16 and inappropriate or inadequately studied
17 development projects are the greatest threats
18 to water quality and quality of life in the
19 New York City Watershed. As a result, we are
20 currently involved in the SEQRA review of
21 dozens of development projects in the
22 watershed.

23 we're also engaged actively in four
24 development Article 78 actions in the New York
25 City Watershed. And further, we have brought
(OPENING REMARKS - ISSUES CONFERENCE)

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1 enforcement actions under the Clean Water Act

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in the New York City Watershed.
In addition, Riverkeeper staff hold positions on the executive committee of the Watershed Protection Partnership Council, the East of Hudson Watershed Supporting Advisory Committee, the Watershed Agricultural Council Advisory Committee and the Catskill Watershed Corporation, Alternative Septic Systems Technology Workgroup. Riverkeeper has approximately 5,000 members, many of whom live in the Catskill Mountains and in New York City and drink water supplies from the Catskill and Delaware Watershed.

We've set forth in our petition for party status a number of issues that we believe are substantive and significant, and the adverse impacts from the proposed projects could jeopardize the quality of drinking water produced from the Catskill/Delaware Watershed.

The proposed project also could affect Riverkeeper members that live in or near, fish in or otherwise use the Catskill and Delaware Watersheds. For these reasons, we believe we should be granted party status in review of
(OPENING REMARKS - ISSUES CONFERENCE)

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the proposed project.

Thank you.

MR. GERSTMAN: For Natural Resources Defense Council, Eric Goldstein.

MR. GOLDSTEIN: Good morning, your Honor. My name's Eric Goldstein, I'm an attorney with the Natural Resources Defense

8 Council, NRDC, a nonprofit legal scientific
9 organization with a nationwide membership of
10 over 500,000 individuals. We have 53,000
11 members in New York State. Of those, more
12 than 30,000 are based in New York City and
13 Westchester County, which consume New York
14 City water. We have several thousand members
15 right here in the Catskills who enjoy the
16 beauty and amenities of the Catskill region.
17 We've been long active on New York City
18 watershed-related issues for approximately 15
19 years, and believe the best way of
20 safeguarding the nation's largest municipal
21 water supply is through a partnership of --
22 through upstate communities and downstate
23 residents, based upon pollution prevention and
24 watershed protection.

25 The primary interests of our members
(OPENING REMARKS - ISSUES CONFERENCE)

1 in the proceeding that is commencing today Vol.1- 55
2 involves the project's potential impacts on
3 water quality; water quality for local
4 communities such as Pine Hill, water quality
5 for certain streams in the project's vicinity,
6 and of course the quality of water in the two
7 largest reservoirs in the New York City water
8 supply system.

9 Our members also have interests on
10 such issues as the review of reasonable
11 alternatives in the Environmental Impact
12 Statement, and on the question of secondary

13 growth in the project's potential impacts to
14 affect border areas beyond simply the
15 immediate project.

16 Finally, we have interests in the
17 watershed ecology as a whole and the impact
18 that this project may have on the delicate
19 ecology of the nonfiltered drinking water
20 supply; and our final interest is that of
21 seeing a full, fair and equitable enforcement
22 of SEQRA and state environmental laws.

23 Thank you.

24 MR. GERSTMAN: On behalf of Trout
25 Unlimited, Chester Karwatowski.
(OPENING REMARKS - ISSUES CONFERENCE)

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1 MR. KARWATOWSKI: Chester Karwatowski,
2 K-A-R-W-A-T-O-W-S-K-I. I represent Trout
3 Unlimited. Trout Unlimited is a national
4 organization, over 130,000 members. There are
5 10,000 members in New York State.

6 Trout Unlimited was founded in the
7 Catskills over 40 years ago in New York State.
8 We have several hundred members in the Hudson
9 Valley. We have 2000 members in New York City
10 and Long Island who come to the Catskills to
11 use the resources. Trout Unlimited's mission
12 is to preserve, protect and restore cold water
13 fisheries. We're -- we're gravely concerned
14 about this Draft Environmental Impact
15 Statement and the effect on the Delaware, the
16 Esopus Rivers and their watersheds. We have a
17 long history of being active in the community,
18 a very strong educational component working

19 with both libraries, local schools, working
20 with local community groups as well on
21 environmental issues and activities. And our
22 concerns with this project have been
23 documented.

24 MR. GERSTMAN: On behalf of
25 Theodore Gordon Fly Fisher, John Barone.
(OPENING REMARKS - ISSUES CONFERENCE)

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1 MR. BARONE: John Barone, B-A-R-O-N-E.
2 I'm representing TGF, Theodore Gordon
3 Fly Fishermen. We're a nonprofit
4 organization. I'm also an attorney here
5 representing them today.

6 TGF was created as a club for anglers
7 by anglers with the main purpose of
8 conservation, and it still is today. Four
9 main reasons exist as to why TGF should be
10 granted standing in this matter. One, and
11 most importantly, is fly fishing. The second,
12 many of our members use the Belleayre region
13 for professional photography, for hunting, for
14 hiking. Third, 20 percent of our group, out
15 of a hundred members, reside in the Catskill
16 region, a portion of which reside in Pine
17 Hill, Fleischmanns, surrounding towns -- for
18 obvious reasons this will be affecting them.
19 And fourth, it's known for its extent and
20 population of trout. Our namesake, Theodore
21 Gordon, frequently visits this area, and that
22 tradition continues today, your Honor. The
23 Belleayre Resort had and will have negative

24 effects to this river which will impact the
25 trout, which will impact fly fishing, and
(OPENING REMARKS - ISSUES CONFERENCE)

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1 which will impact our members directly.

2 Besides the sport of fly fishing, we
3 also have members who rely on fly fishing as a
4 business. These members run guides up and
5 down the Esopus Creek. They teach fly fishing
6 in the area, they sell fly fishing gear,
7 actually create fly fishing flies that are
8 used as bait. Obviously, the effects to the
9 trout and the fly fishing and the sport of fly
10 fishing will affect their income, their
11 livelihood.

12 Furthermore, just to show the
13 importance of fly fishing to this region, the
14 Theodore Gordon Fly Fishermen were granted
15 standing in a lawsuit with regard to the
16 Esopus against the DEP. They were granted
17 standing because of their membership and
18 because of their use of this area. And
19 then -- then the parties with them ended up
20 winning the suit against the DEP and showing
21 how important this area is to fly fishermen
22 and TGF.

23 Thank you.

24 MR. GERSTMAN: Thank you, John.

25 Finally, the Friends of Catskill Park,
(OPENING REMARKS - ISSUES CONFERENCE)

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1 Judith Wyman.

2 MS. WYMAN: Good morning. My name is
3 Judith Wyman, W-Y-M-A-N, Friends of Catskill

4 Park.

5 Friends of Catskill Park was organized
6 in April of 2001 and is a -- Friends of
7 Catskill Park was organized in April of 2001
8 and is grassroots organization based in
9 Shandaken, New York which lies within New
10 York's Catskill Park and the New York City
11 watershed. Friends of Catskill Park's mission
12 is to assist in the preservation and
13 enhancement of Catskill Park, the communities
14 within the park and to help safeguard the park
15 as a wild and natural heritage for all New
16 Yorkers to experience and enjoy for
17 generations to come.

18 Friends of Catskill Park was
19 established in response to the proposed
20 Belleayre Resort at Catskill Park, which is
21 the largest single development ever proposed
22 for the Central Catskills. FCP, Friends of
23 Catskill Park, is a project committed to the
24 open space which serves as an incubator for
25 such projects conferring with 501(c)(3) status
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 and supplying administrative support. Vol.1- 60

2 Friends of Catskill Park supporters
3 include residents of the Central Catskills,
4 the area that would be most directly impacted
5 by the Belleayre Resort, residents from
6 throughout New York State who frequent the
7 park and forest preserve, and residents from
8 New York City who want the New York City

9 watershed protected from degradation.

10 The Catskill Park is the largest
11 accumulation of the forever wildland in New
12 York State, second only to the magnitude of
13 Adirondack Park. It is essentially unique
14 because it is a prized wilderness within just
15 two hours of one of the largest cities in the
16 world, and it contains a substantial part of
17 the New York City watershed.

18 Friends of Catskill Park's mission is
19 to protect the fragile balance that currently
20 exists among the Catskill Park, the New York
21 State Forest Preserve within the park, the New
22 York City watershed and the communities within
23 the park, all which coexist harmoniously and
24 serve a wide range of needs throughout the
25 state. Our focus, our primary focus is to
(OPENING REMARKS - ISSUES CONFERENCE)

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1 keep that balance happening among those three
2 entities, the park, the watershed and the
3 local communities, because what's happening
4 now is working and is growing organically, and
5 we want to support that process.

6 Thank you.

7 MR. GERSTMAN: Thank you, your Honor.
8 We believe that each of our member
9 organizations has demonstrated that they meet
10 the criteria under 624.5. We believe that our
11 petition has offered substantive and
12 significant issues supported by expert
13 testimony, our offers of proof. We believe
14 that we have qualified for party -- full party

15 status.

16 It seems that the only issue is the
17 status of the Coalition itself, and we believe
18 that your Honor can recognize the Coalition
19 within your administrative authority to allow
20 this process to move forward in an efficient
21 and less time-consuming and burdensome manner.

22 Thank you.

23 ALJ WISSLER: One question I -- when
24 we speak about the Coalition, when we speak
25 about CPC, in this proceeding we're speaking
(OPENING REMARKS - ISSUES CONFERENCE)

1 about CPC and the Sierra Club all at once;
2 right? vol.1- 62

3 MR. GERSTMAN: Right.

4 ALJ WISSLER: They're part of; CPC,
5 right? So when we use that term, I'm just
6 going to use that and it covers everybody. I
7 mean, there's not -- it's not like Sierra Club
8 has a separate all-by-itself petition here?

9 MR. GERSTMAN: No.

10 ALJ WISSLER: Okay.

11 MR. RUZOW: Your Honor, I -- if I
12 could just --

13 ALJ WISSLER: Yeah, let me just --
14 well, I want to get staff's input on this.

15 MS. KREBS: Department Staff has no
16 objection to the party status of either the
17 City of New York, nor the CPC.

18 MR. RUZOW: Your Honor, with the
19 assumption that CPC is an unincorporated

20 association, we have no problem with their
21 participation in the proceeding because that's
22 what, as you read the regulations, the
23 definition of party, relying on the definition
24 of person, would have you believe. So again,
25 we have no objection. It's just that we need
(OPENING REMARKS - ISSUES CONFERENCE)

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1 to understand what it is.

2 ALJ WISSLER: Well, I think we have a
3 pretty good record as to the component
4 parties.

5 MR. RUZOW: Right. And you know, with
6 respect to, again, the Zen showing, there is
7 no showing that those wetlands 15 miles away
8 are at any risk. So if that is their
9 environmental interest, at some point in the
10 proceeding it seems to me that as part of the
11 Issues Conference, they have to offer at least
12 some indication that that interest is being
13 affected.

14 And, you know, with respect to the
15 Pine Hill Water Coalition, they are -- the
16 issue of their water supply -- we don't accept
17 the facts as they've alleged them regarding
18 the impacts on the water supply. We didn't
19 contest their environmental interest because
20 they believe otherwise, and there is --
21 they're close enough that no one could
22 reasonably argue that they may not have an
23 interest in this proceeding, given the low
24 standards.

25 So with that, that's all I have to

1 say.

2 ALJ WISSLER: So we're saying the
3 bottom line is, as far as environmental
4 interest is concerned, the Applicant is
5 satisfied that CPC, they --

6 MR. RUZOW: Yeah, as a -- as an
7 unincorporated association, we have no problem
8 recognizing CPC's environmental interest.

9 MR. GERSTMAN: Let me clarify. We are
10 not incorporated and we are an association of
11 groups. Whether they're an unincorporated
12 association is a different -- I'll stand that
13 we are a coalition of environmental groups.
14 But let me supplement, just to emphasize the
15 environmental interest of the Zen
16 Environmental Studies Institute, their members
17 do reside in this area. Their members do
18 utilize the natural resources in the area,
19 hiking, fishing, participating in events.
20 While the statement in the petition was
21 limited to freshwater wetland ecology and the
22 impacts to the Esopus and pesticide runoff,
23 their interests go beyond that, and we've
24 supplemented that record here today.

25 Thank you, gentlemen.
(OPENING REMARKS - ISSUES CONFERENCE)

1 ALJ WISSLER: Thank you.

2 MS. MELTZER: Your Honor, I want to
3 make sure that the City will have an
4 opportunity now or at some point soon to put

5 in a statement of our environmental interests.

6 ALJ WISSLER: Yes, I can let you do
7 that. I mean, I haven't heard any -- nobody
8 is objecting to it at this point.

9 MS. MELTZER: I understand that, but
10 as we discussed on the previous conference
11 calls, we would like to make a statement on
12 the record.

13 ALJ WISSLER: Okay. If beyond what
14 you've already submitted in your papers you
15 want to add more to that, feel free to do so,
16 ma'am.

17 MS. MELTZER: Let me -- to discuss the
18 City's environmental interests, Dr. Michael
19 Principe, who is the Deputy Commissioner of
20 the New York City Department of Environmental
21 Protection, the City's water supply, will
22 present some testimony regarding the City's
23 water supply, the City's environmental
24 concerns relating to the SPEDES permits for
25 this proposed development, as well as our
(OPENING REMARKS - ISSUES CONFERENCE)

1 environmental concerns as an involved agency Vol.1- 66
2 pursuant to SEQRA.

3 DR. PRINCIPE: Thank you. Good
4 morning, your Honor. As counsel indicated,
5 I'd like to just run through a description of
6 the City's water supply, the nature of the
7 City's watershed protection program, and
8 generally describe some of the water quality
9 concerns relevant to this proposed project;
10 particularly as it relates to stormwater

11 controls and the potential impacts on the
12 water supply and our interests in the SPEDES
13 permit, and lastly, just the City's
14 environmental interest as an involved agency
15 under SEQRA.

16 I call your attention to an exhibit
17 counsel just displayed, just an overview of --
18 of the City's water supply. It supplies
19 approximately half the residents of New York
20 State, consists of 19 reservoirs and three
21 controlled lakes, a system capacity of 550
22 billion gallons, serves nine million people
23 and delivers approximately 1.3 billion gallons
24 of water per day, collects water from 2,000
25 square miles of watershed area and is operated
(OPENING REMARKS - ISSUES CONFERENCE)

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1 and maintained by the New York City Department
2 of Environmental Protection.

3 It consists of three systems, the
4 Croton system east of the Hudson River, which
5 supplies ten percent of the City's water
6 supply, which is currently unfiltered, but the
7 City's under consent to create -- to construct
8 a filtration plant by 2010/2011 for that --
9 for that system. The other two systems are
10 the Catskills' supply, consisting of Ashokan
11 Reservoir, Schoharie Reservoir; and the
12 Delaware supply, the four reservoirs, Rondout,
13 Neversink, Pepacton and Cannonsville.

14 That Catskill-Delaware supply supplies
15 approximately 90 percent of the City's average

16 daily needs located, as you can see, west of
17 the Hudson River. The last -- the last
18 reservoir to be constructed was Cannonsville
19 in 1997. Rural mountains -- mountainous
20 watershed that's currently unfiltered, and
21 continues to have filtration avoidance
22 determination for the Catskill/Delaware
23 supply.

24 The water that's generated from the
25 Catskill/Delaware system is very high quality
(OPENING REMARKS - ISSUES CONFERENCE)

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1 water as a result of the -- the natural
2 landscape, which is 75 percent forested, and
3 the geology, which is a porous sandstone shale
4 and which serves to filter the water and yield
5 the water of low dissolved ions, as well as
6 low organic material.

7 As a result of the high quality of
8 this -- this system, the City applied for
9 filtration avoidance back in the early 1990s,
10 which filtration avoidance arose from the 1986
11 State Drinking Water Act Amendments which
12 contain a provision known as the Surface
13 Water Treatment Rule, which required all water
14 supplies in the United States to filter unless
15 they can demonstrate high quality, primarily
16 low concentrations of fecal, coliform,
17 bacteria and low turbidity, both of which the
18 Catskill system, the Delaware system exhibit,
19 as well as water suppliers had to demonstrate
20 they had control over their watershed, either
21 through land -- owning the land in their

22 watershed or having agreements with landowners
23 in the watershed.

24 In the early 1990s, the City was
25 granted filtration avoidance from EPA, twice
(OPENING REMARKS - ISSUES CONFERENCE)

1 in 1993, early in January 1993, and then later ^{Vol.1- 69}
2 in December. Later on in the `90s, it became
3 clear in order to demonstrate this cooperative
4 agreement with landowners, there was much
5 negotiations and agreements that had to be
6 enacted with the municipalities within the
7 watershed, and as a result of this, the 1997
8 Memorandum of Agreement was put in place,
9 which essentially allowed the City to proceed
10 with enacting its new watershed rules and
11 regulations, which were -- hadn't been changed
12 since the 1950s -- allowed the City to proceed
13 with an aggressive land acquisition program
14 and also established cooperative programs with
15 the localities within the watershed.

16 These consisted of the formation of
17 the Catskill Watershed Corporation, which set
18 up the Catskill Fund for the Future, which is
19 a program which allowed economic development
20 to occur that was environmentally responsible,
21 and funding for loans existing within that.

22 There was also the watershed
23 Agricultural Program, which is a partnership
24 program formed, and new infrastructure work in
25 terms of upgrading wastewater treatment
(OPENING REMARKS - ISSUES CONFERENCE)

1 plants, sewer extensions, and an aggressive
2 monitoring assessment program to evaluate how
3 effective all of these different programs
4 would be.

5 Since the '97 agreement, in November
6 of 2002, the filtration avoidance
7 determination was again extended for the next
8 ten years, and it would be reviewed in the
9 five-year period.

10 Some of the issues in the watershed
11 agreement, essentially balanced, responsible
12 and environmentally sensitive economic
13 development with watershed protection -- as I
14 mentioned, it set up a number of programs,
15 cooperative programs with the watershed
16 communities, which the City is fully committed
17 to a partnership, and we believe, as
18 demonstrated in the extension of the FAD 2002,
19 that these programs have been successful. And
20 the MOA also provided for the 1997 watershed
21 regulations to be recognized and administered
22 by DEP.

23 MS. MELTZER: Let me interrupt, Mike,
24 just for a moment.

25 I've been putting up maps to assist in
(OPENING REMARKS - ISSUES CONFERENCE)

1 Mike's presentation. We'd actually like to
2 mark these as exhibits, and we can give copies
3 to everybody. Should we do that after?

4 ALJ WISSLER: Well, yes, and probably
5 just for the sake of the flow here, we can do
6 it after.

7 Do you intend to introduce these as
8 some subsequent time or do you --

9 MS. MELTZER: These watershed maps,
10 no.

11 ALJ WISSLER: All right. why don't
12 you have your witness finish and then we'll
13 mark everything at the end.

14 MS. MELTZER: And this -- this exhibit
15 is from our petition.

16 DR. PRINCIPE: Your Honor, I'd like to
17 shift to the City's environmental interests in
18 the SPEDES permit proceedings because of
19 stormwater discharges from the Crossroads
20 project, proposed Crossroads project during
21 and after construction, which we believe will
22 significantly adversely affect water quality.

