

# NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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April 8, 2016

D. Scott Bassinson, Administrative Law Judge  
New York State Department of Environmental Conservation  
Office of Hearings and Mediation Services  
1<sup>st</sup> Floor, 625 Broadway  
Albany, New York 12233-1550

RE: Matter of Frontier Stone, LLC  
DEC Project Application Nos. 8-3436-00033/00001 and 00002

Dear Judge Bassinson,

Department of Environmental Conservation staff submit this reply to the petitions filed in the above-referenced matter. By providing this written reply, staff does not hereby waive its rights under 6 NYCRR Part 624 to respond additionally to the petitions at the issues conference and by any post-issues conference briefing that may be authorized.

Sincerely,



Dudley D. Loew  
Assistant Regional Attorney

Enclosure

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**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

-----X  
In the Matter of the Applications for a Mined Land Reclamation  
Permit Pursuant to Environmental Conservation Law (ECL)  
Article 23 and a Water Withdrawal Permit Pursuant to ECL  
Article 15

**DEC Application Nos.**

8-3436-0003/00001

8-3436-0003/00002

-by-

**FRONTIER STONE, LLC**

Applicant.

-----X

**DEPARTMENT OF ENVIRONMENTAL CONSERVATION STAFF'S  
RESPONSE TO PETITIONS FOR FULL PARTY STATUS**

Dated: April 8, 2016

Dudley D. Loew, Esq.  
NYSDEC  
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## PRELIMINARY STATEMENT

The staff of the Department of Environmental Conservation (“DEC” or “Department”) respectfully submit this reply (“Department Reply”) to the petitions for full party status filed by the Town Board of the Town of Shelby (“Town”) and the Citizens for Shelby Preservation (“CSP”). Three members of CSP, Wendi Pencille, Ken Printup, and Francis Domoy, Ph.D., also seek full party status in their individual capacities under the CSP petition. Any reference to CSP includes these individuals. In addition, the Town and CSP are hereinafter collectively referred to as the “Petitioners”. For reasons discussed below, Department staff respectfully request that the Petitioners be denied full party status.

**I. THE PETITIONERS FAILED TO COMPLY WITH THE REQUIREMENTS OF A PETITION FOR FULL PARTY STATUS AND, THEREFORE, SHOULD BE DENIED FULL PARTY STATUS.**

“The submission of a petition for party status is not a pro forma exercise.” Matter of Crossroad Ventures, LLC, 2006 WL 3873403, at \*3 (Dec. 29, 2006). A petition for full party status must include, *inter alia*, an offer of proof specifying a witness, the nature of the evidence that witness expects to present, and the grounds upon which the assertion is made with respect to that issue. 6 NYCRR § 624.5(b)(1)-(2). This standard requires strict compliance. See Matter of CMW Industries, LLC, 2010 WL 1652794, at \*4 (Feb. 2, 2010) (rejecting argument that Part 624 requirements for petitions do not require strict compliance and should not be seen as rigid). A proper petition is essential because it informs Department staff, the applicant, and other parties of the issues a petitioner is seeking to adjudicate and allows those parties to effectively consider them. See Crossroad Ventures, LLC, at \*4. If a non-compliant petition is filed, party status may be denied. 6 NYCRR § 624.5(b)(4). Here, the Petitioners fail to meet the requirements of a petition for full party status and, as a result, should be denied full party status.

A. The Town's petition is deficient because it fails to specify the nature of the evidence it expects to present, identify the witnesses that will present that evidence, and explain why that evidence demonstrates an adjudicable issue.

1. *The Town does not specify the nature of the evidence it expects to present.*

The Town does not actually identify what evidence it expects to present in its petition. The Town merely states that it will “present evidence discussing . . . noise, dust, traffic, impact on wildlife, impact on drinking water and hydrogeological concerns.” Town Petition, at 6–7.

The Town also suggests that it will submit “legal authority supporting the denial and/or requiring significant modification of the draft mining permit.” *Id.* at 7. However, it does not cite to or provide the legal authority it intends to present. In addition, the Town fails to identify the parts of the draft Mined Land Reclamation Permit which require significant modifications because of the legal authority it will purportedly submit. By not providing this information, the Town also runs afoul of the requirement that a petition identify the precise grounds for opposition or support. See 6 NYCRR § 624.5(b)(1)(v). Admittedly, the Town discusses several draft permit conditions later in its petition but these discussions never involve its alleged “legal authority”.