23 The exhibit that has been put up is a
24 depiction and location and scope of the
25 project. Just briefly, there are two -- two
(OPENING REMARKS - ISSUES CONFERENCE)

1 sites, the eastern portion, Big Indian site. Vol.1- 72
2 The mountaintop consists of golf course and a
3 resort with timeshare units to be developed on
4 12,141 acres. Because of the location of the
5 project involves regrading of mountaintop
6 areas suitable for fairways and greens for a
7 golf course, stormwater runoff here will go to
8 the Ashokan Reservoir headwaters. Wastewater
9 will be discharged into Birch Creek. The
10 Ashokan Reservoir watershed is categorized by
11 steep slopes, sensitive soils and large

12 deposits of glacial clays. Turbidity is
13 already a significant issue in the Ashokan
14 Reservoir and the New York State Department of
15 Environmental Conservation lists the Ashokan
16 as impaired water because of excessive silts
17 and sediments. And the Ashokan Reservoir
18 provides approximately 24 percent of the
19 City's supply.

20 The second portion of the proposed
21 project is wild Acres in the Belleayre
22 Highlands, the wetland portion. This -- this
23 section also has a golf course, hotel,
24 timeshare units and residential subdivision to
25 be developed on 718 acres. This site drains
(OPENING REMARKS - ISSUES CONFERENCE)

1 into the Pepacton Reservoir, which is part of ^{Vol.1- 73}
2 the Delaware system. Proposed wastewater
3 discharge into an unnamed tributary of Emory
4 Brook and the Pepacton Reservoir. The
5 Pepacton Reservoir is the largest reservoir in
6 the City's system and provides approximately
7 25 percent of the City's water supply.

8 Overall construction plans include a
9 disturbance of over 500 acres, including
10 157 acres with slopes exceeding 35 percent,
11 moving two million cubic yards of earth and
12 rock, removal of some 86,000 mature trees and
13 189,000 saplings, and creation of 85 acres of
14 impervious surfaces. The potential impacts of
15 water quality from the erosion and
16 sedimentation that would occur from the
17 construction of this project is a particularly

18 important issue during construction, which is
19 an eight-year period, because of the nature of
20 the project site. And even after construction
21 is completed, they have -- we have concerns
22 with erosion and sedimentation as well.

23 The environmental impacts of sediment
24 is that it could act as carriers of nutrients,
25 primarily phosphorous. It can also carry
(OPENING REMARKS - ISSUES CONFERENCE)

1 pathogen, protozoan cysts, bacteria, viruses, ^{vol.1- 74}
2 as well as other pollutants that would be on
3 the site in the use of herbicides and
4 pesticides.

5 Sediment could impact the ecosystem,
6 the stream ecosystem, affecting the odor in
7 the stream, affecting the amount of light that
8 could reach deeper waters and also reduce the
9 capacity of -- of certain receiving waters.

10 Soils exposed during construction are
11 definitely vulnerable to significant erosion
12 during storm events. And turbidity is also,
13 as I mentioned, a major -- one of the key
14 filtration avoidance criteria that -- an
15 unfiltered water supply has to meet that
16 particular stringent criteria. And lastly,
17 turbidity can inhibit disinfection of the
18 water supply further on down where the water
19 is put into distribution.

20 Even after construction, development
21 impairs the relative stability of the forested
22 lands, so developed areas remain prone to

23 increased erosion and sedimentation. And the
24 agency, DEP, is familiar with a number of the
25 serious impacts of erosion upon its water
(OPENING REMARKS - ISSUES CONFERENCE)

1 supply based on the few projects that we've
2 been involved in reviewing and overseeing over
3 the past few years.

4 One particular project that was
5 developed in the early '90s was the Anglebrook
6 Golf Club. This is in the Somers -- the Town
7 of Somers in northern Westchester County.
8 This aerial photo shows erosion on the site
9 and sediment flume into the Muscoot Reservoir
10 several miles downstream after a storm event
11 that occurred during the summer, typical to
12 the ones we've been experiencing over the past
13 few days here in the Catskills as well.
14 (Indicating)

15 MS. MELTZER: This just shows a
16 broader view of that. (Indicating)

17 DR. PRINCIPE: Yes, this is a broader
18 view of Muscoot Reservoir, which is where the
19 Anglebrook actually discharges into -- you can
20 see it in the lower left corner in that
21 photograph. And it gives you some idea of the
22 scale of the clearing of this area. This area
23 was a 200-acre site, and 100 acres of that
24 200 acres were cleared, and a thunderstorm,
25 one inch within a few-hour period, generated
(OPENING REMARKS - ISSUES CONFERENCE)

1 this type of flume in the reservoir.
2 (Indicating)

8 challenges because of the steep mountainsides
9 on that site and the stormwater released from
10 the developed area which will traverse that
11 particular gradient. The Applicant has not
12 proposed adequate mechanisms for safely
13 transporting the water down the mountain.

14 Just to draw a relation between the
15 project that I had just mentioned earlier, the
16 Hanna Golf Course, which was a 2800-foot
17 access road, the proposed work on the Big
18 Indian site consists of two roads, Friendship
19 Road, which is an access road of 7800 feet on
20 a 36 percent slope, and Giggie Hollow access
21 road, which is a 4800-foot stretch on a
22 57 percent slope; in comparison to the Hanna
23 access road, which is a 2800-foot access road
24 with a 27 percent slope. So drastically
25 different from what we saw at the Hanna Golf
(OPENING REMARKS - ISSUES CONFERENCE)

□

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1 Club.

2 Throughout construction of the
3 project, the Applicant proposes to expose 25
4 or more acres of soil at a time, which, as the
5 Anglebroke project and the Hanna projects
6 demonstrate, threatens to cause a disastrous
7 impact. Five acres of disturbance of soils
8 are standard -- is the State standard
9 regulatory maximum. So these 25 acres are
10 five times what -- what the DEC standard
11 regulatory maximum is.

12 And so for all these reasons, the City
13 is deeply concerned that erosion from the

14 construction and operation of the proposed
15 projects would endanger the quality in the
16 City's watershed, especially in the Ashokan
17 Reservoir.

18 The sedimentation also leads to
19 increased phosphorous in most of the water
20 supply, and phosphorous is a -- a nutrient
21 that is a major concern to most water supplies
22 in that it leads to the generation of plant
23 growth in bodies of water, which generates
24 increased organic material. And when that
25 organic material is disinfected with the use
(OPENING REMARKS - ISSUES CONFERENCE)

1 of chlorine or other disinfecting agents, it ^{Vol.1- 79}
2 forms by-products. And for a water supply,
3 minimization of phosphorous inputs to
4 reservoirs is key.

5 The watershed regulations that the
6 City implemented in 1997 focuses very heavily
7 on controlling phosphorous. A number of the
8 watershed protection programs put in place
9 through stormwater management, best management
10 practices and upgrading wastewater treatment
11 plants, some hundred odd treatment plants in
12 the City's watershed, for removing phosphorous
13 has had measurable improvements to the water
14 supply, particularly in the Cannonsville
15 Reservoir. We've seen the reservoir move from
16 what's known as a restricted --
17 phosphorous-restricted reservoir to an
18 unrestricted reservoir within the last few

19 years due to the implementation of a number of
20 these programs.

21 By generation of sediment on the scale
22 of a project such as this without adequate
23 stormwater protection, the localization of
24 phosphorous could reverse some of the progress
25 that we've seen in certain reservoirs in the
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 City's supply, particularly in the Ashokan. vol.1- 80

2 The phosphorous total maximum daily
3 loads have been established for each of the
4 City's reservoirs, including Ashokan,
5 Pepacton, and according to the DEIS, the
6 Applicant intends to rely on the fact that
7 these reservoirs are not currently exceeding
8 that total maximum daily load to avoid
9 mitigating phosphorous in stormwater
10 discharges from the site.

11 And lastly, one other concern that we
12 have in addition to phosphorous in sediment
13 transport is the transport of pesticides into
14 the water supply. The golf courses are
15 designed to include a system of underdrains
16 that would accelerate transportation of
17 pesticides to surface waters without adequate
18 opportunity for treatment and attenuation in
19 the soil.

20 The City also has an environmental
21 interest because DEP is an involved agency
22 under SEQRA as a result of its authority to
23 issue discretionary approvals for key aspects
24 of the Applicant's project under the watershed

25 regulations. Aspects of the project requiring
(OPENING REMARKS - ISSUES CONFERENCE)

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1 approval under the watershed regulations
2 include construction of wastewater treatment
3 plants, stormwater pollution prevention plans,
4 which include plans for controlling erosion
5 during construction as well as managing
6 stormwater during operation of the project,
7 and lastly, design of subsurface sewage
8 systems such as the one proposed for the
9 gatehouse in the Big Indian phase of the
10 project.

11 As an involved agency, DEP is
12 obligated to review and assess the adequacies
13 of the environmental review of the project,
14 and as the City's testimony will demonstrate
15 throughout this proceeding, we have serious
16 concerns about the adequacy and the accuracy
17 of the DEIS for the project.

18 So in conclusion, for the above
19 reasons that I have stated, the City has
20 substantial environmental interests in
21 participating as a full party in an
22 adjudicatory hearing on the proposed SPEDES
23 permits for the Crossroads project.

24 I thank you for the opportunity to
25 provide this testimony.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 MR. RUZOW: Your Honor, may I have an
2 opportunity to footnote that statement with
3 regard to their environmental interests?

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ALJ WISSLER: Sure.

MR. RUZOW: First, I want to object to the introduction of these types of photographs at this stage of the proceeding. There's an insufficient basis for their consideration and the proper time is when the issues are probably going to be examined a few weeks from now.

Secondly, to draw attention to the Anglebrook project at a time that preceded the kinds of environmental controls that are found in the 1997 watershed regs and the New York State DEC Stormwater Controls that are not applicable, and particularly are supplemented with the individual permits and requirements that we are meeting and as conditioned by DEC, is an apples and orange comparison.

Also, the proximity of the Anglebrook Golf Course to the receiving waters is another apples and orange comparison. We are miles and miles away, and the steps that we are taking and which have, to date, satisfied DEC
(OPENING REMARKS - ISSUES CONFERENCE)

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in terms of the degree of controls -- and with all due respect, we still don't believe the DEP understands the nature of those controls, which are just fundamentally different than what is at play here.

With respect to Hanna, we will live and learn what mistakes they made, but they don't have the degree of controls and the examination of those controls that the

10 proceedings before your Honor and the
11 Department have had. And so we think we can
12 avoid the kind of mistakes that were perhaps
13 made over there.

14 With respect to DEP's and the City's
15 environmental interests, as I said, the
16 context needs to be understood. DEP's
17 authority pursuant to the watershed rules is a
18 limited grant of authority granted by the New
19 York State Health Department. They are not
20 like other agencies. They only get the right
21 to regulate within the watershed pursuant to
22 the actions of the New York State Health
23 Department. It's fundamental, it's
24 constitutional in its underpinnings because
25 the watershed communities do not elect the
(OPENING REMARKS - ISSUES CONFERENCE)

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1 officials in New York City that seek to
2 regulate them. Vol.1- 84

3 Their authority pursuant to SEQRA, in
4 our view, also needs to be looked at in that
5 vein. They were given the right by New York
6 State DOH to protect water quality within the
7 watershed. When you apply SEQRA's discretion
8 on top of that, we think that there are limits
9 not yet tested by the courts in terms of the
10 City's application of how far they can examine
11 into areas, particularly where those areas are
12 within the jurisdiction of other agencies,
13 such as the towns and the DEC.

14 Noticeably absent from their comments

15 in their expression of interest is the balance
16 that SEQRA employs, and indeed, we think the
17 watershed Memorandum of Agreement employs, of
18 the consistency with protection of the
19 environment, but consistent with social,
20 economic and other essential considerations.
21 There's been no lip service even given to that
22 notion in their review. In the case of this
23 project, we're talking about 2000 man years of
24 construction employment, 750 full-time jobs,
25 two to four million dollars in annual real
(OPENING REMARKS - ISSUES CONFERENCE)

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1 property tax over time, and tens of millions^{Vol.1- 85}
2 of dollars of annual wages and -- and indirect
3 benefits.

4 The other context is the overall MOA
5 and FAD, which was mentioned by Dr. Principe,
6 that was a comprehensive planning approach to
7 watershed protection, and viewing in an
8 individual permit application has to be in the
9 context of the other measures that the MOA and
10 the FAD contemplated with the City to
11 undertake.

12 In particular, Dr. Principe mentioned
13 the municipalities' cooperation in allowing
14 the City to have land acquisition. That
15 allowance comes not because the City has a
16 right to take land to protect it for watershed
17 protection in the watershed, but because New
18 York State DEC, by permit, has allowed them to
19 do that.

20 I just want to draw a comparison, as
Page 70

21 he has drawn, to the fact that, as he
22 described, we have about 331 acres in the
23 Ashokan Basin and 242 acres in the Pepacton
24 that are proposed to be developed. Not
25 mentioned is the 1390 acres of protected land
(OPENING REMARKS - ISSUES CONFERENCE)

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1 that the project will take out of future
2 development opportunity.

3 when you compare what the City has
4 acquired -- and on my numbers, I apologize if
5 my numbers are off, the City has acquired
6 approximately 7,000 acres in the Ashokan Basin
7 pursuant to the DEC permit based on its
8 reports. I apologize, I'm missing a year's
9 data. If you compare the amount of
10 development that we are proposing of 331, it's
11 a 21 to one ratio. They've already protected,
12 taken land out of potential development
13 opportunity, 21 times what we're proposing to
14 develop.

15 In Pepacton, there's about 3500 acres
16 of land that they've acquired to date. And
17 indeed, with respect to both of these
18 acquisitions in these basins, Ashokan is a
19 priority 2, Pepacton is a priority 3. They
20 are the most successful rate of acquisition in
21 terms of solicitations that they've had. So
22 the likelihood that additional land will be
23 acquired in the next portion, because they
24 still have funds available, will even be
25 greater. So the 7,000 will be added to and
(OPENING REMARKS - ISSUES CONFERENCE)

1 the 3500 will be added to, again, with the
2 cooperation and meeting the compliance of the
3 DEC. But the amount of development that we're
4 talking about is fixed.

5 DEP's interest, we believe, in the
6 west of Hudson watershed is often clouded by
7 its east of Hudson experience in the suburban
8 Westchester and Putnam areas. We think that
9 their legal positions that they've asserted as
10 well as their scientific positions are colored
11 by it. The view that they have taken is there
12 can be no net increase as a matter of law in
13 the phosphorous -- amount of phosphorous that
14 can be increased in either basin. We think
15 that's wrong as a matter of law and -- but
16 their premise starts from that, that there
17 can't be an increase, and therefore, we're
18 violating some fundamental principle.

19 This is not a phosphorous-restricted
20 basin. The stormwater modeling and treatment
21 methods that are in place and available today
22 are not precise yet. They are still in an
23 evolving science. And so in the criticism of
24 our methodology -- and there may be
25 appropriate criticism -- we also see it is not
(OPENING REMARKS - ISSUES CONFERENCE)

1 something that can be measured with the level
2 of precision that they're talking about. And
3 indeed, in setting the TMDLs, there are
4 margins of safety built into the whole system,
5 the planning system, to account for some of

6 that uncertainty.

7 The Ashokan basin has available before
8 it reaches the stage of the greatest
9 concern -- the phosphorous restricted -- some
10 8,000 kilograms a year of available
11 phosphorous. We are proposing to increase
12 that by somewhere between, depending upon the
13 methodology and the -- how you measure,
14 somewhere between perhaps 70 and maybe 300
15 kilograms a year, assuming that their
16 methodology is correct, and ours is wrong. I
17 don't know that at the moment. That's
18 somewhere in the -- in the neighborhood of one
19 to two and a half percent of the total
20 phosphorous that can be absorbed in that
21 basin. There's some 40,000 kilograms that the
22 basin allocates.

23 when you look at their contribution to
24 the Shandaken tunnel, the concerns that they
25 had expressed about turbidity and the -- and
(OPENING REMARKS - ISSUES CONFERENCE)

1 the successful litigation brought by some of ^{Vol.1- 89}
2 the other parties to this proceeding -- that
3 consumes, based on the DEC SPEDES permit, some
4 10,457 kilograms, about a quarter of what that
5 entire Ashokan Reservoir can consume. Compare
6 that, again, to somewhere between 70 and 300,
7 it is a fraction; and you're talking about a
8 basin that -- its development potential is
9 limited because of the physical
10 characteristics.

11 As everyone has expressed, this is the
12 largest project that's been proposed. It is
13 singularly different than any other large
14 project. And there are reasons why other
15 projects have not been proposed. And the
16 reason it's proposed here is because of the
17 Belleayre Ski Center and the efforts to try to
18 make Belleayre and this area, the Central
19 Catskills, comparable to what is found in
20 Windham and Greene County as another resource,
21 recreational resource for the area.

22 Their concerns over secondary growth
23 and induced growth is also exaggerated, and
24 the significance that they -- that they
25 attribute to it, in our judgment, strains
(OPENING REMARKS - ISSUES CONFERENCE)

credulity. They have projected out and it
means that we question 158 homes in an area of
395 square miles over a ten-year period over
four townships. That's including impacts,
presumably in three different basins, though
largely in Ashokan, Pepacton, with a lesser
extent, I assume, in Cannonsville. That
impact is simply not a significant one by
anybody's measure. I respect Dr. Principe's
concerns about how you manage a watershed, but
on an individual permit application, trying to
ascribe a -- a new standard of no net increase
is simply both unfair and -- and not supported
in the regulations or by reference to
reference to SEQRA.

16 We started this process -- the
Page 74

17 Applicant has started this process by seeking
18 to reach out and to involve many of these same
19 parties in a dialogue and discussion to ensure
20 that the important environmental impacts have
21 been addressed, along with the social and
22 economic factors stemming from the project.
23 And I believe our DEIS, despite its criticism,
24 has done that.

25 We also think that the comments that
(OPENING REMARKS - ISSUES CONFERENCE)

□
1 have been provided by these parties, including Vol.1- 91
2 DEP, have been very valuable in both
3 elucidating other issues and other important
4 considerations, but we need to get to a final
5 EIS for the final design of the project. The
6 adjudicatory process may or may not be the
7 best means to do that, and we have serious
8 questions about what issues are warranted for
9 adjudication. But in any event, whether
10 they're adjudicated or not, the SEQRA process
11 contemplates that the Applicant, working with
12 the lead agency, responds to all of the
13 comments. And we think there will be a great
14 deal of learning provided by all of these
15 comments that have come in. Some, however,
16 bear little relation to decision-making for an
17 individual project as compared with the
18 planning, just as they have described, that a
19 watershed needs to adopt in terms of land use
20 planning at a local level and other mechanisms
21 that are in place.

22 So with that, we don't object to the
23 City's environmental interest. They clearly
24 have an environmental interest, but we think
25 that it's cast in a different light than their
(OPENING REMARKS - ISSUES CONFERENCE)

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1 expressions they have made about the world
2 ending and the watershed ending and the City's
3 water supply being so threatened by this
4 individual project located so far from the
5 reservoirs and with as many protections as we
6 have provided to date and with the process
7 will be able to provide.

8 Thank you.

9 ALJ WISSLER: Okay.

10 MS. MELTZER: If I might respond
11 briefly. I recognize this is not the time for
12 oral argument here and I don't intend to make
13 them, but in that -- at this point, I'd just
14 like to respond to a couple of points.

15 First, to clarify, Mr. Ruzow referred
16 to the City having limited regulatory
17 authority, and I'm not actually sure what he's
18 getting at. The City has authority pursuant
19 to state law to enact, administer and enforce
20 regulations that have been approved by the
21 State Department of Health. That has
22 happened. Since these regulations that we're
23 talking about have gone through the approval
24 process, they are now effective, they are
25 codified in both City codes and the State
(OPENING REMARKS - ISSUES CONFERENCE)

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1 codes, and the City has full authority to
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2 administer and enforce those regulations
3 that -- as has been recognized by the courts
4 of this state.

5 As an agency with that regulatory
6 role, we have a role as an involved agency
7 under SEQRA for any project that triggers a
8 review, a discretionary review pursuant to
9 those regulations. And so again, I don't know
10 if -- I want to clarify, I don't know of any
11 basis for viewing the City's role under SEQRA
12 as limited in any way that any other involved
13 agency's role under SEQRA would or would not
14 be.

15 Second, I'd like to respond to the
16 points that Mr. Ruzow is making about
17 phosphorous here and to clarify. This is not
18 a proceeding under the City's watershed
19 regulations and we have not raised, and do not
20 intend to discuss in this proceeding the
21 application of the watershed regulations to
22 this project, except as they relate to the
23 environmental impact of the project as a
24 whole. We're not applying the standard from
25 the watershed regulations to this project at
(OPENING REMARKS - ISSUES CONFERENCE)

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1 this point because there's no application and
2 we have not seen a complete stormwater
3 pollution prevention plan that would allow us
4 to assess their compliance with the watershed
5 regulations.

6 We are objecting instead to the

7 Applicant's analysis under SEQRA of the
8 phosphorous impacts to the water supply
9 system. The Applicant has, as Dr. Principe
10 mentioned, assumed that to the extent the
11 receiving reservoirs are not currently
12 exceeding the maximum daily loads for
13 phosphorous, that that's available capacity
14 that is -- that can simply be used up by a
15 development project. In our view, SEQRA does
16 not contemplate using the fact that these
17 reservoirs are not currently eutrophic as a
18 basis for not mitigating the on-site
19 phosphorous impacts, and we, as we will be
20 testifying, that the phosphorous impacts, we
21 believe, have been significantly understated
22 primarily because the Applicant's analysis of
23 predeveloped phosphorous runoff has been
24 overstated so that the increased
25 postdevelopment has been understated.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 And finally, to respond very
2 specifically with respect to the suggestion
3 that there's any comparison with the City of
4 Shandaken Tunnel SPEDES permit, that SPEDES
5 permit does have a large phosphorous
6 allocation. There's not new phosphorous being
7 added to the Shandaken Tunnel. It's been
8 there since 1924. We're simply proposing to
9 convert that phosphorous that comes in that
10 water, and has always come in that water, as a
11 load allocation, into a weight load
12 allocation, in light of the different

13 permitting structures in the Town of
14 Shandaken.

15 ALJ WISSLER: Mr. Baker.

16 MR. BAKER: Thank you, your Honor. On
17 behalf of the Coalition, I'd like to support
18 Mr. Ruzow's statements. And I think one of
19 the points that he's made -- obviously we're
20 going to have to get deferred when we'll talk
21 about the specific issues that are relevant
22 that are proposed for adjudication -- and I
23 think the point that he made and the Coalition
24 joins into, is, keep in mind because the
25 Coalition does not object obviously to the
(OPENING REMARKS - ISSUES CONFERENCE)

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1 City's environmental standing in this, but vol.1- 96
2 recognize that it -- that it has to be
3 considered somewhat limited to the legitimate
4 issues associated with water quality
5 protection, and that they do not have as broad
6 a scope as they seem to be arguing in the
7 context of these proceedings. SEQRA does not
8 change the jurisdiction amongst agencies, and
9 many of the instances of what the City's
10 trying to do is extending themselves beyond
11 that.

12 And Mr. Ruzow is correct that
13 specifically when we're talking about the
14 issues of phosphorous loadings from the
15 secondary growth, those are, by definition,
16 not substantive and significant. The analysis
17 of the City's should have stopped once it

18 rose -- it arrived at those numbers. It had
19 the right to look at the question. Once they
20 found those numbers, they are, by definition,
21 not substantive or significant. And we would
22 just ask you that you keep that in mind.

23 And because I can't leave anything
24 unsaid, and Ms. Meltzer's final comment
25 regarding the Shandaken Tunnel SPEDES --
(OPENING REMARKS - ISSUES CONFERENCE)

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1 proposed SPEDES limitations and its effect on ^{Vol.1- 97}
2 the TMDL allocations for the Ashokan
3 Reservoir -- I agree with her correctly and
4 completely except for the fact that the
5 Shandaken Tunnel should not be using up the
6 existing phosphorous allocations for the
7 Ashokan because it's not a new discharge. It
8 was part of the background, the continuing
9 discharge that was there that rose -- that
10 gave rise to the assessment of the TMDLs for
11 the Ashokan. And to -- so we have an
12 agreement on that, and I'd like to put that on
13 the record so when we go to the other DEC
14 proceedings on the SPEDES permit, we can have
15 that changed, because that will affect future
16 developments and activities in the watershed.

17 So thank you, your Honor.

18 ALJ WISSLER: Thank you. I have to
19 say I think I have a very thorough record here
20 upon which to determine whether or not the
21 proposed parties have the requisite
22 environmental interest.

23 It is ten after 12. Why don't we take

24 just a five-minute break and I'll see counsel
25 up here for a moment, please.
(OPENING REMARKS - ISSUES CONFERENCE)

1 (12:10 - 1:37 P.M - DISCUSSION OFF ^{Vol.1- 98})

2 THE RECORD AND LUNCHEON RECESS TAKEN FOLLOWING
3 DISCUSSION.)

4 ALJ WISSLER: As we begin, I have a
5 couple of items -- or three items, actually,
6 that I'm going to add to the Office of
7 Hearings' Exhibits in this matter.

8 Exhibit No. 10 will be the Draft
9 SPEDES permits, the draft number 2 dated May
10 24th, '04.

11 MR. RUZOW: These are the revised
12 drafts; is that correct, your Honor?

13 ALJ WISSLER: That's what I'm led to
14 understand. Am I correct; revised drafts?

15 MR. ALTIERI: Yes.

16 ALJ WISSLER: Supersedes anything we
17 got before; correct?

18 MR. ALTIERI: Correct.

19 ALJ WISSLER: Okay. That will be
20 Exhibit No. 10.

21 (DRAFT SPEDES PERMITS REVISED 5/24/04
22 RECEIVED AND MARKED AS OHMS EXHIBIT NO. 10,
23 THIS DATE.)

24 ALJ WISSLER: Exhibit 11 are the water
25 supply permits in this matter, also dated --
(OPENING REMARKS - ISSUES CONFERENCE)

1 draft number 1 dated 5/24/04, and they are ^{Vol.1- 99}
2 specifically permit applications by wildacres

3 5-25-04crossroadsF
Waterworks Corporation and Big Indian
4 Waterworks Corporation.

5 (WATER SUPPLY PERMITS REVISED 5/24/04
6 RECEIVED AND MARKED AS OHMS EXHIBIT NO. 11,
7 THIS DATE.)

8 ALJ WISSLER: And Hearing Exhibit No.
9 12 will be the Draft Article 15, Protection of
10 Waters Permits, also dated 5/24/04. There are
11 two of them, and annexed to them are a series
12 of drawings dated May the 20th -- I'm sorry,
13 revisions as of 5/13/04, basically showing the
14 structural changes to the bridges that are
15 affected by those permits. Again, that's
16 Exhibit No. 12.

17 (DRAFT ARTICLE 15 - PROTECTION OF
18 WATER PERMITS AND WATER QUALITY
19 CERTIFICATION UNDER 6 NYCRR 608
20 RECEIVED AND MARKED AS OHMS EXHIBIT NO. 12,
21 THIS DATE.)

22 ALJ WISSLER: After today's
23 proceeding, we will be adjourning the hearing
24 until Thursday back here. Tomorrow we will be
25 conducting a site visit. One of the
(OPENING REMARKS - ISSUES CONFERENCE)

1 enumerated powers that an Administrative Law ^{Vol.1-100}
2 Judge has is to order a site visit on notice
3 to the parties. There are two kinds of site
4 visits. This site visit is purely for the
5 purpose of familiarizing me, the Judge, and
6 the attorneys with the actual, physical layout
7 of the site, the wildacres site and the Big
8 Indian site.

14 to the site as evidence in the same way that a
15 jury might view a scene and make it -- and it
16 becomes part of the evidentiary record of a
17 trial. This is not that case, it's purely
18 informational so that when we talk about the
19 various environmental features of the site and
20 the environs, that the Judge and the attorneys
21 know what they're talking about.

22 To that end, there will be no
23 discussion on that site visit of the various
24 things that we look at. If somebody wants me
25 to observe something, a particular view,
(OPENING REMARKS - ISSUES CONFERENCE)

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1 again, a particular environmental feature,^{vol.1-102}
2 that will be the end of it. There will be no
3 discussion as to why that's important for me
4 to look at, nor will there be any -- any
5 opportunity for folks to argue about whether a
6 feature is important or not important.

7 So again, because of the nature of
8 this matter, because of the magnitude of the
9 site, it's important that counsel for the
10 parties and the Judge are all listening to the
11 same radio station, all on the same page with
12 respect to the environmental features that are
13 present at the site that is affected by -- by
14 this project and the neighborhood that's
15 affected by this project.

16 So to that end, again, attorneys will
17 go on the site visit, I will go on the site
18 visit, and such experts, such people who have
19 certain knowledge with respect to the site can

20 accompany their respective party's counsel to
21 the extent that it's reasonably necessary to
22 facilitate them in this site visit process.

23 We're not going to be making any
24 decisions on the mountaintop. We're not going
25 to be conducting any kind of hearing or any
(OPENING REMARKS - ISSUES CONFERENCE)

1 kind of trial on the mountaintop. We are ^{Vol.1-103}
2 simply there to observe and only to observe.

3 Now, in that regard, we have discussed
4 this, and I've discussed it with -- with the
5 parties during conference calls that we have
6 had in this matter and -- how's that, Mr.
7 Gerstman, have I laid enough of a foundation
8 for you there? Is that ...

9 MR. GERSTMAN: That sounds pretty
10 good, your Honor.

11 ALJ WISSLER: Okay.

12 MR. GERSTMAN: Thank you.

13 ALJ WISSLER: You've got the stage,
14 Mr. Gerstman.

15 MR. GERSTMAN: Your Honor, thanks very
16 much.

17 As your Honor alluded to, we did have
18 an opportunity to discuss the issue of site
19 access and we've also made an application to
20 allow us to take photographs on the site.
21 Preliminarily you had indicated that you were
22 going to deny the application to allow us to
23 take photographs and also possibly -- and to
24 deny access to two of the proposed attendees.

25

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1 had just recently with counsel for the
2 Applicant, we reiterated our application that
3 we be allowed to take photographs, which I'd
4 like to allude to in a minute. To the extent
5 that your Honor denies that application, we
6 have agreed that we will not appeal that
7 ruling; and the Applicant has stipulated that
8 Ms. Wyman, Monica, would be allowed on the
9 site.

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Let me identify, your Honor, also a
further application. I understand that there
is interest on the part of Phoenicia Times and
WAMC to have access to the site with us. It's
our position, your Honor, that this site visit
is part of the public hearing process, that
both a reasonable number of press, and
certainly a reasonable number of members of
the Coalition should have access, there being
no justification for keeping them out. The
people that we've proposed to accompany us on
the site visit will provide exactly the kind
of information that your Honor has suggested
is appropriate here; that is, that they will
help provide counsel who have not been on the
site with information concerning the context
(OPENING REMARKS - ISSUES CONFERENCE)

1 of the site, the terrain, topography, the
2 features and the surrounding land.

3

4

It is for those reasons why we have
presented a list of 11 people that we've

5 requested come on the site with us. As a
6 result of the stipulation with the Applicant,
7 we -- we now have an agreement that those 11
8 people will enter.

9 with respect to photographing the
10 site, the opportunity to take photographs on
11 the site is important to us in order to allow
12 us to identify areas that might be considered
13 important to your Honor. Anything that's --
14 that your Honor's taking notice of or
15 identified by the Applicant, or any of the
16 agencies as being significant, would be very
17 helpful to us to be able to prepare for the
18 Issues Conference. It would facilitate our
19 participation in the Issues Conference. As
20 you know, we do not have that access.

21 Fortunately, your Honor has allowed
22 our experts to attend the site visit and we
23 will, of course, gain information that will
24 help us participate in the Issues Conference
25 in the future. However, the inability to take
(OPENING REMARKS - ISSUES CONFERENCE)

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1 photographs and preserve for further Vol.1-106
2 discussion among our experts and the parties
3 those areas which may be significant in the
4 Issues Conference would be very important to
5 us. It would help us fully participate.

6 With respect to the press, your Honor,
7 I believe that the -- the regulations and the
8 statute governing permit hearings in no way
9 indicate that the participation of the press

10 should be excluded. This is a very important
11 project in this community, in this area, in
12 this region, and the press certainly have an
13 opportunity, or should have an opportunity to
14 participate and to attend every aspect of the
15 public hearing process. It's not that there
16 are undue numbers of press corps who want to
17 make this trip. As far as I know, I've
18 identified two at this point who have asked to
19 be -- to be accompanying us on the site visit.

20 I don't believe, your Honor, that the
21 exclusion of the press is consistent with,
22 frankly, the First Amendment. By the
23 Applicant's submitting the DEIS application
24 for approval to the Department, the Applicant
25 has consented to your jurisdiction and to
(OPENING REMARKS - ISSUES CONFERENCE)

1 allow the public opportunity to fully vol.1-107
2 participate in the hearing process. I would
3 imagine the press would be subject to the same
4 release and indemnification agreements that --
5 that the Applicant has provided to us and
6 which we will sign in order to obtain access.

7 So we request, your Honor, on behalf
8 of the two press representatives who expressed
9 interest to us, that they be allowed to attend
10 the site visit with us tomorrow.

11 Thank you.

12 ALJ WISSLER: Ms. Bakner, Mr. Ruzow.

13 MS. BAKNER: With respect to the
14 issues of the ability to take photographs, we
15 continue to object to that as extraordinary

16 relief that they're seeking, which isn't
17 warranted in this context. As we understand
18 it, the purposes of the site visit is for your
19 Honor to become familiar with the site. It's
20 not for the purpose of collecting evidence.
21 So we just want to reiterate our appreciation
22 for your ruling on that point.

23 As far as the persons that Marc has --
24 Mr. Gerstman has proposed to take along on the
25 site visit, as you know, we had strong
(OPENING REMARKS - ISSUES CONFERENCE)

1 objections to two of those parties, and we
2 have indicated that if they'll sign the
3 release and indemnification agreements, that
4 we will -- in the interests of keeping things
5 moving forward and with Marc's determination
6 that he will not appeal any ruling with
7 respect to either the press or with respect to
8 the photographs -- that we'll consent to have
9 them there, although we'll do so, you know,
10 under objection. We don't feel they should be
11 there, they don't appear to serve any purpose.
12 They don't appear to serve any purposes. They
13 don't have any expertise, not having been on
14 the site.

15 Certainly we have not objected to any
16 of the true experts that Mr. Gerstman has
17 proposed, such as Dr. Michalski, or the other
18 people, but again, in the interest of keeping
19 things moving forward, we can live with that
20 situation.

21 ALJ WISSLER: How about members of the
22 press coming in?

23 MS. BAKNER: We don't believe that
24 this is an opportunity for public information.
25 This is an opportunity for your Honor to be
(OPENING REMARKS - ISSUES CONFERENCE)

1 informed about site conditions and for counsel^{Vol.1-109}
2 to become familiar with the site to help the
3 Issues Conference move forward. It's not a
4 public moment, it's not a public hearing and
5 we -- we're not aware of any case in which
6 press were present on a site visit. Certainly
7 neither Mr. Ruzow, nor I have been involved in
8 any.

9 ALJ WISSLER: Anything?

10 MR. RUZOW: No. I join in Terresa's
11 comment.

12 with respect to the site visit itself,
13 I want to reiterate what we had said on the
14 conference call as well. This is a site that
15 is largely in existing natural conditions.
16 Portions of the Big Indian site have been
17 heavily logged. So depending upon how far you
18 want to walk, your Honor, decides where we're
19 going to let the counsel walk, the risks and
20 that they -- they're clear in the waivers, the
21 releases. The people need to know that if --
22 if you're moving up and down slopes, if you're
23 on -- if it's wet -- it's been wet, things are
24 slippery, there's moss in lots of places, the
25 rocks are not necessarily all bedrock. And so
(OPENING REMARKS - ISSUES CONFERENCE)

1 you need to wear appropriate clothing and
2 shoes and be comfortable with doing that.

3 But as far as the press is concerned,
4 this is not a press event. This is an
5 opportunity for your Honor and the -- and
6 counsel to the parties to get familiarity with
7 the site so that when we get back into this
8 room, as you said, everyone will be on the
9 same page relative to physical conditions out
10 there.

11 ALJ WISSLER: Anything from staff?

12 MS. KREBS: It does seem
13 extraordinary, your Honor, to have press
14 attending a site visit. I'm certainly not
15 aware of any such happenings, but Department
16 staff will defer to your judgment on that.

17 MR. GERSTMAN: Your Honor, if I might.
18 I'm holding the regulations, Part 624, which
19 governs permit hearings of the Department, and
20 the note indicates essentially that this part
21 governs the public hearing process. If your
22 Honor were a judge, you would have to weigh
23 the prejudice -- in conducting a trial -- your
24 Honor would have to weigh the prejudice to the
25 defendant and the opportunity to get a fair
(OPENING REMARKS - ISSUES CONFERENCE)

1 trial and the right of the public to
2 understand what is going on in a particular
3 judicial proceeding. We see no reason why
4 that evaluation ought not apply here.

5 The Issues Conference site visit is

6 part of the public hearing process. The press
7 has an opportunity and a responsibility to
8 report the goings-on in this very important
9 hearing to the public, whether it's in favor
10 of the project or against the project, to
11 express what's going on. This is that
12 opportunity, your Honor, and I believe your
13 denial -- if you were to deny the access to
14 the press, you would essentially be denying
15 the public the right to understand and know
16 what is going on in a public hearing process,
17 in contravention of the Constitution.

18 ALJ WISSLER: Okay. With respect to
19 the photographs, you -- CPC taking
20 photographs, Mr. Gerstman, let me ask you
21 this: with respect to the reporters and so
22 forth, would they be taking photographs?

23 MR. GERSTMAN: Your Honor, I have not
24 approached that issue with them. I could
25 take -- if I could have a short recess to take
(OPENING REMARKS - ISSUES CONFERENCE)

1 a -- to have a caucus with them, their Vol.1-112
2 representatives are here. If we wanted to ask
3 them, we could find that out.

4 ALJ WISSLER: Let's take five minutes
5 and do that. We're going to take a
6 five-minute recess.

7 (1:55 - 2:05 P.M - BRIEF RECESS
8 TAKEN.)

9 ALJ WISSLER: Okay. Going back on the
10 record. I apologize for the brief delay, but
11 I think it was necessary under the

12 circumstances in the case.

13 with respect to the two individuals
14 who are going to make the site visit with us
15 tomorrow, I'm delighted that -- that counsel
16 have been able to work out that matter.

17 with respect to the taking of
18 photographs, again, the important thing is
19 this site visit is an informational visit to
20 make sure that the lawyers and the Judge are
21 equally familiar with the site so that -- to
22 facilitate the hearing, the issues hearing
23 process. So to that end, I am ordering that
24 the people who attend this site visit, that I
25 am ordering attend this site visit, myself --
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 I will follow my own order -- the lawyers and
2 the experts that we have agreed on. Vol.1-113

3 with respect to the press, I am not
4 directing that they cannot come on this site
5 visit, however -- and as far as I'm concerned,
6 they're welcome to join us; however, whether
7 or not they can enter upon the private
8 property of the Applicant is within the sole
9 discretion of the Applicant and, as has been
10 the case with other folks who will be
11 accompanying us on the site visit, will
12 probably require that they sign a release.
13 But I am not directing that they not attend
14 the site visit. It is my understanding that
15 the Applicant will be reviewing the matter and
16 will advise us.