Furthermore, to the extent that the Town's reference to “legal authority” alludes to local zoning, the Department does not adjudicate legal issues concerning compliance with local zoning. Matter of CMW Industries, LLC, at \*6. “The applicant's ability to obtain zoning or other permits is not a matter to be adjudicated or resolved by [the Department].” Matter of 4-C's Development Corporation, 1996 WL 566235, at \*3 (May 1, 1996).

The Town also mentions that it will present “documentary evidence demonstrating that the impact of the mine requires denial and/or modification of the requested mining permit.” Town Petition, at 7. The Town, however, does not identify what documentary evidence it expects to present anywhere in its petition. See id. The authors of these documents, their contents, and who

will testify to their substance are not mentioned. The Town only states that its documentary evidence will “concern hydrogeological, wildlife, aesthetic, noise, wetlands and other impacts . . . .” Town Petition, at 7. This is insufficient. The Town also fails to indicate the sections of the draft Mined Land Reclamation Permit which require modifications because of its unidentified “documentary evidence”. Id. at 7. Again, by not providing this information, the Town has not identified its precise grounds for opposition or support. See 6 NYCRR § 624.5(b)(1)(v). As stated above, the Town discusses several draft permit conditions later in its petition. However, none of these discussions include its unidentified “documentary evidence”.

The Town’s petition contains no further discussion of the evidence the Town intends to present. As a result, Department staff are prevented from effectively considering the issues the Town seeks to adjudicate. At this point, Department staff are forced to guess what evidence the Town intends to present and how to address it. This has unfairly shifted the burden of proof from the Town to Department staff. Department staff would like to emphasize that it is the Town’s burden to demonstrate that an adjudicable issue exists. 6 NYCRR § 624.4(c)(4). It is not the Department’s burden to prove that an adjudicable issue does not exist. See id.

Although the Town includes in its petition documents from the U.S. Fish and Wildlife Service (USFWS), U.S. Department of Labor (USDOL), and the U.S. Geological Survey (USGS), its intention for attaching these documents is unclear. See Town Petition, at 8. However, to the extent that the Town intends to present these documents as evidence at an adjudicatory hearing, it has not specified who will testify to the contents of these documents. The Town’s witness list does not include anyone from USFWS, USDOL, or USGS. See id. Also, these federal agencies have elected to not file a petition for party status despite being informed of this proceeding. Furthermore, it is questionable whether the Town may deputize itself and represent interests that

are limited to the aforementioned federal agencies in this matter. To add to this, it appears that the Town is attempting to propose an issue that has already been resolved with USFWS. See Town Petition, at 15–17 and Exhibit C.

2. *The Town does not identify witnesses that will present evidence.*

The Town has failed to identify any witnesses that will present evidence. The Town lists two witnesses it may or may not call. Id. at 8. The Town’s petition, however, is completely silent as to what particular evidence these witnesses are expected to present. Conversely, the Town states that it will “present evidence discussing . . . noise, dust, traffic, impact on wildlife, impact on drinking water and hydrogeological concerns” (id. at 6–7) but does not identify who will actually testify about the aforementioned subjects.

The Town also neglects to provide any information regarding the competency of the witnesses it may call. Although the competency of a witness does not need to be determined until an adjudicatory hearing, an indication of the competency of a witness offered to testify must be shown in a petition’s offer of proof. Crossroad Ventures, LLC, at \*3. Again, the Town claims generally that it will “present evidence discussing . . . noise, dust, traffic, impact on wildlife, impact on drinking water and hydrogeological concerns.” Town Petition, at 6–7. It does not, however, provide any indication that the witnesses it may call are competent to testify on all these distinct allege impacts. Furthermore, to the extent that the Town intends to present the documents from USFWS, USDOL, or USGS as evidence (see id. at 7–8), it is unclear whether the witnesses the Town may put forth are competent to testify to the contents of those documents.

3. *The Town does not explain how its alleged evidence demonstrates an adjudicable issue.*

The Town has not explained how its alleged evidence demonstrates an adjudicable issue. Again, it has not actually specified the nature of the evidence it expects to present. As a result, the Town cannot to explain how its purported evidence establishes an adjudicable issue.

As stated above, a petition for full party status is not a mere formality. A petitioner must comply fully with its requirements. The failure to file a proper petition for full party status substantially burdens Department staff because they are prevented from effectively considering the issues a potential party seeks to adjudicate. Because the Town's petition is non-compliant, it should be denied full party status.