17 MR. RUZOW: Yeah, we'll -- as soon as
18 we can. If they can -- if the people from the
19 press that would like to attend can give me a
20 card or a phone number or something -- and I
21 can get to you folks today, I'll be glad to
22 try to do that and we'll get back to you ASAP.
23 You have copies of an agreement that you need
24 to look at which we will share with you in
25 advance of that so that you'll know what
(OPENING REMARKS - ISSUES CONFERENCE)

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1 you -- what you're signing in advance of
2 going.

3 ALJ WISSLER: Okay. Mr. Gerstman,
4 anything else?

5 MR. GERSTMAN: Well, your Honor, yes,
6 there is one other thing. I recently received
7 a denial of my Freedom of Information Law
8 request from the record access officer,
9 Ruth Earl. The date of her letter to me is
10 May 21st. The subject of my request was the
11 Belleayre Mountain ski expansion and various
12 other records associated with Belleayre
13 Mountain's operation, water usage.

14 As you know, your Honor, we have
15 submitted issues or offered issues for
16 adjudication concerning cumulative impacts of
17 the proposed Crossroads project and the
18 Belleayre Mountain ski expansion. We believe
19 that in order to fully inform the Commissioner
20 on the issues of cumulative impacts with
21 respect to traffic, water budget, hydrology of
22 the site in general, the information that is

23 being withheld by the Department of
24 Environmental Conservation is critical to our
25 case.

(OPENING REMARKS - ISSUES CONFERENCE)

1 This is not just an ordinary Freedom^{Vol.1-115}
2 of Information Law request denial, and I'm
3 looking for copies so that I can give it to
4 your Honor, I did make them here so that I
5 may -- this is not just an ordinary request
6 for information concerning a department
7 project. Here the lead agencies for the
8 project that we're talking about, the
9 Belleayre Catskill Park, is the Department of
10 Environmental Conservation. The project
11 sponsor and the lead agency for the proposed
12 Belleayre Mountain expansion is the Department
13 of Environmental Conservation.

14 The Department has publicly talked
15 about the proposed expansion. Many of the
16 Coalition members have participated in public
17 meetings with the director of the mountain,
18 Tony Lanza, who has explained the need for the
19 expansion, explained that there would be a
20 draft Unit Management Plan released to the
21 public approximately a year ago, I believe.
22 And I -- once I get the articles, I can let
23 you know more. Those are included in the
24 petition for party status.

25 This agency has a responsibility, I
(OPENING REMARKS - ISSUES CONFERENCE)

1 believe, to fully inform the Commissioner^{Vol.1-116}

2 concerning the potential environmental impacts
3 associated with the project before her in this
4 particular application as well as those other
5 simultaneous and -- and actions that have a
6 bearing on and are related, to the proposed
7 project.

8 It's no secret that the -- the DEIS
9 for this project speaks very clearly in terms
10 of its dependency and its relationship to the
11 Belleayre Mountain ski expansion.
12 Accordingly, that information becomes critical
13 in the EIS in the SEQRA analysis. It becomes
14 critical with respect to the other substantive
15 issues that we've proffered for adjudication
16 in this case.

17 We just found a copy of the denial
18 which I'd like to hand to your Honor, and I'll
19 give copies to DEP and the Applicant.

20 ALJ WISLER: And this is the -- this
21 is the denial?

22 MR. GERSTMAN: Yes, it is.

23 Your Honor, I previously, in our
24 conference calls, indicated my intention to
25 move for discovery. As you've said, your
(OPENING REMARKS - ISSUES CONFERENCE)

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1 Honor, discovery at an Issues Conference stage
2 prior to the issues ruling is only granted in
3 extraordinary circumstances. I would like to
4 have the opportunity to make such a motion. I
5 believe it would be appropriate to do it on
6 papers; however, here we are starting the
7 Issues Conference discussing substantive

8 issues which are duplicated in the cumulative
9 impact analysis. Thursday we're scheduled to
10 discuss traffic. We have certain -- we made
11 certain assumptions based upon the expanded
12 use of the Belleayre Ski Center. We do not
13 have the information that DEC has concerning
14 the actual projections of what the expansion
15 will result in, what kind of use -- what kind
16 of water use, what kind of traffic. Those
17 are -- those are factual issues that we should
18 be entitled to and which the Department should
19 provide to us in the interests of informing
20 the Commissioner and the public on the actual
21 environmental impacts on this project.

22 Your Honor, I leave it to your
23 discretion whether you want to entertain a
24 written motion or if -- do you think an oral
25 motion to this effect would -- is sufficient?
(OPENING REMARKS - ISSUES CONFERENCE)

1 ALJ WISSLER: With respect to the --^{Vol.1-118}
2 the FOIL denial; is that what we're talking
3 about?

4 MR. GERSTMAN: Well, I believe I may
5 have to exhaust my administrative remedies and
6 make it a FOIL appeal, but I would also
7 request, pursuant to the provisions of 624,
8 that either you grant me leave to make a
9 motion on the papers or entertain this motion
10 as my oral motion to compel the Department to
11 turn over these records.

12 ALJ WISSLER: I think the motion

13 probably has to be made on papers, and I think
14 that it needs to be made to the Assistant
15 Commissioner. As a matter of Office of
16 Hearings' policy, because I am the
17 Administrative Law Judge on this case, an
18 appeal of your FOIL ruling will be -- would be
19 handled by another Administrative Law Judge,
20 so probably it would be inappropriate for me
21 to rule on your FOIL request.

22 Now, if the schedule that we
23 tentatively looked at or considered was
24 community character and alternatives --
25 actually cumulative impacts is scheduled for
(OPENING REMARKS - ISSUES CONFERENCE)

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1 June the 11th; community character and
2 alternatives is scheduled for June the 9th.
3 It would seem to me that there may be enough
4 time to have your FOIL appeal issue resolved.
5 I will certainly -- these proceedings can
6 be -- or that issue, the issues of community
7 impact and so forth, if we have to reconvene
8 at a future date in order to do that, we'll do
9 that.

10 I want to do traffic on Thursday. If
11 there are cumulative impacts from some
12 proposed expansion of the Belleayre Ski Center
13 and we need to revisit traffic before we --
14 before the Issues Conference closes, we can do
15 that. I'll certainly give you the opportunity
16 to do that.

17 But, you know, in terms of the appeal
18 of any FOIL denial, that needs to go to the

19 office of Hearings and then to be assigned to
20 another ALJ, who will make that determination.

21 MR. GERSTMAN: Your Honor, we may seek
22 to actually pursue the FOIL appeal as well as
23 a motion before your Honor to compel
24 disclosure?

25 ALJ WISSLER: Let me -- okay. Let me
(OPENING REMARKS - ISSUES CONFERENCE)

1 understand this. So you would say independent ^{Vol.1-120}
2 of the FOIL and the FOIL appeal process, that
3 because discovery is essentially limited to
4 FOIL, that within the context of this hearing,
5 that a separate motion can be made to me for
6 discovery?

7 MR. GERSTMAN: Yes, your Honor.

8 ALJ WISSLER: I guess --

9 MR. GERSTMAN: Independent of this
10 hearing, we have the right to request records
11 from the Department pursuant to the Freedom of
12 Information Law. We've done so, and we have
13 received this denial. It's a blanket denial.
14 We haven't even been given access to factual
15 data or information, so the document has not
16 been redacted and provided to us without the
17 intra-agency opinion or information that would
18 be protected.

19 But independent of the FOIL process,
20 we have, with your Honor's permission, a
21 basis, we believe, to seek discovery from the
22 Department of information at the Issues
23 Conference date based upon the standards in

24 624. So we believe we can pursue
25 simultaneously a FOIL appeal and discovery
(OPENING REMARKS - ISSUES CONFERENCE)

1 against the agency which has failed to provide Vol.1-121
2 this information.

3 ALJ WISSLER: But in substance, the
4 arguments that you would make on your FOIL
5 appeal would be the same arguments you would
6 make to me; correct?

7 MR. GERSTMAN: Yes, your Honor. I
8 think they carry more -- well, I think,
9 frankly, they would carry more weight in this
10 proceeding because of the dual role of the
11 Commissioner as -- for the project sponsor for
12 the Belleayre Mountain ski expansion and also
13 as -- as the ultimate decision-maker
14 concerning this project and the environmental
15 impacts associated with it. We don't believe
16 that the record can be complete in this
17 proceeding without having that information;
18 and therefore, the Commissioner would be
19 precluded from making SEQRA findings without
20 having the requisite information concerning
21 the Belleayre Mountain Ski -- Ski Center
22 expansion and therefore, I -- we believe that
23 that argument carries much greater weight in
24 this proceeding than it would in a FOIL
25 process.

(OPENING REMARKS - ISSUES CONFERENCE)

1 ALJ WISSLER: Comment from staff? Vol.1-122

2 MS. KREBS: Yes, your Honor.

3 Initially, your Honor, I think that
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4 Mr. Gerstman should go through the public
5 officer's law process to appeal the denial of
6 access because I'd be concerned that there
7 might be a different result reached by
8 Assistant Commissioner of Hearings or your
9 Honor ordering the petition to -- allowing for
10 the discovery.

11 In our case, your Honor, I reserve the
12 right to brief this. I think that
13 Mr. Gerstman should go through the public
14 officer's laws process for appealing denial of
15 access. I'm concerned that the two processes
16 might result in different results, going
17 through the discovery versus the FOIL appeal.
18 In our case, we reserve the right to brief
19 this.

20 ALJ WISSLER: Ms. Krebs, let me
21 just -- let me ask you this. I don't disagree
22 with -- with anything you said, and because of
23 the nature of the issue, I -- I would like to
24 see it on papers, frankly.

25 We will accommodate our schedule to
(OPENING REMARKS - ISSUES CONFERENCE)

1 make sure that whatever the outcome is, Vol.1-123
2 that -- that you would have a full opportunity
3 to make your record at this Issues Conference.
4 But I guess my question is, is this: Looking
5 at 624(7)(A), okay, discovery is limited to
6 what is quoted under Part 616 of this title,
7 access to records, which is basically FOIL,
8 right, "In the absence of extraordinary

9 circumstances, the ALJ will not grant
10 petitions for further discovery." If I
11 understand Mr. Gerstman's argument, he's
12 saying, these are the -- these are
13 extraordinary circumstances.

14 Is that what you're saying?

15 MR. GERSTMAN: Yes, your Honor.

16 ALJ WISSLER: What's your answer to
17 that?

18 MS. KREBS: I, again, would want to
19 have that in writing, your Honor, and have
20 this case compared to other cases.

21 ALJ WISSLER: But does that -- does
22 that extraordinary -- that finding of
23 extraordinary circumstances, does that take a
24 discovery request outside of FOIL and make it
25 the same as if it was a demand under 3120 of
(OPENING REMARKS - ISSUES CONFERENCE)

1 the CPLR after the issue had been joined? ^{Vol.1-124}

2 MS. KREBS: Very possibly, your Honor.

3 MR. RUZOW: Your Honor, on just a very
4 narrow point, because we're -- we're sort of
5 pawns in the middle of all this, I want to
6 clarify that however Mr. Gerstman is reading
7 the EIS, this project is not dependent on any
8 expansion the Department may, or may not
9 consider doing under the Unit Management Plan
10 at the Belleayre Ski Center. When that
11 paragraph was written in the EIS, it was
12 talking about the development under the 1998
13 Unit Management Plan, which was still under
14 the works. So we're -- this project just

15 doesn't rise or fall with respect to that.

16 We had previously sought access
17 to -- based on the communications that Marc
18 referred to about Mr. Lanza and the press
19 releases about, talking about things that
20 would like to be -- the Department might want
21 to see happen at Belleayre, and we were told
22 that there is no such plan yet, everything is
23 still in sort of a talking stage so ...

24 ALJ WISSLER: So you're saying that
25 the Unit Management Plan, such as it has been
(OPENING REMARKS - ISSUES CONFERENCE)

1 solidified and exists, is what was written in ^{Vol.1-125}
2 1998?

3 MR. RUZOW: Yes. That's the only plan
4 that we -- we were given access to. And
5 anything else beyond that, unless and until
6 the Department releases that plan for public
7 comment, it is somebody's ideas. It hasn't
8 yet reached the point of a plan. But I'm not
9 privy to anything beyond what I just said
10 relative to the status of any documents,
11 because we were -- we were told essentially
12 there is no plan. And when it's releasable to
13 the public, it will be released to the public.
14 It's in development stage, so -- that's as
15 much as we know.

16 ALJ WISSLER: Is it going to be the
17 Department's position, when we discuss
18 cumulative impacts, that they'll only be
19 looking at the 1998 plan?

20 MS. KREBS: Yes, your Honor. It -- as
21 of this time, we don't have, per se, clear
22 numbers to give it to the Applicant to use.
23 Right now the only UMP numbers that are
24 available is the 1998 UMP, which is the Unit
25 Management Plan.

(OPENING REMARKS - ISSUES CONFERENCE)

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1 ALJ WISSLER: Was that -- was that
2 communicated to Mr. Gerstman in the form his
3 FOIL -- pursuant to his FOIL request or in
4 some denial or anything?

5 MS. KREBS: I'm not sure, your Honor.
6 I only have the denial letter.

7 MR. GERSTMAN: Your Honor, I did
8 receive the -- the latest public UMP. I
9 believe that we've been -- but again, we
10 haven't -- my understanding of the FOIL
11 process is that if there is factual
12 information or data set forth in a document
13 that's being withheld, that the agency has an
14 obligation to redact that information which it
15 believes should be confidential and disclose
16 that information which is factual, and that
17 has not been done either.

18 MS. KREBS: Your Honor, that --

19 ALJ WISSLER: Yes, but that isn't all
20 you're asking, though; is it?

21 MR. GERSTMAN: No, that's not all I'm
22 asking.

23 ALJ WISSLER: You're saying that even
24 if they redact, there is a separate 3120 CPLR
25 discovery motion that I'm making to you,

1 Judge. I realize it's premature because the
2 issue has -- hasn't been joined, but only
3 because of the nature of this Issues
4 Conference or the issues that will be raised,
5 I should be entitled to that discovery?

6 MR. GERSTMAN: That sounds like the
7 beginning of my affirmation in support of my
8 motion, your Honor.

9 ALJ WISSLER: I want credit.

10 MR. RUZOW: Your Honor, to the
11 relevance of all this and to meet the
12 extraordinary circumstances test, we were not
13 planning to argue this today, but --

14 ALJ WISSLER: No, and I'm not
15 expecting you to. That's why I just want to
16 be clear what's coming down the --

17 MR. RUZOW: But the rule with respect
18 to cumulative impact in terms of when it is
19 mandatory goes to whether you have pending
20 proposals for consideration that affect a
21 certain area -- geographic area, et cetera.
22 The response that we got from the agency was
23 not in writing, but orally was, there is no
24 pending proposal for you to start examining
25 together. When and if it comes out, there'll
(OPENING REMARKS - ISSUES CONFERENCE)

1 be a pending proposal and at that point either
2 we or you will have that obligation to
3 consider -- we being the agency -- to consider
4 it as -- we being the other pending proposal.

5 So cumulative impact is not required
6 in the absence of that and -- and I understand
7 Mr. Gerstman's basic argument about the
8 rationality for it in these circumstances, but
9 unless and until it comes out and is proposed
10 as a preliminary action by the agency, it's
11 somebody's idea. It has not germinated to the
12 point of a pending proposal. And the Court of
13 Appeals' decisions and a whole line of cases
14 support that, and we'll be glad to brief that
15 at the appropriate time.

16 MR. GERSTMAN: A little different
17 issue here, your Honor. Far be it for me to
18 challenge Mr. Ruzow's understanding of the
19 cumulative impact issue under SEQRA, but many
20 of those cases don't involve the same agency
21 that is reviewing a project under SEQRA from
22 an Applicant, and undertaking a project and
23 reviewing it under SEQRA. And there's, I
24 think, a very different situation here.

25 We have PowerPoint presentations that
(OPENING REMARKS - ISSUES CONFERENCE)

□

1 Mr. Lanza, as a part of the FOIL response, Vol.1-129
2 made in public meetings concerning the
3 proposed expansion. There are newspaper
4 articles concerning releasing the UMP, I
5 believe, as early as 2002; would that be
6 correct?

7 MS. KREBS: Yes, that's correct.

8 MR. GERSTMAN: 2002. So this is a
9 proposal that the agency has -- has put on a
10 public table for consideration; for whatever

11 reason, hasn't made it out the door yet. I
12 also believe that there may even be budget
13 proposals that have endorsed this expansion
14 which -- which we'll also seek Freedom of
15 Information Law requests to the Division of
16 Budget.

17 ALJ WISSLER: Mr. Gerstman, I -- I
18 would just ask that you make your argument on
19 papers to me, and since I wrote part of it for
20 you, it shouldn't take you that long; right?

21 MR. GERSTMAN: Thank you, Judge.

22 ALJ WISSLER: Not a problem.

23 Okay. Any other preliminary matters?

24 Do we want to discuss wastewater? Is that

25 where we are?

(OPENING REMARKS - ISSUES CONFERENCE)

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1 MS. MELTZER: Yeah.

2 MR. GREENE: Yes, your Honor.

3 ALJ WISSLER: All right.

4 First issue we are going to address

5 are those that are related to wastewater

6 treatment at both wildacres and Big Indian?

7 MR. GREENE: Correct.

8 ALJ WISSLER: Okay. All right. Who

9 are you, for the record, please?

10 MR. GREENE: My name is Daniel Greene,
11 representing the City of New York.

12 And just to clarify, these are issues

13 5 and 6 in our petition for party status.

14 These are technical wastewater issues which --

15 which we must address before the SPEDES

16 permits are issued. They involve the phase of
17 the SPEDES permit, but they are very technical
18 issues.

19 For its offer of proof, the City will
20 be offering the testimony of Brenda Drake, who
21 is seated beside me here.

22 And Ms. Drake, for the record, will
23 you just tell us your occupation and your
24 background, please.

25 MS. DRAKE: I'm a civil engineer with
(WASTEWATER ISSUES)

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1 the New York City Department of Environmental
2 Protection.

3 ALJ WISSLER: Ms. Drake, can I just
4 stop you for a minute?

5 would it be better to have her sit up
6 here so that folks behind you can hear you
7 and ...

8 (2:32 P.M. - BRIEF DISCUSSION OFF
9 THE RECORD.)

10 MR. GREENE: Before the shift-around,
11 the question was: Can you just describe your
12 background?

13 ALJ WISSLER: I'm sorry. Your name
14 is, for the record?

15 MS. DRAKE: Brenda Drake. I'm a civil
16 engineer with the New York State Department of
17 Environmental Protection. I've been with the
18 Department for eight years. I currently hold
19 a Pennsylvania professional engineering degree
20 that I received in 1990, and a New York
21 professional engineering license I received in

22 1993. I have approximately 20 years of
23 environmental engineering experience.

24 MR. GREENE: Okay, Ms. Drake, the
25 first issue we're going to testify --
(WASTEWATER ISSUES)

1 Ms. Drake is going to testify to is Issue 5 in ^{Vol.1-132}
2 our petition for party status, which deal with
3 hydraulic loading estimates, which are located
4 in Appendix 8 of the Draft SPEDES -- excuse
5 me, of the Draft Environmental Impact
6 Statement.

7 Ms. Drake, can you please explain what
8 hydraulic loading estimates are?

9 MS. DRAKE: Hydraulic loading
10 estimates are values given to different
11 situations for a restaurant or a residential
12 house to determine the hydraulic flows used to
13 size a wastewater treatment plant.

14 MR. GREENE: Okay. And where do --
15 where do hydraulic loading estimates come
16 from?

17 MS. DRAKE: There's a DEC standard
18 publication with the hydraulic loadings and a
19 table presented in the 1988 DEC standards.

20 MR. GREENE: And at this point, your
21 Honor, I'd like to request you to take
22 judicial notice of the design standard for
23 wastewater treatment works from 1988. It's a
24 DEC manual. We provided you a copy earlier
25 and I can provide copies to the other parties,
(WASTEWATER ISSUES)

1 if you wish.

2 ALJ WISSLER: Okay. I will take
3 notice of that and we'll make it City Exhibit
4 1.

5 (DEC DESIGN STANDARDS FOR WASTEWATER
6 TREATMENT WORKS 1988 RECEIVED AND MARKED AS
7 CITY EXHIBIT NO. 1, THIS DATE.)

8 MR. GREENE: Okay. I'm asking
9 Ms. Drake to look at -- could everybody look
10 at copies.

11 Ms. Drake, I'd like you to please
12 refer to page -- pages 10 through 12 of this
13 design manual, please.

14 MS. DRAKE: Yes. This is Table 3 of
15 the expected hydraulic loading rates for
16 different types of facilities, whether it be a
17 factory, a food service, hotels. It gives the
18 gallons per day per person, or gallons of flow
19 rate per unit. And there's different flow
20 rates for different application rates.

21 MR. GREENE: Okay. And why would
22 somebody use this chart?

23 MS. DRAKE: This chart establishes the
24 hydraulic loading for a wastewater treatment
25 plant for sizing your pumps and your tank
(WASTEWATER ISSUES)

1 capacities in a wastewater treatment plant,
2 and for establishing your discharge limits in
3 your SPEDES permit.

4 MR. GREENE: Have you reviewed the
5 Applicant's hydraulic loading estimates in
6 Appendix 8 of the DEIS?

7 MS. DRAKE: Yes, I have.

8 MR. GREENE: Can you please tell me
9 what you found when you reviewed those,
10 starting with Big Indian?

11 MS. DRAKE: Okay. They used, for the
12 banquet facilities or the ballroom, a flow of
13 3 gallons per day per seat versus using the
14 flow rate of 20 gallons per day for a banquet
15 facility. There is reference to the DEIS on
16 page 2-64, a reference where it states that a
17 200-seat ballroom facility will also be
18 available to country club members, hotel
19 guests, and to the private -- or public for
20 private functions such as weddings,
21 receptions, golf conventions and non --
22 nongolf seminars and lectures. And based on
23 the fact that it references wedding
24 facilities, it is felt that the banquet
25 facilities would be more appropriate at
(WASTEWATER ISSUES)

1 20 gallons per day versus 3 gallons per day^{Vol.1-135}
2 per seat.

3 MR. GREENE: How does this affect the
4 total hydraulic loading estimate per day from
5 Big Indian -- from this facility to the Big
6 Indian wastewater treatment plant?

7 MS. DRAKE: The three gallons per day
8 times the Big Indian -- actually, could I have
9 hydraulic Table 1?

10 MR. GREENE: Sure. (Indicating)

11 MS. DRAKE: Thank you.

12 MR. GREENE: (Tendering documents.)
13 I'm giving the witness now hydraulic Table 1,
14 which is in Appendix 8 of the DEIS. I can
15 provide copies to your Honor.

16 MS. DRAKE: Table 1 references the
17 ballroom at 200 seats at 300 -- three gallons
18 per day at 600 gallons per day total flow.
19 And if you were to use 20 gallons per day
20 times the 200, it would be 4,000 gallons per
21 day instead of 600 gallons per day. So it
22 would be an increase in the total flow for the
23 wastewater treatment plant.

24 MR. GREENE: Did you find similar such
25 issues in reviewing the wildacres wastewater
(WASTEWATER ISSUES)

1 treatment plant's hydraulic loading estimates? ^{Vol.1-136}

2 MS. DRAKE: Yes, I did. And in that
3 situation, it's 700 seats instead of 200, so
4 it's a larger significant impact to the flow
5 of the wastewater treatment plant.

6 MR. GREENE: would you like the chart
7 from wildacres as well to explain that?

8 MS. DRAKE: Yes.

9 MR. GREENE: This is the -- also from
10 the DEIS, Appendix 8. It's the wildacres
11 hydraulic loading estimate chart.

12 (Indicating)

13 MS. DRAKE: So on this one here, it's
14 700 gallons per day times three. They have it
15 at 2100 gallons per day. And if you were to
16 do it times 20 gallons per day, it would be
17 14 -- 14,000 gallons per day in flow for the

18 wastewater treatment plant.

19 MR. GREENE: And that's a -- so it's a
20 difference between 2,000 per day, which they
21 use in the DEIS, and 14,000 gallons per day
22 based, upon your estimates?

23 MS. DRAKE: Correct.

24 MR. GREENE: Okay. And I would just
25 like to put on the record that the references
(WASTEWATER ISSUES)

1 to the wildacres facility being used for ^{vol.1-137}
2 catering weddings is at 2-66 in the DEIS, and
3 at 2-18.

4 Ms. Drake, can you please explain what
5 effect these miscalculations have on the draft
6 SPEDES permits?

7 MS. DRAKE: Yes. The effluent limits
8 for the SPEDES permit would be lower than what
9 they actually would be at full capacity of the
10 wastewater plant. The pumps would be
11 undersized, the tanks would be undersized; and
12 the discharge limits of the SPEDES permit
13 would actually be higher, and therefore, have
14 an impact on the pollutant loadings calculated
15 from the discharge of the wastewater treatment
16 plant, which would, in turn, impact the TMDLs
17 and the pollutant loadings in the Ashokan
18 Reservoir.

19 MR. GREENE: And what percentage at
20 the wildacres plant does this omission
21 represent of the total -- of the current total
22 maximum --

23 MS. DRAKE: Eight percent.

24 MR. GREENE: I'd like to now move on
25 to -- I'd like to now move on to Issue 6 in
(WASTEWATER ISSUES)

1 our petition for party status. This issue Vol.1-138
2 deals with the irrigation pond system and the
3 wastewater discharges to them.

4 Under these draft SPEDES permits,
5 where is the Applicant permitted to discharge
6 wastewater?

7 MS. DRAKE: Outflow 1 is to surface
8 waters, either to Emory Brook or -- Birch
9 Creek or a tributary to Emory Brook. Outfall
10 2 is to the irrigation ponds both at Big
11 Indian and wildacres site.

12 MR. GREENE: Can you please describe
13 how the Applicant intends to use these
14 irrigation ponds?

15 MS. DRAKE: Irrigation ponds are
16 filled with wastewater, public water, drinking
17 water, and also some stormwater, and they're
18 to be used for irrigating the golf greens and
19 golf fairways.

20 MR. GREENE: Are the effluent
21 limitations to these irrigation ponds the same
22 as the effluent limitations to surface water
23 discharge -- for surface water discharges?

24 MS. DRAKE: No, they are not.

25 MR. GREENE: Can you explain -- are
(WASTEWATER ISSUES)

1 they less stringent or more stringent? Vol.1-139

2 MS. DRAKE: Less stringent.
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3 MR. GREENE: How are they different?
4 And to help her testify, I will -- I'm
5 giving her what's been marked as Exhibits 11
6 and 12, which is just -- which is pages from
7 the State Pollution Elimination System
8 Discharge Permits, page 3 of the Big Indian
9 permit.

10 ALJ WISSELER: You're talking about
11 Hearings' Exhibit 10?

12 MR. GREENE: Yes.

13 ALJ WISSELER: Okay.

14 MR. GREENE: Page 3 and page 5.

15 MS. DRAKE: Outfall 1, which is to
16 Birch Creek, has a BOD limits. It also has
17 nitrogen ammonia, and -- limits of 1.1;
18 whereas the outfall 2 to the irrigation ponds
19 does not have a BOD limit and it has a nitrate
20 limit of 20 milligrams per liter versus the
21 1.1 milligrams per liter.

22 MR. GREENE: Are the effluent
23 limitations to these irrigation ponds
24 comparable to effluent -- other wastewater
25 effluent limitations in the watershed?
(WASTEWATER ISSUES)

1 MS. DRAKE: Not ones that are going to
2 receive surface water.

3 MR. GREENE: Will the wastewater
4 that's discharged to the irrigation pond reach
5 surface waters?

6 MS. DRAKE: Yes. The DEIS states that
7 the spray heads from the irrigation pond are

8 not within 200 foot of any surface waters.
9 The DEP has located additional water courses
10 on site that are within 200 foot of the spray
11 heads for the golf greens. And also, the golf
12 greens that's described in the DEIS will have
13 six to eight inches of topsoil, crushed stone
14 and then the underdrain system. And it's
15 believed -- felt that the irrigation water
16 will go right through the topsoil to the
17 underdrains and its discharged directly to the
18 micropools, which then discharge directly to
19 the surface waters in the water course the DEP
20 has flagged as additional water courses.

21 MR. GREENE: Okay. And your Honor, at
22 this point, I'd like to just footnote
23 Ms. Drake's testimony. During the stormwater
24 portion, which was scheduled to actually go
25 first, we will provide extensive testimony on
(WASTEWATER ISSUES)

1 the underdrain system, also -- and also the Vol.1-141
2 water courses that -- that DEP has delineated
3 on the project site. However, Ms. Drake did
4 not perform those herself, she just based her
5 conclusions upon those analyses. So
6 therefore, we would just like to footnote her
7 testimony and make you aware that an expert
8 will later testify concerning the underdrain
9 to -- the water flow to the underdrains and
10 flowing into the water courses that DEP has
11 delineated.

12 MR. RUZOW: Your Honor, can I just --
13 just for a point of information for the

14 record, this isn't testimony. This is
15 argument at this stage.

16 ALJ WISSLER: Yes, that's right.

17 MR. RUZOW: Okay.

18 ALJ WISSLER: Yes, I made -- well,
19 yes.

20 MR. RUZOW: It's just --

21 ALJ WISSLER: The expert's position
22 here is for the convenience of the court
23 reporter.

24 MR. RUZOW: Right. No, I understand
25 that, but she's not sworn and this is just --
(WASTEWATER ISSUES)

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1 ALJ WISSLER: No, no.

2 MR. GREENE: This is to clarify the
3 record.

4 MR. RUZOW: Yes.

5 MR. GREENE: I'm sorry to sound so
6 formal.

7 MR. RUZOW: That's okay.

8 MR. GREENE: I just came up from the
9 City. You know, it's ...

10 ALJ WISSLER: They play -- play tough
11 down there.

12 MR. GREENE: And with that, I think --
13 unless you have anything else, I think we're
14 all set.

15 ALJ WISSLER: Nice job there,
16 Mr. Greene.

17 I'll take it whatever order you want.
18 It's your SPEDES permit. Do you want to --

19 staff, do you want to go first, or Applicant?

20 MR. ALTIERI: We were anticipating
21 Applicant going first.

22 ALJ WISSLER: Okay.

23 MS. BAKNER: Okay.

24 ALJ WISSLER: Ms. Bakner.

25 MS. BAKNER: I'm happy to do that.
(WASTEWATER ISSUES)

1 The first thing I want to talk about, your
2 Honor, as part of the argument as to why
3 neither of these two things are issues is that
4 neither of these issues, whether 5 or 6, is
5 substantive and significant.

6 what we have here is a SPEDES permit,
7 draft permit, that's been put forth by staff,
8 even revised by staff, and which presents a
9 prima facia case that we meet the regulatory
10 standards for a discharge -- for discharges;
11 discharge for Big Indian to Birch Creek, a
12 discharge from Big Indian, in the alternative,
13 to an irrigation pond for the purposes of
14 recycling and reusing treated effluent. The
15 other permit, similarly for wildacres, is to a
16 tributary of the Emory Brook or the irrigation
17 pond, again, to make sure that we take full
18 use in recycling of the treated effluent.

19 Our record on this matter is
20 extensive. And really, the purpose of moving
21 to an adjudicatory hearing on an issue is if
22 there is a dispute about facts that are
23 substantive that would lead to a change in the
24 permit or a permit denial or a condition to

25 the permit. And again, we'd submit that we
(WASTEWATER ISSUES)

1 don't have that situation with either of these ^{Vol.1-144}
2 very technical issues.

3 Our record is the Draft Environmental
4 Impact Statement, Volume 1, pages 2-26 through
5 2-31 and 2-91, as well as an extensive
6 discussion in section 5.5 of the alternative
7 wastewater disposal methods that were
8 considered for this project as a whole. And
9 I'd like to get back to that in the future
10 because there are issues raised by the
11 proximity of the Pine Hill's wastewater
12 treatment plant operated by the City of New
13 York which I think is relevant to the issue of
14 wastewater in general.

15 In addition, we have DEIS volume 2
16 which contains our application for the SPEDES
17 permits, as well as DEIS Volume 4, Appendix 8,
18 which contains conceptual wastewater design
19 reports. These are not final design reports.
20 These are conceptual design reports for the
21 wastewater.

22 In addition to that, we have DEIS
23 Volume 6, Appendix 16, which provides
24 extensive data on the use of treated
25 wastewater for golf course irrigation and why
(WASTEWATER ISSUES)

1 generally it's a good idea. And it also ^{Vol.1-145}
2 notes, as it does in the DEIS, that this is
3 used in Lake Placid and other areas in New

4 York State in addition to other states.

5 The first allegation that I would like
6 to cover is DEP's allegations that the
7 discharges from Wildacres' and Big Indian's
8 wastewater treatment plants to the irrigation
9 ponds should be subject to the same effluent
10 limitations and monitoring requirement as the
11 discharge to the surface waters.

12 Now, there's two -- two important
13 points here. One is, we're proposing one
14 method of wastewater treatment. The method of
15 wastewater treatment does not change depending
16 on whether we're going to Outfall 1, which is
17 the surface water, or Outfall 2, which is the
18 irrigation pond. So from the Applicant's
19 perspective, we've proposed a method of
20 wastewater treatment that meets DEC and DEP's
21 requirement for tertiary treatment within the
22 watershed. And in fact, we're -- you know,
23 we're presenting a tried and proven technology
24 which even DEP's consultants, EA, indicate
25 meet the requirement. So there's no question
(WASTEWATER ISSUES)

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1 that what we're proposing meets the
2 requirements.

3 And it is accurate to state that the
4 Department has put out a draft SPEDES permit
5 which has different limitations for the
6 irrigation ponds as opposed to the surface
7 waters. And I'm sure that the Department
8 feels that is appropriate and is in accordance
9 with their regulations.

10 From the Applicant's standpoint, we
11 really could care less. We're happy to have
12 the same standards apply to the irrigation
13 ponds as they apply to the surface water
14 discharges because, again, we have one method
15 of treatment, one method of effluent that's
16 being discharged, regardless of wherever it
17 goes. So from our perspective, this isn't an
18 issue, substantive, significant or otherwise.

19 And there's a couple ways to resolve
20 this issue. One is, the Department could
21 amend the permit. We have no objection to
22 that. The other is, they could require us to
23 use the same method of treatment regardless of
24 our discharge. We have no objection to that
25 either, your Honor.

(WASTEWATER ISSUES)

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1 Now, getting back to the issue of the
2 wastewater treatment plant, I guess -- I guess
3 what we want to note here for the record is
4 that several parties that commented during the
5 public comment period indicated that they
6 thought a more appropriate alternative for the
7 treatment of the wastewater for the Big Indian
8 plant was, in fact, the existing Pine Hill's
9 wastewater plant that is owned and operated by
10 the City pursuant to a SPEDES permit.

11 And we just want to make sure that
12 it's -- it is on the record that that permit,
13 as we've described in our DEIS, is for roughly
14 a half a million gallons per day of flow. And

15 although estimates vary, apparently the actual
16 discharge is approximately 85,000 gallons per
17 day, inclusive of the waste loading
18 -- wastewater loading from the seasonal use of
19 the Belleayre Ski Center.

20 So from our perspective, we note that
21 EPA has suggested that it would be more
22 appropriate for us to use that as an
23 alternative. It is indeed an alternative that
24 we've covered in the Draft Environmental
25 Impact Statement. And what I'd like to do is
(WASTEWATER ISSUES)

1 just mention briefly the letters on this, your
2 Honor, so that they're clear in the record.

3 There's a letter from Walter Mugdin of
4 EPA to Alec Ciesluk dated March 23rd, 2004,
5 and I quote, "EPA recommends that if the
6 projects goes forward, the nearby Pine Hill's
7 facility be reconsidered for treating
8 wastewater from the Big Indian portion of this
9 site. We believe that, consistent with the
10 roles of the FAD, the filtration avoidance
11 determination, it is environmentally prudent
12 to use existing treatment capacity instead of
13 building an entirely new treatment facility in
14 the watershed."

15 The other advantage that this could
16 potentially offer is, there's a real positive
17 environmental benefit from reuse of treated
18 effluent, particularly effluent that's not
19 only treated to secondary levels, but tertiary
20 levels. And we've indicated to DEP and also

21 in the Draft Environmental Impact Statement
22 that we would be willing, if they would be
23 willing to treat our wastewater, to take the
24 effluent from their treatment process and use
25 it in our irrigation pond. So from our
(WASTEWATER ISSUES)

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1 specific perspective, this is a -- a
2 substantially acceptable alternative.

3 We understand that the DEP has taken
4 sort of a different approach to this, and
5 there's letters in the record, one dated
6 January 6th, 2003 from Mark Hoffer, who is
7 with the Department --

8 ALJ WISSLER: What's the date on it?
9 What's the date of that letter?

10 MS. BAKNER: It is January 6th, 2003
11 from Mark Hoffer, one of the attorneys with
12 DEP, to Dan Ruzow, a letter dated June 21st,
13 2002 to Alex Ciesluk from Jeff Graf of DEP,
14 and then a July 12th, 2004 letter to Alex
15 Ciesluk from Jeff Graf. In all these letters,
16 DEP asserts that they do not wish to treat the
17 wastewater from the facility.

18 So although we've included it as an
19 alternative, and we think it provides some
20 pretty important environmental benefits over
21 a -- certainly over the existing discharge by
22 the City into Birch Creek, you know, that's --
23 that's the status of that.

24 But to get back to the point raised by
25 the City, we see this as essentially a
(WASTEWATER ISSUES)

1 nonissue. The discharge of the treated -- the
2 effluent will be treated to the same
3 standards, whether it goes to the irrigation
4 pond or it goes to the creek. We have no
5 objection to either a condition to that effect
6 or the imposition of standards that are the
7 same for both.

8 Number three, we've just heard one
9 view of how one estimates -- and I emphasize
10 the word "estimates" -- annual loadings,
11 hydraulic loadings for a wastewater treatment
12 facility. And what I'd like to do is call up
13 our two experts -- maybe if they could just
14 come forward -- Patrick Lawler, he's with
15 Lawler, Matusky & Skelly, and he'll describe
16 his qualifications for the record -- and Gary
17 Kerzic, P.E., with Delaware Engineering, who's
18 also done substantial work in the watershed.

19 why don't you guys come over here --

20 ALJ WISSELER: You guys want to sit
21 together up there?

22 MS. BAKNER: Yeah, so that -- so she
23 can hear you.

24 ALJ WISSELER: Ms. Bakner, as an aside,
25 did you want to put those letters in that you
(WASTEWATER ISSUES)

1 made reference to?