- B. CSP's petition is also deficient because it fails to specify witnesses, the nature of the evidence those witnesses are expected to present, and how that evidence demonstrates an adjudicable issue.

CSP has failed to identify any witnesses. When discussing alleged impacts to wildlife, CSP refers to two of its members, Wendy Pencille and Kenneth Printup, but does not actually indicate whether they are being offered as witnesses. See CSP Petition, at 3. The CSP petition only states that they will "present NYSDEC records or other information. . . ." Id. The remainder of the petition proposes several other issues for adjudication but fails to state who will testify about those alleged issues.

If CSP intends Wendy Pencille and Kenneth Printup to be witnesses, it has failed to provide any information regarding their competency to testify. CSP mentions that Wendy Pencille has many years of experience as a licensed wildlife rehabilitator. Id. However, there is no discussion of how and on what subjects that experience qualifies her to testify. There is also no discussion of her specific qualifications to testify about alleged wildlife impacts or any other topics proposed by CSP. Similarly, there is no indication that Kenneth Printup is able to testify on purported impacts to wildlife or any other topic.

CSP has also failed to specify the evidence it expects to present. When discussing alleged impacts to wildlife, CSP states that it will present “NYSDEC records and other information demonstrating that NYSDEC has imposed conditions intend to prevent disruption to the habit of Short-Eared Owls and Upland Sandpipers.” Id. CSP, however, does not provide these records and documents. It also fails to discuss the contents of these documents. The remainder of the CSP petition does not specify any evidence it intends to present but merely restates unsworn comments already made at the legislative hearing in the form of a purported petition. See generally id.

CSP has not explained how its arguments demonstrate an adjudicable issue. Since CSP has not specified the nature of its evidence, it cannot explain how its unidentified evidence demonstrates an adjudicable issue. Like the Town, CSP’s petition is non-compliant. As a result, CSP should also be denied full party status.

**II. THE PETITIONERS HAVE NOT IDENTIFIED ANY SUBSTANTIVE AND SIGNIFICANT ISSUES AND, THEREFORE, SHOULD BE DENIED FULL PARTY STATUS.**

A petition for full party status must identify an issue for adjudication. 6 NYCRR § 624.5(b)(2)(i). For an issue to be adjudicable, it must be both substantive and significant. 6 NYCRR § 624.4(c)(1)(iii). An issue is substantive if there is “significant doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to the project such that a personable person would require further inquiry.” 6 NYCRR § 624.4(c)(2). An issue is only significant if it has “the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.” 6 NYCRR § 624.4(c)(3). For reasons discussed below, the Petitioners have failed to identify any substantive and significant issues and, as a result, they should be denied full party status.

A. The Petitioners Have Failed to Identify Any Substantive and Significant Issues Related to the DEIS or Mined-Land Use Plan.

Whenever the Department, as lead agency, has required preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS will be made in accordance with the same standards that apply to the identification of adjudicable issues. 6 NYCRR § 624.4(c)(6)(ii). In other words, for a deficiency in the DEIS to be adjudicable, it must still be substantive and significant.

Here, the Department, as lead agency, required that a DEIS be prepared. Where an agency with expertise and jurisdiction over impacts has provided its analysis in the State Environmental Quality Review Act (SEQRA) process and concluded that all matters have been satisfactorily addressed, no adjudication is warranted. Crossroads Ventures, LLC, at \*23. Department staff have reviewed the DEIS and considered it sufficient for purposes of public review in accordance with the requirements of 6 NYCRR Subpart 617.9(a)(2).

Nothing in the normal course of an EIS review precludes additional information being provided in the course of preparing a FEIS for purposes of an agency's required findings. In this case, as discussed further below, the Department has obtained additional information to further address comments raised on the DEIS which is appropriate. Here, the hearing record itself will constitute the FEIS. 6 NYCRR § 624.13(c). The burden of proof is on the Petitioners to demonstrate that an adjudicable issue exists with regards to the DEIS. See 6 NYCRR § 624.4(c)(4).

Although the Petitioners assert that there are deficiencies in the DEIS, they have failed to demonstrate that any of these alleged deficiencies are substantive and significant issues which require adjudication. First, the Petitioners offer no proof that the sections of the DEIS they cite to are in fact deficient. They merely speculate about or question their sufficiency. They also attempt

to support their assertions with vague or conclusory statements. Second, the Petitioners do not provide any evidence which indicates that the alleged deficiencies of the DEIS are actually substantive and significant. They also do not identify witnesses that will testify about these alleged deficiencies.