2 MS. BAKNER: I believe all those
3 letters are, in fact, in the Draft
4 Environmental Impact Statement.

5 ALJ WISSELER: Are they? Okay.

6 MS. BAKNER: If they're not, we'll --
7 we'll be sure and introduce those.

8 ALJ WISSLER: Okay.

9 MR. KERZIC: My name's Gary Kerzic,
10 K-E-R-Z-I-C, and I'm with Delaware
11 Engineering.

12 MR. LAWLER: Patrick Lawler,
13 L-A-W-L-E-R, with LMS Engineers.

14 MS. BAKNER: Just to start out, to get
15 this out of the way, Gary, what's your
16 experience and Delaware Engineering's
17 experience in the watershed on projects?

18 MR. KERZIC: Well, to start, I'm a New
19 York State licensed professional engineer with
20 almost 23 years of experience.

21 ALJ WISSLER: You've got to keep your
22 voice up.

23 MR. KERZIC: I'm a civil engineer with
24 Delaware Engineering. Our role on this
25 project has been to do the conceptual
(WASTEWATER ISSUES)

1 engineering for the water and the wastewater
2 systems. Vol.1-152

3 Delaware Engineering has extensive
4 experience with wastewater projects in the New
5 York City watershed, some on the order of 26
6 projects that have been completed or are in
7 the process of being completed, and those
8 include both upgrade projects as well as new
9 infrastructure projects.

10 MS. BAKNER: Okay. And

11 Patrick Lawler?

12 MR. LAWLER: I'm a -- basically a
13 civil engineer. I've been practicing at
14 consulting environmental engineering since
15 1966. I've been a professional engineer in
16 New York State since 1969, and our firm, LMS,
17 also has been engaged in several of the
18 watershed projects, both upgrade projects and
19 community infrastructure projects, and I have
20 been involved in every one of those that --
21 that LMS has done.

22 MS. BAKNER: Thank you very much.

23 Gary, what I'd like you to do is talk
24 about how you calculated -- how you estimated
25 the hydraulic loading for the wastewater
(WASTEWATER ISSUES)

□

1 treatment plants.

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2 MR. KERZIC: These are expanded
3 versions of Table 1 in Appendix 8 of the DEIS.
4 One is --

5 ALJ WISSLER: Is this what the City
6 gave us?

7 MS. BAKNER: Yes.

8 MR. KERZIC: Yes. I just blew it up
9 for demonstration sake.

10 One is for wildacres, one is for Big
11 Indian, and these are the hydraulic loading
12 estimates. I just want to describe what the
13 tables include.

14 The first column includes the
15 different types of facilities for each
16 development. The second column includes what

17 we call different units. For instance, in the
18 case of a hotel, it would -- would be a room.
19 In the case of a restaurant, it would be a
20 seat. The third column indicates the maximum
21 number of units for each of those facilities;
22 so in the case of a hotel room, the maximum
23 number of rooms for the hotel, and so on down
24 the line. The next column includes the daily
25 flow. Those are per capita flows that were
(WASTEWATER ISSUES)

1 taken from the 199 -- excuse me, 1988 DEC^{Vol.1-154}
2 design standard that was mentioned previously.
3 And the final column is just a mathematical
4 total of the number of rooms. There's a
5 number of units times the unit flow.

6 I want to point out that the DEC 1988
7 design standards include facilities which
8 don't necessarily line up exactly with the
9 facilities that we have at -- at this
10 development. So there's judgment involved in
11 trying to determine how we fit our facilities
12 with the facilities that are included in the
13 Table 3 of the DEC manual.

14 I want to mention in our estimate of
15 the -- what we determined to be the average
16 daily flow is, we took the maximum number of
17 units. We took -- we assumed that the
18 facilities would be occupied to the maximum;
19 the hotel rooms would be occupied to the
20 maximum, the restaurant seats would be
21 occupied to the maximum and so on. And we

22 defined that as our average daily flow. So
23 that has a built-in overestimation in it.

24 If you were to look at just the
25 overnight lodging units, we have information
(WASTEWATER ISSUES)

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1 that we've gotten from resort associations,
2 and this was information that was submitted to
3 the DEC with one of the water supply permit
4 applications; which indicates that typical
5 average occupancies for facilities, and this
6 lists particular facilities in Vermont, New
7 York and New Hampshire, for these particular
8 facilities, it indicated that the average
9 occupancy for the years from 1997 to 2003 was
10 53.1 percent. So you can see that by us
11 estimating an average daily flow of a hundred
12 percent, we have a built-in overestimation of
13 somewhere on the order of 40 percent or more.

14 If you were just to look at overnight
15 lodging units, which amount to -- which will
16 amount to almost two-thirds of the total
17 loading for each of the facilities, and you
18 assume that there's a 30 to 40 percent
19 overestimation there, that gives us
20 approximately a 30,000-gallon per day
21 overestimation.

22 So getting back to the issue of
23 whether or not we've adequately estimated a
24 ballroom facility, which we had estimated at
25 three gallons -- three gallons per seat per
(WASTEWATER ISSUES)

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1 day, or whether it's actually 20 gallons per
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2 seat per day, it doesn't make any difference
3 in our total estimate because we've
4 overestimated the -- the total average daily
5 loading for the facility as a whole.

6 MS. BAKNER: Okay. Do you have any
7 questions, your Honor, about that estimation
8 and how it was made?

9 ALJ WISSELER: No.

10 MS. BAKNER: Okay. Gary, talk a
11 little about what the annual average -- I
12 mean, what the average daily represents in
13 terms of is it a hard and fast number, is it
14 an estimation? Why is it relevant to the
15 design of the facility?

16 MR. KERZIC: Well, it's -- it's a
17 number that we use to design the facility,
18 actually the treatment units, the pumps and so
19 on. The actual treatment facility that we're
20 proposing to use is kind of what we would call
21 a package system, whereas it comes in sizes
22 and -- and it's not like you design for a
23 particular number. You pick a unit and that
24 unit is -- it's always a size larger than what
25 you need. So by design, you end up with an
(WASTEWATER ISSUES)

1 overdesign of your facility, if I'm making^{Vol.1-157}
2 myself clear.

3 MS. BAKNER: Well, describe the design
4 a little bit so it's clear why that's the case
5 in terms of the sand filters and things.

6 MR. KERZIC: Well, the design includes

7 an aeration basin -- actually three treatment
8 trains. One treatment train consists of an
9 aeration basin, a sand filter which provides
10 our tertiary treatment, and then disinfection.
11 Each treatment train can be operated
12 independently. The reason we do it that way
13 is that we can handle varying flows. We can
14 handle low flows by just operating one
15 treatment train. When the flows are higher,
16 we may use two or all three treatment trains.

17 The units that we've selected, as I
18 mentioned, are designed to meet DEP and DEC
19 standards, and it's also, as I mentioned, an
20 overestimation of -- of what we would need to
21 actually meet the flows.

22 MS. BAKNER: Gary, has DEP approved
23 designs just very similar or the same as the
24 ones that you're proposing for this facility?

25 MR. KERZIC: Delaware Engineering is
(WASTEWATER ISSUES)

1 actually working on a -- has just completed
2 the design of a similar facility for the
3 Village of Fleischmanns, which includes a very
4 similar process, and that's a facility that's
5 being funded by the DEP and I -- I'm not
6 working on it specifically, but my
7 understanding is that it's been approved, and
8 it's a very similar design to what we propose.

9 MS. BAKNER: What would be a reason
10 for not overdesigning the facility?

11 MR. KERZIC: If you overdesign a
12 facility and you don't receive an adequate

13 volume, it's more difficult to operate the
14 facility. It's a biological process and if
15 you can't treat the -- the wastewater because
16 you don't have enough volume, you need to
17 maintain that biological activity, you need
18 to --

19 ALJ WISSLER: Feed the bugs in it?

20 MR. KERZIC: Exactly. Feed the bugs,
21 add oxygen to keep it alive and so on. It
22 just -- it makes for a more difficult
23 operation if you design it --

24 ALJ WISSLER: Is there a minimum flow
25 you have to have for this unit?
(WASTEWATER ISSUES)

1 MR. KERZIC: Each of the units will ^{Vol.1-159}
2 handle about 50,000 gallons a day, so if we
3 were operating just one unit during initial
4 stages at low flows, it may be necessary to,
5 you know, feed the bugs.

6 ALJ WISSLER: Through backflow?

7 MR. KERZIC: I'm sorry?

8 ALJ WISSLER: Through backflow and
9 things like that?

10 MR. KERZIC: You can actually add
11 nutrients to it. Dog food is something that's
12 added to oxygenate the wastewater. You may
13 recycle it. But there are ways around it, but
14 that -- that's what we would do during the
15 initial stages of buildout until -- well, that
16 gets to a point where it's more imaginable.

17 MS. BAKNER: If you assume for a

18 second that DEP was accurate and you had
19 somehow not exercised your best judgment in --
20 in developing these estimates with respect to
21 the ballroom, would it have any impact on the
22 design of this facility?

23 MR. KERZIC: No, it wouldn't.

24 MS. BAKNER: Thank you very much.

25 And Mr. Lawler, if you could address
(WASTEWATER ISSUES)

1 whether there's any need for a change in the ^{Vol.1-160}
2 design flows that are permitted in the SPEDES
3 permit, I would very much appreciate it.

4 MR. LAWLER: I've reviewed the
5 estimates that Mr. Kerzic has made and I agree
6 that they are appropriately conservative for
7 this design. I think that -- I'd like to make
8 two major points. Number one, is that the
9 SPEDES permitted flow is the average daily
10 flow in the maximum month of flow over the
11 life of the permit, so that within that
12 maximum month, the concept of the SPEDES flow
13 recognizes that there will be some days when
14 the flow might be higher than that average for
15 the 30 days and some days when it would be
16 lower. And I think it's not realistic to
17 -- it's not effective use of resources to
18 assume that every one of those facilities will
19 be loaded to its capacity every -- all 30 days
20 of that month that the maximum flow occurs.
21 And therefore, I'm in agreement with the
22 estimate that was made. I'm in agreement that
23 the flow is probably estimated quite a bit

24 higher than the actual flow that will occur.

25 The second point is that the -- the
(WASTEWATER ISSUES)

1 treatment plant is not only designed for Vol.1-161
2 hydraulic load, and as Mr. Kerzic has pointed
3 out, there's also a daily hydraulic load and a
4 maximum hourly hydraulic load that it's
5 designed for, but it's also designed for an
6 organic load. And I reviewed the organic
7 loadings that Mr. Kerzic has made, and I think
8 that they are also on the conservative side.
9 So I think there's actually double
10 conservatives built in. It's designed and I
11 think that the SPEDES permit flow should stay
12 where it has been estimated.

13 MS. BAKNER: Your Honor, do you have
14 any questions for Mr. Lawler?

15 ALJ WISSLER: No.

16 MS. BAKNER: Thank you very much.

17 ALJ WISSLER: Comments from staff?

18 MS. KREBS: Your Honor, this is
19 William Mirabile, he's an environmental
20 program specialist in the Division of water,
21 DEC.

22 Mr. Mirabile, you were responsible for
23 drafting the SPEDES permits?

24 MR. MIRABILE: That's correct.

25 MS. KREBS: And as to -- I'm going to
(WASTEWATER ISSUES)

1 take them out of order. As to the New York Vol.1-162
2 City DEP, issue number 6 --

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MR. MIRABILE: Okay.

MS. KREBS: -- there was a question as to using different standards and why that was done.

MR. MIRABILE: Okay.

MS. KREBS: Did you want to comment on that?

MR. MIRABILE: Yeah, I would like to comment on that. Whenever we develop a permit limit that we -- a couple of very key considerations. Number one, the character and the nature of the wastewater -- of course, there we're talking about sanitary wastewater -- you have typical parameters of concern with sanitary wastewater. You have different parameters of concern with industrial wastewater, for example.

Now, with sanitary wastewater -- well, the other key consideration when you're developing a permit limit is the classification and the type of receiving water. In this case, like for instance, Big Indian has a -- the receiving water is Birch
(WASTEWATER ISSUES)

Creek, has a classification of BTS. That's one of the highest, most stringent classifications that you can have, and B -- Class B, TS meaning trout spawning.

So when we develop permit limits, we consider, again, the nature of the wastewater and the classification of the receiving water.

The criteria, in other words, the

9 regulatory limits, the ambient standards
10 are -- stringency is based upon the
11 specification. So in this case, we have
12 direct discharge wastewater, treated
13 wastewater from outflow 001. We have
14 essentially -- we have this exact same treated
15 wastewater going to outflow 002, which goes to
16 the irrigation ponds.

17 well, do we -- what are we looking at
18 when we are talking about the limits? We're
19 looking at the classifications. We're looking
20 at protecting the receiving water. Okay. So
21 we have -- we have a very high level of
22 protection required with a stream that
23 receives any -- any kind of wastewater input
24 that is a B classification, trout spawning
25 stream.

(WASTEWATER ISSUES)

1 Do we have these same levels of ^{Vol.1-164}
2 stringency requirements for irrigation water,
3 treated wastewater going to a man-made
4 engineered pond that's basically a retention
5 or holding pond for -- as part of a
6 distribution system? We don't have -- we
7 don't have the aquatic protection requirements
8 for the irrigation pond and the downstream,
9 the fate of the irrigation water.

10 Another consideration is the
11 irrigation water, when we develop these
12 permits, we consider the irrigation water
13 discharges to groundwater. Okay. So you have

14 different criteria and classifications for
15 groundwater discharge. In this case, I
16 believe the -- the classification is GA, A
17 classification, G meaning groundwater. Well,
18 again, you don't have -- you have a totally
19 different set of criteria to consider when
20 you're discharging to groundwater.

21 Let me just take some parameter --
22 parameters off here to exemplify what I'm
23 saying here. CBOD or BOD5, and the same with
24 TSS, total suspended solids. These are
25 oxygen -- oxygen-demanding parameters. Okay?
(WASTEWATER ISSUES)

□

1 when they are discharged to a receiving water, ^{Vol.1-165}
2 they're going to pull oxygen out of the water
3 column. So therefore, we are concerned about
4 the aquatic life in the receiving water, so we
5 limit BOD and TSS and dissolved oxygen in the
6 discharge to the surface water.

7 Are we concerned about that with
8 irrigation water? No, we're not. Nitrogen
9 ammonia -- and by the way, nitrogen ammonia
10 and nitrates are totally different parameters.
11 They have their own separate considerations.
12 Ammonia is toxic. Nitrates, again, they --
13 the nitrogen series, it's an oxygen-demanding
14 consideration. As nitrogen stabilizes, it
15 uses oxygen.

16 So nitrates are a concern for drinking
17 water -- or excuse me, for groundwater.
18 There's a standard -- nitrate standard for
19 groundwater. We have nitrates in the

20 irrigation water discharge, Outflow 002. We
21 have ammonia, CBOD. This settles -- a total
22 suspended solid to the discharge to the
23 receiving water, Birch Creek, because we're
24 concerned about the aquatic life in Birch
25 Creek.

(WASTEWATER ISSUES)

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1 So there are substantial differences
2 in the receiving water and substantial
3 differences in the considerations for your
4 discharge, and that's why we have different
5 limits.

6 Here again -- lastly, to wrap up,
7 irrigation water, a concern that we have is
8 with -- of course it can come into contact
9 with human beings, so we have, you know,
10 bacteriological limits, okay, fecal and total
11 coliform. That's as much of a Health
12 Department concern as it is a DEC concern, so
13 we have -- we have coliform limitations in
14 both the Outflow 001 and Outflow 002 because
15 it's a concern for both irrigation water and
16 the aquatic life and down, and human contact.

17 So lastly, we have the New York City
18 DEP criteria which specified what we had to
19 put into the limits for the surface water
20 discharge. These criteria do not apply to
21 irrigation water. The criteria in the Outflow
22 001 discharge to the surface waters are -- are
23 right out of the New York City DEP MOU,
24 Memorandum of Understanding, and they cover

5-25-04crossroadsF
TSS, total phosphorous and BOD, as well as
(WASTEWATER ISSUES)

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enteroviruses and GRD.

So I don't see any justification for making an issue out of the differences in limitations. They're totally different considerations.

MS. KREBS: All right. And your Honor, I think that based on what Ms. Bakner had said, it sounds like it isn't an issue anyway from the Applicant's perspective. We can rewrite the permit.

In that case, we'll be more stringent with what you've written out?

MR. MIRABILE: We can -- that's easy to do.

MS. KREBS: So the Department staff's position is that that doesn't sound like it's a substantive, nor a significant issue.

Okay. Now. Mr. Mirabile, turning to issue number 5, the New York City DEP issues, you received the SPEDES application and then --

MR. MIRABILE: Right.

MS. KREBS: -- and then what happened; you applied the 1988 standards?

MR. MIRABILE: No. Well, typically as
(WASTEWATER ISSUES)

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part of the SPEDES permitting process, we receive an application, an NY II(c) application, and the applicant provides us with their flow, their hydraulic loading

5 estimate. We don't normally look too deeply
6 into that, if at all. We go with the -- the
7 number that's provided to us. It's as simple
8 as that. We can look more deeply into it if
9 it's necessary and we think it's justified,
10 but we don't normally as part of the
11 permitting process. We go with the number
12 that's provided in the application, and that's
13 what we did here. I think, in fact, the --
14 the flows were changed once or twice, the
15 estimates were changed once or twice, if I
16 recall right.

17 MS. KREBS: And you've heard the other
18 experts speaking today. You heard talk about
19 typically overestimating or applying
20 conservative numbers chosen. Was there
21 anything you heard that would lead you to
22 believe that these numbers were not correct
23 that were chosen?

24 MR. MIRABILE: Without having looked
25 at the -- at the particulars in the DEIS, just
(WASTEWATER ISSUES)

1 from the presentation I heard, it sounded to^{Vol.1-169}
2 me, in my judgment, that there was an
3 abundance of conservatism in their estimate,
4 which I think the numbers probably are okay
5 based upon -- that's common engineering
6 practice. You always use conservative numbers
7 and overestimates, so ...

8 And by the way, the only parameter
9 that -- for which the hydraulic loading would

10 make a difference is phosphorous. Certainly
11 not the least important parameter.
12 Phosphorous in the permit is expressed -- the
13 limit is expressed as a load, kilograms per
14 day, kilograms per year, from TMDL. All of
15 the other limitations are simply concentration
16 limits and milligrams per liter. So the --
17 the loading rate doesn't affect those limits
18 at all. It only effects phosphorous. And
19 it's not that it's not important, it is
20 important. So it's only one parameter that's
21 affected.

22 MS. KREBS: Your Honor, do you have
23 any questions?

24 ALJ WISSLER: I don't think so.

25 Mr. Greene?
(WASTEWATER ISSUES)

1 MR. GREENE: Yes. In terms of issue Vol.1-170
2 5, the hydraulic loading estimates, we would
3 just like to respond that it's standard
4 engineering practices to use conservative
5 estimates when you're sizing the wastewater
6 treatment plant. The Applicant did nothing
7 more or less than it was required to do under
8 standard engineering practices.

9 Secondly, as Ms. Drake testified, the
10 14,000 gallons per day flowing from wildacres
11 that was not contained in the SPEDES permit
12 will affect the SPEDES, the phase of the
13 SPEDES permit and will also affect the sizing
14 of certain equipment in the wastewater
15 treatment plant, as our expert testified to.

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As far as the --

ALJ WISSLER: When you say it will affect the phase of the SPEDES permit, what do you mean?

MR. GREENE: It will affect --

ALJ WISSLER: The total flow from it?

MR. GREENE: It will affect the daily flow, the daily flow that's currently listed in the SPEDES permit.

ALJ WISSLER: Okay.
(WASTEWATER ISSUES)

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MR. GREENE: And the phosphorous loading, as pointed out by staff's expert.

As far as the draft -- as far as the effluent limitations are concerned, the staff has testified that its justification for treating them differently was based upon its belief that the wastewater would be going to groundwater and not to surface waters. However, as I stated, DEP -- we will testify that this wastewater from the irrigation ponds will reach surface waters through the underdrain system and through the spray irrigation being located within 200 feet of a water course; therefore, their -- that assertion it will filter to groundwater is incorrect.

But we would like to note that it seems here that this issue can be stipulated to between the parties and that the -- that the draft SPEDES permit can be modified as the

21 Applicant and staff don't seem to object to
22 that modification to harmonize the two
23 effluent limitations to the surface waters and
24 the irrigation ponds.

25 ALJ WISSLER: So let me ask you this:
(WASTEWATER ISSUES)

1 So it's the City's position that if the ^{Vol.1-172}
2 Applicant and staff agree that there will be
3 one -- the same effluent limits across the
4 board; right --

5 MR. GREENE: Yes.

6 ALJ WISSLER: -- that that eliminates
7 that issue?

8 MR. GREENE: Correct.

9 ALJ WISSLER: But the City's saying --
10 if I understand the Applicant's expert,
11 they -- this thing has been conservatively
12 designed; right? There are essentially three
13 components to it so that even if there was an
14 error, 14,000-gallon error with respect to --
15 is it wildacres?

16 MS. BAKNER: Yes.

17 ALJ WISSLER: So I mean, if that
18 was -- even if you crank in that factor, given
19 the fact that you've got -- you've got a flow
20 rate that is maybe twice -- a design flow rate
21 that's maybe twice of what may actually flow
22 through the plant, that that -- that that
23 14,000-gallon increment does not have such an
24 egregious impact. Did I get that right?

25 MS. BAKNER: Yes, that's correct.
(WASTEWATER ISSUES)

1 ALJ WISSLER: Okay.

2 So I mean, how does it still remain on
3 the table as an issue that we ought to be
4 looking at?

5 MR. GREENE: Well, as I stated when I
6 started, this is a highly technical issue. We
7 have established in the DEIS, however, that
8 these facilities will be used for banquets and
9 for the catering, therefore, the hydraulic
10 loading estimate should be performed with the
11 correct numbers, which is 20 gallons per day
12 as compared to 3 used by the Applicant. To
13 me, that isn't conservative -- isn't a
14 conservative estimate to change a hydraulic
15 loading estimate from 3 -- that should be
16 20 -- to 3 gallons per day. And it will
17 affect -- as our expert testified, it will
18 affect sizing of certain equipment in the
19 wastewater treatment -- in the wildacres
20 wastewater treatment plant. It's ten percent
21 of the daily flow to that plant if it's
22 modified.

23 Therefore, we feel that that is a
24 significant issue and it does affect the
25 SPEDES permit. It does -- as DEC testified,
(WASTEWATER ISSUES)

1 does affect phosphorous loading, and any
2 consideration of the TMDL should be based upon
3 the best -- the best estimates possible. And
4 therefore, we feel that it's important that
5 this is considered by the Applicant and

6 therefore, it is substantive and significant.

7 ALJ WISSLER: Can you tell me in what
8 way that the proposed design inadequate? I
9 mean, if you crank in that extra flow.

10 MR. GREENE: Yeah. We don't -- we
11 just --

12 ALJ WISSLER: I mean, do we need a
13 bigger pipe? Do we need a -- do we need
14 another RBC unit on there? What's missing in
15 this -- what's missing in this plant that
16 ought to be there if your flow numbers -- we
17 use your flow numbers?

18 MR. GREENE: You know, we haven't
19 -- first of all, we haven't designed this
20 plant. We just want to make sure that this
21 is -- that the numbers are correct and that
22 the wastewater treatment plant can handle the
23 flows from the facilities. And based upon --
24 based upon this number, it doesn't seem that
25 they can for the wildacres plant. It's
(WASTEWATER ISSUES)

1 14,000 gallons per day. And our expert could
2 perhaps elaborate on what equipment would
3 be -- would need to be resized.

4 ALJ WISSLER: I'll let you do that if
5 you want.

6 why don't we take a break first. It's
7 20 after 3 right now. We'll reconvene at
8 3:30. Ten minutes.

9 (3:20 - 3:35 P.M - BRIEF RECESS
10 TAKEN.)

11 ALJ WISSLER: Were you done? You
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12 had --

13 MR. GREENE: If our expert can just
14 provide a one-minute -- a one-minute closing
15 for argument, then we'll be done.

16 ALJ WISSLER: Sure. You can do it --
17 you want to do it right from there? I
18 mean ...

19 MR. GREENE: Yeah, that's fine. Just
20 very quick.

21 ALJ WISSLER: If I could have quiet,
22 please. We have reconvened.

23 MS. DRAKE: I just wanted to say for
24 the record that we're just -- we're just
25 addressing it as a technical calculation, that
(WASTEWATER ISSUES)

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1 they use the conservative figures for
2 everything else. I didn't understand where
3 the 3 gallons per day came from. If they're
4 using it for a wedding facility, then I would
5 understand it to be a banquet of 20 gallons
6 per day. It's just an issue of clarifying
7 where the 3 gallons came from or using the
8 correct application rate. You don't cite a
9 four-bedroom house based on two people living
10 in the house, but on four bedrooms.

11 ALJ WISSLER: Okay. I understand your
12 analysis and I appreciate your analysis, but
13 you've heard the Applicant's experts. Does
14 this permit need to be changed? Does the
15 proposed plant need to be changed in some way
16 as a result of the -- of the change in figures

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that you have highlighted?

MS. DRAKE: Probably not any of the components, but the total flow should reflect what the possible maximum daily flow could be.

ALJ WISSLER: Okay. So instead of 140 and change, it should be 140 and change plus 14,000 --

MS. DRAKE: Correct, for the --

ALJ WISSLER: -- for the water? Okay.
(WASTEWATER ISSUES)

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All right.

MS. BAKNER: One final word, if we could, from Mr. Matusky on the issue --

MR. LAWLER: Lawler.

MS. BAKNER: Oh, I'm sorry, Mr. Lawler; with respect to the flow issue.

ALJ WISSLER: Okay.

MR. LAWLER: It's my belief, having seen what was done -- first of all, I'd like to reiterate that I think the treatment plant flows applied for in the SPEDES permit are conservative, coupled with the conservative BOD loadings that we used for that design; but with respect to the phosphorous, it's true that right now in the draft SPEDES permits, there are phosphorous limits that are expressed both as a concentration and as a mass loading.

It's my belief -- not that I work for the DEC -- but if the flows in the SPEDES permit were to be applied for higher than they are now, that .5 milligrams per liter which

23 has been applied throughout the watershed for
24 flows greater than 50,000 would also have been
25 applied and the allowable mass loading which
(WASTEWATER ISSUES)

1 would -- would be that much higher than the ^{Vol.1-178}
2 Applicant has currently agreed to. So I think
3 that raising the flows or -- or leaving the
4 flows where they are and with that, the mass
5 loading of phosphorous, it's more protective
6 of the environment than raising the flows.

7 ALJ WISSLER: Okay. So bottom line
8 for you is that even if -- even if you would
9 agree with your colleague from the City, that
10 a different estimate for the banquet
11 facilities could have been used, that as a
12 practical matter, this permit, as written, is
13 adequate?

14 MR. LAWLER: Yes, I think it is.

15 ALJ WISSLER: Anything else?

16 MS. KREBS: Yes, your Honor.

17 Department staff, we had one more person we
18 wanted to comment on this issue.

19 ALJ WISSLER: Sure.

20 MS. KREBS: Shayne Mitchell,
21 S-H-A-Y-N-E, Mitchell, M-I-T-C-H-E-L-L.

22 MR. MITCHELL: Your Honor, we've
23 evaluated the comments made by the City and --

24 ALJ WISSLER: Mr. Mitchell, who are
25 you?

(WASTEWATER ISSUES)

1 MR. MITCHELL: I'm the chief of the ^{Vol.1-179}

2 wastewater permit section, the Division of
3 Water in Albany.

4 ALJ WISSLER: Okay.

5 MR. MITCHELL: As I said, we've
6 considered the comments made by the City, and
7 I haven't heard anything that would cause me
8 to agree with using the 20-gallon-per-day
9 value versus the 3-gallon-per-day value. But
10 for the sake of argument, even if we accepted
11 that value, I would agree that -- with the
12 Applicant that the methodology used to come up
13 with the total flow for the proposed projects
14 is very conservative and that we don't believe
15 that there's a need to change the flow limits
16 in the permits at this time.

17 And furthermore --

18 ALJ WISSLER: And in fact, with
19 respect to phosphorous, the permit, as
20 written, is more protective than it would be
21 if you altered that flow; is that what I
22 understood Mr. Lawler to say?

23 MR. MITCHELL: That could be. I'm
24 not --

25 ALJ WISSLER: Okay.
(WASTEWATER ISSUES)

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1 MR. MITCHELL: I don't want to
2 interpret his --

3 ALJ WISSLER: And I think Mr.
4 Mirabile made some reference to changing the
5 flows as affecting --

6 MR. MITCHELL: Well, it is -- it is
7 likely that if the flow limit were to increase

8 in the permit, one possible outcome would be
9 to increase the phosphorous limit by the same
10 ratio, but we don't believe there's a need to
11 raise the flow limit in the permit. The
12 permits -- both permits include limitations on
13 flow, so the permits constrain --

14 ALJ WISSLER: And given the fudge
15 factor that that flow -- total flow is almost,
16 under one scenario, like 50 percent greater
17 than it needs to be, am I -- did I get that
18 right? Okay. It's 50 percent greater than it
19 needs to be. Even if we're out 14,000 gallons
20 for a facility, this permit still covers that
21 flow, even if we were wrong?

22 MR. MITCHELL: That's the basic idea,
23 yes.

24 ALJ WISSLER: Anything else? Anything
25 else on this issue?
(WASTEWATER ISSUES)

1 Just as an aside, because I don't --
2 for the sake of clarity of the record, there
3 was a reference by Ms. Bakner to a letter from
4 Mark Hoffer. For the issues that you have --
5 that you have addressed, sending stuff to Pine
6 Hill isn't one of them, so in that sense, it's
7 not related. But Ms. Bakner did mention
8 correspondence with the City with respect to
9 the Pine Hill plan. Is there any comment the
10 City wants to make with respect to
11 Ms. Bakner's statements?

12 MS. MELTZER: No, your Honor. Thank

13 you.

14 ALJ WISSLER: Okay. All right. If
15 there is nothing else on the issue of
16 wastewater, we will move on.

17 MS. BAKNER: Your Honor, I have copies
18 of those letters for you just in case they're
19 not in the DEIS.

20 ALJ WISSLER: Okay. Well -- yes.
21 What I'm going to do is, just for the sake of
22 the record -- one other question of the City.
23 The three pages of the SPEDES permit for Big
24 Indian that you gave me --

25 MR. GREENE: Yes.
(WASTEWATER ISSUES)

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1 ALJ WISSLER: -- how do they compare
2 with the revised permit that was submitted by
3 the staff today, if at all?

4 MR. GREENE: Your honor, we'd just
5 withdraw that and just refer to those same
6 pages in the new permit or to the comparable
7 pages in the new permit and there -- there
8 should be no changes as to these two issues
9 that we raised.

10 ALJ WISSLER: Okay.

11 MR. GREENE: We just got the new
12 permit today. We just brought that along with
13 us for clarity.

14 ALJ WISSLER: Okay. What I'm going
15 to -- what I'm going to do is I'm going to
16 take these -- because I'm making an exhibit
17 list for you folks.

18 MR. GREENE: Sure.
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19 ALJ WISSLER: All right. So the 1988
20 design standards of the Department which was
21 offered by the City will be City Exhibit 1.

22 City Exhibit No. 2 will be the DEIS
23 Appendix 8 page dealing with Big Indian.

24 (DEIS APPENDIX 8 - TABLE 1 - BIG
25 INDIAN RECEIVED AND MARKED AS CITY EXHIBIT NO.
(WASTEWATER ISSUES)

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1 2, THIS DATE.)

2 MS. MELTZER: Your Honor, is there a
3 reason to have that marked as a City exhibit
4 rather than -- than refer to the page in
5 the --

6 ALJ WISSLER: well, the only reason
7 why I referred to it as a City exhibit is
8 because it's part of your presentation. And
9 it's in -- when I go back and look at the
10 record, I want to be able to know who gave me
11 this. Yes, it's all part of the DEIS. Yes,
12 you could just refer to it as that. You
13 didn't choose to do that, you chose to give --
14 you gave me this copy, said: Please, Judge,
15 focus on this page. Okay? So even though
16 it's listed in another exhibit, all right,
17 it's part -- it's part of your unique
18 presentation with respect to that issue. So
19 I'll just keep it aside as -- as an exhibit.

20 MS. MELTZER: Oh, okay. And if that's
21 convenient, your Honor, that's fine. I just
22 note that it made -- we're referring to
23 numerous pages of the DEIS and don't intend to

24 copy every page.

25 ALJ WISSLER: Well, then you don't
(WASTEWATER ISSUES)

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1 have to.

2 MS. MELTZER: Okay.

3 ALJ WISSLER: But if you're going --
4 but if you do that, then we'll go to the
5 binder.

6 MS. MELTZER: Okay.

7 ALJ WISSLER: But I just need -- you
8 know, I've been handed a piece of something, I
9 need to identify it for the record, what it
10 is.

11 MS. MELTZER: Okay.

12 ALJ WISSLER: So City Exhibit No. 3
13 will be that page of DEIS Exhibit 8, Table 1
14 dealing with wildacres.

15 (DEIS EXHIBIT 8 TABLE 1 - WILDACRES
16 RECEIVED AND MARKED AS CITY EXHIBIT NO. 3,
17 THIS DATE.)

18 ALJ WISSLER: And then City Exhibit
19 No. 4 will be the pages of the SPEDES permit,
20 Big Indian Plateau Sewage Works Corporation,
21 pages -- the first page, page 3 of 22 and page
22 5 of 22, as they may be modified as a result
23 of the draft permit that the staff's submitted
24 today, which is Exhibit 10. That is an Office
25 of Hearing exhibit.

(WASTEWATER ISSUES)

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1 (SPEDES PERMIT - PLATEAU SEWAGE WORKS
2 CORPORATION RECEIVED AND MARKED AS CITY
3 EXHIBIT NO. 4, THIS DATE.)

4 ALJ WISSLER: In addition, I've been
5 provided copies of letters, letter of January
6 6th from Daniel -- or to Daniel A. Ruzow, Esq.
7 from Mark G. Hoffer, and that is dated January
8 the 6th, 2003. That's going to be Applicant's
9 1.

10 (LETTER DATED 1/6/03 FROM MARK HOFFER
11 TO DANIEL RUZOW RECEIVED AND MARKED AS
12 APPLICANT'S EXHIBIT NO. 1, THIS DATE.)

13 ALJ WISSLER: Applicant's 2 will be a
14 letter from -- or, I'm sorry, a letter to Mark
15 Hoffer from Daniel Ruzow dated November 19th,
16 2002. Applicant's 2.

17 (LETTER DATED 11/19/02 FROM
18 WHITEMAN, OSTERMAN TO MARK HOFFER RECEIVED AND
19 MARKED AS APPLICANT'S EXHIBIT NO. 2, THIS
20 DATE.)

21 ALJ WISSLER: Okay, that completes
22 wastewater issues.

23 The remaining issue that we wanted to
24 deal with today was mining permit.

25 Mr. Gerstman?
(WASTEWATER ISSUES)

1 MR. GERSTMAN: Thank you, your Honor. Vol.1-186

2 Mining issues addressed in our
3 petition for party status would be under Issue
4 Q. There's no reason at this point, your
5 Honor, to repeat the -- what's in the
6 petition. We believe that under the mining
7 law, the project would exceed the threshold
8 for requiring a permit. The project sponsor

9 claims the exemption under Department of
10 Environmental Conservation Law 23-2705, that
11 essentially mining will not include the
12 excavation, removal and disposition of
13 minerals for construction projects.

14 It's our contention, your Honor, that
15 that exclusion from the requirement to obtain
16 a mining permit does not apply here because
17 mining at this project site will cause a
18 creation of water bodies under that section of
19 the law.

20 We believe that the -- this is
21 essentially a legal issue. The facts are not
22 in dispute. I don't believe that the
23 Applicant would contest that they don't meet
24 the threshold for mining in terms of the
25 extraction of minerals. I believe that the
(MINING ISSUE)

1 only issue for adjudication is whether or not ^{Vol.1-187}
2 they are creating water bodies on the project
3 site. We believe that the DEIS demonstrates
4 that, in fact, water bodies, irrigation ponds,
5 retention ponds are being created.

6 We specifically have focused on the
7 irrigation ponds. They are water bodies. We
8 can certainly take the time to brief this
9 issue, your Honor. No reason to spend a lot
10 of time on this issue now. I think it's
11 appropriate for a post-issues conference brief
12 so we can expedite the issues in that way.

13 ALJ WISSLER: Applicant?

14 MS. BAKNER: Your Honor, I think this
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15 is something that we really should address on
16 the record here because there are some factual
17 issues that are relevant to the issue of what
18 is a water body and is a water body even
19 relevant to whether or not we, in fact,
20 complied with the construction exemption.

21 The first thing I'd like to enter
22 into --

23 ALJ WISSLER: Well, just take a
24 minute, let me just ask you this: If that's
25 what you want to do, I can give it back to Mr.
(MINING ISSUE)

1 Gerstman and say: Do you want to provide us ^{Vol.1-188}
2 with a more -- a fuller position with respect
3 to the mining permit?

4 MR. GERSTMAN: In terms of the --

5 ALJ WISSLER: Well, what I'd like is
6 just to hear your presentation, your argument
7 and then have Ms. Bakner respond to that. And
8 she's willing to jump ahead and respond, but I
9 need to be responsive to things that you have
10 said.

11 MR. GERSTMAN: Clearly, our position
12 is laid out in the petition.

13 ALJ WISSLER: Okay.

14 MR. GERSTMAN: We believe that -- that
15 the threshold for a mining permit has been
16 met. There has been over -- there will be in
17 any 12-month period the extraction of a
18 thousand tons of materials, which requires a
19 mining permit.

20 we believe that a claim is being made
21 under the Environmental Conservation Law
22 section that I cited, that essentially the --
23 that this mining is being done in connection
24 with construction and therefore, no mining
25 permit is necessary.

(MINING ISSUE)

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1 Under that provision of the law, that
2 exemption does not apply if there's a creation
3 of water bodies involved in the extraction of
4 minerals.

5 ALJ WISSLER: Well, can you cite to
6 the section while you're ...

7 MR. GERSTMAN: Yes, your Honor. It's
8 23-2705, paragraph eight, and it's the
9 definition of mining.

10 ALJ WISSLER: Okay.

11 MR. GERSTMAN: We believe that -- that
12 the EIS and the applications that are before
13 your Honor all call for the creation of water
14 bodies in connection with this project. I
15 believe the Applicant will say that the
16 purpose of these water bodies is essentially
17 very different, that they're not, in fact,
18 water bodies per se, irrigation ponds serve a
19 different function; and therefore, they ought
20 not to come within the exemption from the
21 exclusion. I don't believe that that's a --
22 that can be read into the law.