When there is no adjudicable issue, a participant in a Part 624 hearing process is simply adding information on a topic for which the DEIS contains sufficient information. See Crossroads Ventures, LLC, at \*6. This additional information is considered in the on-going SEQRA process and can be addressed in the final environmental impact statement. Here, as the Petitioners have failed to identify an adjudicable issue related to the DEIS, their statements are comments on the DEIS and can be addressed in the FEIS.

1. *The alleged effects on recreation and wildlife are not substantive and significant issues.*

The Petitioners assert that the DEIS is not sufficient because it did not properly address the proposed quarry's potential impacts to recreation in the IWNR. Town Petition, at 10; CSP Petition, at 4–5.

As initial matter, the Petitioners raises several objections to how the Applicant performed its studies but do not provide any evidence which indicates that the conclusions were incorrect. See Town Petition, at 10–11; see also CSP Petition, at 4–5. Also, to the extent that certain alleged impacts were not properly addressed in the DEIS, the Petitioners fail to offer any proof which demonstrates why they are substantive and significant.

In addition, the Town alleges that impacts associated with the proposed quarry would have a significant negative affect on recreation but does not support this statement. See Town Petition, at 11. Also, with regards to fishing, canoeing, and hiking, the Town does not actually identify how alleged impacts associated with the proposed quarry affect these activities. See id. at 10–11.

Lastly, CSP asserts that additional studies examining alleged impacts to recreation are needed but does not indicate what studies and impacts must be looked at. See CSP Petition, at 5.

With that said, Department staff is prepared to incorporate the Town's recommendation that the Applicant use the Fletcher Chapel Road access point. See Town Petition, at 29. Access *via* Sour Springs Road would be limited to emergency and incidental use. By using Fletcher Chapel Road, truck traffic associated with the proposed quarry in the INWR would essentially be eliminated. This would address alleged truck traffic impacts on recreation in the INWR. The Town's birding concern would also be addressed. See id. at 10.

The Petitioners also assert that the DEIS is not sufficient because it did not properly address the proposed quarry's potential impacts to wildlife in the IWNR. Town Petition, at 11; CSP Petition, at 3. They also allege that certain wildlife were not properly addressed or overlooked. Town Petition, at 12–13; CSP Petition, at 3.

To begin, the Petitioners object to the age of certain studies and to how some studies were performed but do not set forth any evidence which indicates that the conclusions were incorrect or proof which contradicts them. See Town Petition, at 11–12; see also CSP Petition, at 3. In addition, to the extent that certain alleged impacts to wildlife were not appropriately discussed in the DEIS, the Petitioners fail to provide any proof which illustrating why they are substantive and significant.

Also, to reiterate, Department staff is prepared to incorporate the Town's recommendation that the Applicant use the Fletcher Chapel Road access point. See Town Petition, at 29. This would address most, if not all, alleged impacts to wildlife associated with truck traffic in the INWR.

Department staff have determined that the proposed quarry is not considered to be a significant adverse impact to short-eared owls (State-listed endangered). With the help of volunteers, Department staff have performed numerous surveys at the known wintering area and at surrounding points, including Fletcher Chapel Road with a view of the proposed quarry site. These surveys started in 2011 and include up to the winter of 2015/16. Since 2011, short-eared owls and northern harriers (State-listed threatened) have been consistently observed in an area east of Southwoods Road. Department staff considers this area to be the core wintering area. It does not include the proposed quarry site.

The proposed quarry is within approximately 0.5 miles of the core area. Since 2011, approximately 16 surveys have been performed from the Fletcher Chapel Road observation point. A short-eared owl was observed flying from the east, swooping down once, and then perching in a tree on the proposed quarry site during one of these surveys. There have also been unconfirmed birding accounts in vicinity of the site.

Department staff have no evidence which indicates that short-eared owls are using the site for roosting or for any activity other than occasional perching, flying over the site, or limited foraging. Because of the lack of prime habitat for this species at the site, which consists primarily of agricultural row crops, the proposed quarry does not provided essential habitat and will not cause a significant adverse impact to short-eared owls especially considering the fact that the quarry will not be active for most of the time period when the birds are present.