23 I believe the law is very clear in
24 what it says in the statute. I've researched
25 administrative decisions and have found very

1 little guidance on it from the DEC. I've
2 looked at the Division of Mineral Resources'
3 technical guidance and memoranda. I don't
4 believe that it's addressed in there. I would
5 ask Department staff to direct me to the right
6 technical guidance if it is, in fact,
7 addressed in those situations.

8 So your Honor, I believe this is a
9 very straightforward issue. Mining permits
10 should be required. It's not required.
11 Certainly it would not be hard for the
12 Applicant to put in a mining plan. All the
13 details are set forth in the DEIS in terms of
14 construction, in terms of the phasing of the
15 construction. And of course, the reclamation
16 itself is obviously very clear, it's the
17 proposed resort project.

18 what's not included here, and which we
19 believe should be included is a surety, a bond
20 which will insure that the project is
21 undertaken, reclaimed in accordance with the
22 proposed reclamation plan, whatever that might
23 be. We believe that's an essential plan of
24 what the Mined Land Reclamation Law requires,
25 and we believe that that's what's appropriate
(MINING ISSUE)

1 for this project. It would not require, we
2 believe, very extensive application in order
3 to bring this under the auspices of the
4 Division of Mineral Resources; however, the

5 requirement for a surety, for a bond, has not
6 been satisfied, and that would have to be done
7 before the application is complete.

8 ALJ WISSLER: Well, that requirement
9 for a surety is a requirement of a mining
10 permit application; correct?

11 MR. GERSTMAN: Yes.

12 ALJ WISSLER: Okay. So just let me
13 understand your argument. The mining permit
14 here is -- I have 420 in front of me. As the
15 regs define mining, they create an exemption
16 for water bodies. All right. So is your
17 argument strictly that the creation of the two
18 detention ponds, the irrigation ponds, would
19 require a mining permit?

20 MR. GERSTMAN: Yes, if that -- that
21 there's an exemption which should be narrowly
22 construed. The exemption -- there would be a
23 mining permit required but for the exemption
24 for construction activities. Obviously within
25 that broad exemption for -- for construction
(MINING ISSUE)

1 activities is this exclusion for the creation ^{Vol.1-192}
2 of water bodies --

3 ALJ WISSLER: Okay.

4 MR. GERSTMAN: -- which we believe
5 puts it back within the general requirement
6 that a mining permit is required.

7 ALJ WISSLER: But just for the
8 creation of the detention ponds?

9 MR. GERSTMAN: Well, your Honor, I
10 think what we need to see is an overall mining
Page 158

11 and reclamation plan. If there's excavation
12 required, then the excavation for the entire
13 site ought to be covered by the mining permit.
14 I don't believe at this point that -- that the
15 mining permit exemption for construction would
16 apply.

17 ALJ WISSLER: Just so that I
18 understand. In other words, if you have a
19 plan that includes the creation of a water
20 body and you need a mining permit to create --
21 because you're creating that water body,
22 therefore everything else you're doing in
23 terms of construction on this site now should
24 come under that same permit?

25 MR. GERSTMAN: Well, we don't know
(MINING ISSUE)

1 where -- what the material is used for, how ^{Vol.1-193}
2 the reclamation is involved with respect to
3 the other aspects of the site. None of that
4 is necessarily clear at this point. That
5 would have to be spelled out in the mining --
6 mined land use plan and a mining reclamation
7 plan.

8 ALJ WISSLER: Okay.

9 MR. GERSTMAN: At this point,
10 that's -- it's not clear to us. It would have
11 to be laid out by the Applicant. At the very
12 least, your Honor, a mining -- mining permit
13 can be required -- mined land use plan for the
14 creation of the water bodies. We don't
15 interpret that -- interpret it that way. We

16 believe that once you take yourself out of the
17 mining -- the exemption for construction
18 activities, you're right back into the mining
19 permit process for the entire extraction of
20 minerals.

21 ALJ WISSLER: So our language in the
22 definition in Part 420 there, it says:
23 "Mining shall not include the excavation,
24 removal, disposition of minerals, the
25 excavation of minerals from construction
(MINING ISSUE)

1 projects, exclusive of the creation of water ^{vol.1-194}
2 bodies;" et cetera?

3 MR. GERSTMAN: Yeah. If this were
4 just a project where somebody were extracting
5 minerals for the creation of a water body,
6 literally that whole thing would be -- that
7 whole action would be subject to a mining
8 permit. But that's not what we have here. We
9 have a larger project within which there will
10 be the creation of water bodies.

11 ALJ WISSLER: Okay. So because that
12 water body's there, then -- then the mining
13 permit -- any mining permit that is issued
14 needs to cover the whole project; is what
15 you're saying?

16 MR. GERSTMAN: I would think that it
17 has to, yes.

18 ALJ WISSLER: Okay. Is that it?

19 MR. GERSTMAN: Yes. Thank you.

20 ALJ WISSLER: Okay.

21 Now, Ms. Bakner.

22 MS. BAKNER: Sorry for running ahead,
23 your Honor.

24 ALJ WISSLER: No, that's okay.

25 MS. BAKNER: All right. What I'd like
(MINING ISSUE)

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1 to enter into the record is a letter dated May
2 18th, 2004 from our expert in this matter.
3 The gentleman's name Greg Sovas. He was the
4 Director of Mineral Resources at DEC for a
5 long, long time, and he currently works -- he
6 currently works as a consulting engineer with
7 Spectra Environmental. Just so your Honor --

8 ALJ WISSLER: It will be known as
9 Applicant's 3.

10 (LETTER FROM SPECTRA ENVIRONMENTAL
11 FROM GREGORY SOVAS TO TERRESA BAKNER DATED
12 5-18-04 RECEIVED AND MARKED AS APPLICANT'S
13 EXHIBIT NO. 3, THIS DATE.)

14 MS. BAKNER: Applicant's 3.

15 when we looked at this issue, your
16 Honor, it seemed to us to be one not only of
17 law, but also of policy and fact, because if
18 you look at the TGM, the Technical Guidance
19 Memorandum that was issued by the Mineral
20 Resources Division at DEC, there is a
21 discussion of the construction exemption in
22 there. And I would be happy -- it is attached
23 to Mr. Sovas' letter, so it is also in effect
24 being entered into the record.

25 This TGM, when read along with the
(MINING ISSUE)

Vol.1-196

1 law, kind of obviates the absurd conclusion
2 that one would reach that any time you have a
3 construction project involving construction of
4 a structure which is an irrigation pond, that
5 you need to get some sort of mined land
6 reclamation plan in effect, a permit, and all
7 of those bells and whistles.

8 In fact, if you look at Mr. Sovas'
9 letter, you'll see that the purpose of the
10 exemption, the limited exemption to the
11 construction exemption, was in fact to make
12 sure that people who were masquerading as pond
13 builders, but were actually people who were
14 seeking to excavate mineral resources,
15 couldn't thereby avoid the level playing field
16 of the Mined Land Reclamation Act.

17 For example, you're Joe Smith and you
18 want to excavate some material and sell it
19 from the site. You could very easily avoid
20 having to get a Mineral Resources Permit by
21 going into your local town hall and saying, I
22 want a building permit to build the pond. And
23 then you dig it all out, however long it
24 takes, and in the end it fills up with water
25 and you built a pond. You know, this is not
(MINING ISSUE)

□

1 the circumstance that we have here. There is ^{Vol.1-197}
2 no definition of the phrase, "water body" in
3 the law. It just mentions water bodies. It
4 doesn't say what kind of water bodies. It
5 doesn't define it further.

6 However, the Technical Guidance
Page 162

7 Memorandum says that: "Examples of activities
8 that are exempt include site preparation for
9 buildings and associated amenities, cut and
10 fill for roadway construction, construction of
11 drainage features, including drainage ways and
12 water retention/detention ponds, and basins
13 built for the control of stormwater runoff."

14 Now, I would submit that what we have
15 here are multi-use structures, entirely
16 artificial. We're blasting out rock solely
17 for the purpose of lining that and then
18 putting -- not water in it for recreational
19 purposes, but we're putting water, effluent
20 and also stormwater management. Each of
21 those irrigation ponds are integral parts of
22 our stormwater management plan, and it's set
23 up that way.

24 With all due respect to Marc, it is
25 covered in the Draft Environmental Impact
(MINING ISSUE)

1 Statement and it's explained thoroughly. And ^{Vol.1-198}
2 I'd just like to draw your attention to the
3 following DEIS excerpts. First of all, in
4 2-53, we have the construction schedule which
5 sets forth how everything's going to be built
6 and how the ponds are going to be blasted, how
7 they're going to be lined and how then they're
8 going to be used for stormwater, effluent and
9 also groundwater that will be pumped up from a
10 series of wells down by Route 28 known as the
11 Rosenthal wells. And it covers very precisely

12 what's going to happen and how they're going
13 to be filled immediately, so that they can
14 used for irrigation of the golf course as it's
15 under construction.

16 That continues on 2-55, all the way
17 through 2-58, where it talks about
18 construction of the wildacres irrigation pond,
19 which will not require any blasting at all.
20 It's merely excavation of the irrigation pond
21 or structure.

22 Then the next section that's relevant
23 to this is 3-24, which talks about how the
24 ponds are going to be used to accept runoff
25 from stormwater events. So that shows that
(MINING ISSUE)

1 it's part of our stormwater detention system. Vol.1-199
2 It's not, by far, like the primary point of
3 it, but it is part of it. And that's
4 discussed on 3-53 and 3-54 and 3-63. Again,
5 these are clearly not ponds that are being
6 created as some sort of subterfuge to avoid
7 getting a Mined Land Reclamation Permit.

8 We're here. We've been at the DEC.
9 We've asked them -- we've told them it's our
10 intention to apply for all permits we need.
11 We've not been advised that we need one. We
12 don't feel that we need one. I think that the
13 TGM is clear that for this kind of
14 construction activity, it -- it is exempt from
15 a construction.

16 Thank you very much.

17 ALJ WISSELER: Thank you.

18 Staff.

19 MR. ALTIERI: Good afternoon, your
20 Honor. Vincent Altieri.

21 It's staff's view that a mining permit
22 is not needed at this site for the project
23 that's being undertaken because the activity
24 clearly falls under the exemption for
25 construction activity. The fact that a --
(MINING ISSUE)

1 some basins are being constructed as part of ^{vol.1-200}
2 this -- as one subpart of an overall obvious
3 construction site brings the whole project
4 under the construction exemption. These
5 activities are all -- all this excavation is
6 all intertwined together into this one larger
7 construction activity, and therefore, all the
8 activity enjoys the benefit of the exemption.

9 To view it otherwise, every time a
10 contractor wants to build a residential
11 development, or perhaps a relatively large one
12 and would have heretofore been exempt from a
13 mining permit, now perhaps they might need a
14 mining permit simply because they're building
15 a water retention basin. That's not the
16 purpose of the mining law. The purpose of the
17 mining law is to regulate mine sites. This
18 clearly is not a mine site.

19 Regarding surety, clearly when there's
20 a mine activity going on, perhaps a strip
21 mine -- if the mine operation goes out of
22 business or if the miner abandons the site,

23 there is the need for some sort of surety to
24 achieve the reclamation of the site. Here,
25 because this is pursuant to construction
(MINING ISSUE)

1 activity, the site is essentially being
2 reclaimed as it's being excavated because the
3 buildings, the golf courses and whatnot are
4 all being built. So there is no need for --
5 the purpose of the surety requirement is not
6 met here.

7 Referring to the TGM, I'll just read
8 another -- another part of the TGM, May 4th,
9 1992: "Specific water bodies, defined under
10 the construction and agricultural categories
11 and small general purpose recreational ponds,
12 may also be exempt where a reclamation is
13 inherent in their construction." That's
14 exactly what's happening here. So it's
15 staff's view that the intervenors have failed
16 to -- to satisfy their burden to show a
17 substantive and significant issue as to
18 mining.

19 ALJ WISSLER: Mr. Gerstman, anything
20 else?

21 MR. GERSTMAN: Yes, your Honor.
22 First, we refer you to the remainder of the
23 TGM dealing with small pond construction. The
24 ponds or surface area will not exceed
25 two acres is one of the criteria, and I
(MINING ISSUE)

1 believe the irrigation ponds are more -- are
2 greater than two acres in area. So that's --

3 if you're going to follow the TGM, that
4 certainly would apply.

5 In terms of the memorandum and the
6 letter from Mr. Sovas, I've had the pleasure
7 of working with Mr. Sovas in the Department.
8 As far as I know, he's not a legislator, he
9 doesn't represent the legislative history of a
10 particular enactment. If you want to look at
11 legislative history, that's something that we
12 will offer to do, look at the '91 amendment to
13 the -- to the Mined Land Reclamation Law, find
14 out what the Legislature was thinking during
15 that period of time. Mr. Sovas' offer on that
16 issue, I believe, is not competent evidence to
17 address that concern. And essentially, that's
18 all he offers on that issue.

19 In connection with the TGM itself,
20 there are some on-site construction-related
21 activities that are referenced in terms of the
22 stormwater pond that might be very closely
23 associated with on-site construction. Here we
24 have some irrigation ponds, all purpose ponds.
25 It reminds me of a situation where a wetland
(MINING ISSUE)

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1 could be created by an activity which
2 otherwise comes into -- which otherwise
3 becomes regulated pursuant to vegetation which
4 grows up around it. It's not intended for the
5 purpose of creating wetland or being
6 regulated, but nonetheless, it is because of
7 its characteristics.

8 In terms of the bond on this issue,
9 that's exactly the point. This is precisely
10 an issue that -- that needs to be addressed by
11 the agency, whether through the Mined Land
12 Reclamation Law or through SEQRA. We have a
13 huge development being proposed for a mountain
14 where it's inappropriately sited. The
15 potential impacts of this project and its
16 location, being the golf courses and the
17 hotels and the associated housing, is
18 potentially huge. It's a project which has
19 not, from what we can understand, had very
20 firm financial footings up to date in terms of
21 the ultimate development. Were it to fail for
22 some reason, this community, DEC and the rest
23 of the region, the Catskills itself, would be
24 left with essentially a devastated area with
25 no way to put back the project or put back the
(MINING ISSUE)

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1 land to its natural landscape.
2 We hope, of course, that this project
3 is not approved in the current form, but if it
4 is, unfortunately if it gets to that point,
5 and the project is not completed or if it's
6 stopped for any reason, then we believe the
7 Mined Land Reclamation Law bond would be an
8 appropriate mechanism to provide for the
9 rehabilitation of that -- of that area.
10 We would also offer that this is an
11 appropriate offer for legal briefing after the
12 Issues Conference.

13 ALJ WISSELER: Mr. Ruzow?
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14 MR. RUZOW: Just one -- one further
15 response.

16 The issue of the Mined Land
17 Reclamation Law being a general excavation
18 statute has been around since, when I was
19 counsel in 1979. The law was passed, I think,
20 in '75, '76, when it first passed. It was an
21 issue that the Mineral Resources Division was
22 -- in those days, the Bureau, was just trying
23 to get their hands around back then.

24 The law was never intended to be a
25 general excavation law. What happened,
(MINING ISSUE)

1 though, in the early days, and it's continued ^{Vol.1-205}
2 as a policy issue through the amendments in
3 '91 and through these TGMs, has been that
4 people seek to escape the requirements of the
5 MLRL, as Ms. Bakner described, and in effect,
6 go into the business of mining by selling
7 resources through excavation, and by claiming
8 that your reclamation objective is a pond with
9 some other purpose other than mining with
10 reclamation, and you can escape that. And so
11 the fees that are paid, the strictures of
12 having to get a permit, a reclamation, go
13 through SEQRA and all the other things that
14 would be required, are lost on somebody who's
15 seeking to evade the law.

16 So the policy evolved over years. The
17 first declaratory ruling was in 1980, if I
18 recall, having drafted that one, which dealt

19 with trying to, in effect, eliminate a sham,
20 what was perceived to be a sham residential
21 subdivision which was really a gravel pit,
22 with a very long-term goal of creating a
23 residential subdivision. And that policy has
24 continued for 20-some odd years.

25 This project is so far away from an
(MINING ISSUE)

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1 excavation project that would mirror those
2 kinds of concerns that to try to contort the
3 law's purposes to address the issue that Marc
4 raises of a bond is just foolish and,
5 consistent with the Department's position, not
6 warranted. To address those issues, there are
7 other mechanisms to address those issues, if
8 they're indeed a legitimate concern, but the
9 mining law is not one of them. And the notion
10 that somehow beyond the ponds themselves,
11 which are structures -- they're not
12 recreational ponds, nobody I know goes
13 swimming in effluent, even if it's tertiary
14 treated effluent directly -- combined it with
15 the stormwater detention requirements that we
16 are to meet, both DEC and DEP requirements, to
17 suggest that -- even if that, assuming
18 arguendo, that that would -- would constitute
19 mining, that the entire site excavation would
20 somehow now fall under the MLRL is just a
21 ludicrous position.

22 One of the things that the project
23 evolved to do was to -- from the early EIS,
24 the earlier EIS, the earlier draft, and you'll

25 remember this -- we had moving -- some of the
(MINING ISSUE)

1 excavation -- the product of the activities on ^{Vol.1-207}
2 one site moving to the other. We were able to
3 cut and balance the fills on site to avoid the
4 environmental effect of truck -- trucking that
5 stuff back and forth between the sites. That
6 is in support of the -- in effect, the
7 project-related activities on each site. It's
8 not mining. There's no sale or exchange of
9 the minerals occurring. There's no value
10 being created, in effect, off site, all of
11 which is, by definition, the act of mining.

12 with all due respect, the argument is
13 seeking to look at this narrow exemption and
14 the exemption from the rule, to deal with a
15 problem because the '91 amendment, which was a
16 budget bill -- and Marc, I'm not sure you will
17 find any more legislative history than I've
18 been able to find -- had to do with creating
19 a -- responding to a concern that these ponds,
20 recreational ponds were being created, in
21 effect, masquerading as ponds when, in fact,
22 they were mining. So the history -- the
23 pattern is consistent, and it's not a general
24 excavation statute.

25 So we will be glad to brief this
(MINING ISSUE)

1 further and resolve it, but it doesn't make ^{Vol.1-208}
2 any sense, logical sense, in terms of the
3 history of the Mining Law to -- to take a

4 5-25-04crossroadsF
project as complex as this and all of a sudden
5 say this is now a mining activity.

6 MR. ALTIERI: I would just add that --
7 just let me reiterate, I guess, that this
8 would be -- the intervenor's view, would be an
9 unreasonable overexpansion of the Mined Land
10 Reclamation law. The mining statute pertains
11 to mining activity. If it was read the
12 intervenor's way, every time a developer cut
13 out a detention basin, mining would be
14 involved, even though the activity is clearly
15 construction. The DEC is against this
16 interpretation, and we view this as a
17 construction site. It's an entire
18 construction site that -- all this
19 excavation's intertwined with other aspects of
20 the construction that shouldn't separate out
21 one fraction of a much greater site just to
22 get a hook to require another permit. We're
23 against that in this -- this case here.

24 ALJ WISSLER: Okay, that's it. The
25 time is now 4:10, and we will adjourn and
(MINING ISSUE)

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1 reconvene here on Thursday.

2 (4:10 - 4:15 P.M. - DISCUSSION OFF
3 THE RECORD.)

4 ALJ WISSLER: Okay. See you all
5 Thursday.

6 (4:20 P.M. - WHEREUPON, THE ISSUES
7 CONFERENCE PROCEEDINGS ADJOURNED FOR THE DAY.)

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(MINING 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.

5-25-04crossroadsF

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THERESA C. VINING

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19 DATED: September 4, 2004

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