Please note that the Town attaches a letter from the Orleans County Soil & Water Conservation District to the Orleans County Highway Department, dated February 11, 2016, which inaccurately describe statements made by Department staff. See Town Petition, Exhibit F. CSP appears to allude to this letter as well. See CSP Petition, at 3. Department staff did not say that

short-eared owls nest in the ditch described in the letter during the winter months. Instead, it was stated that short-eared owls roost in grassy areas, including road-side ditches in this area, during the winter months. The proposed quarry, including truck traffic, is outside the core wintering area. Timing restrictions similar to those imposed in recent permits for ditch work in the core area are not needed.

Department staff does not anticipate impacts to the upland sandpiper (State-listed threatened). The proposed quarry site, in most years, provides limited habitat value to upland sandpipers due to the presence of row crops such as corn. In some years, habitat on the site may provide some value to upland sandpipers. However, there is no strong evidence that nesting will occur on the proposed quarry site and, therefore, no potential impacts to upland sandpipers are anticipated.

Henslows sparrows are not a concern for the quarry site. The closest recent documented location for this species was at Forrestal Flats along Oak Orchard Ridge Road at a site that would have likely been impacted by the additional truck traffic and road widening needed for that truck route. Routing the traffic to Fletcher Chapel alleviates that concern. Issues related to additional water flowing through the Forrestal Flats brought up in the INWR comments are not anticipated to be a problem, but this concern can be addressed by the permit condition related to Alternative Mine Dewatering Discharge location.

Horned Larks are listed as a Special Concern species, which does not garner any additional regulatory protections. In addition this species is widespread in open grassland as well as agricultural lands, so while it may be present at the site, it has plenty of habitat in the surrounding landscape and may even continue at the site outside the active working areas.

With regards to eagles, Department staff expect no impact. The closest known eagle nest is approximately 2.5 miles from the proposed quarry.

Also, Department staff do not anticipate the proposed quarry to impact to any listed bats. The project does not involve significant tree clearing and is outside of the 5 mile buffer to the closest bat hibernacula. There are also no known summer roost locations within the vicinity of the proposed quarry.

Lastly, the Town provides no evidence indicating that blasting in a dewatered quarry will harm fish. See Town Petition, at 14. The USFWS letter it refers to does not provide any proof either. See id., Exhibit A, at 4. Potential impacts to fish and other aquatic species are generally related to confined, and unconfined blasting within a water body at close distances, and at significantly higher peak particle velocities than what is even proposed at this quarry and allowed under the draft permit. Furthermore, the proposed quarry operation is to be operated in a dewatered, dry condition.

*2. Increased surface water runoff into the wetlands of the Iroquois National Wildlife Refuge (INWR) is not a substantive and significant issue.*

The Petitioners allege that additional studies of the potential impact of surface water runoff from the proposed quarry should be conducted. Town Petition, at 15–17; CSP Petition, at 3. They claim that the DEIS did not address this subject and has not evaluated alternative discharge locations. Town Petition, at 16; CSP Petition, at 3. In addition, the Town cites to a comment letter from USFWS which raised concerns regarding whether the INWR can manage water levels in Schoolhouse Marsh because of surface water runoff from the mine. Town Petition, at 17.

The Petitioners fail include an offer of proof demonstrating why the alleged impacts to the INWR are substantive and significant issues. They also produce no evidence indicating that additional studies are needed or what the additional studies would provide.

The Petitioners incorrectly assert that the DEIS fails to evaluate the impacts of surface water into the INWR. The impacts of surface water runoff has been evaluated and addressed in numerous sections of the DEIS.<sup>1</sup> Department staff have reviewed these documents and determined that they are sufficient. To summarize, increased surface water runoff will not significantly impact the INWR.

The maximum discharge rate from the quarry into the INWR is 385.6 gallons per minute. At the maximum discharge rate, surface water runoff would raise the overall water elevation of the INWR wetlands approximately 0.26 inches. This would result in a potential 0.2 acre surface area increase within the approximately 74 acre Schoolhouse Marsh. These wetlands are already seasonally subject to fluctuations greater than 0.26 inches from runoff and precipitation events. Alpha Geoscience Groundwater Study, Volume 4, Appendix 4.

In addition, the minimal impacts of increased surface water runoff are mitigated by several factors. USFWS staff actively manage the INWR wetlands and periodically manipulate their water elevations. See Town Petition, Exhibit A, at 19–20. USFWS staff have indicated that water elevations in the marshes can be adjusted several inches to several feet depending on what they are trying to accomplish. In some cases, a marsh may be completely. Conversely, water elevations may be raised several feet to restore open water habitat for waterfowl.

The Applicant can also adjust its pumping rates as well as retain water within the mined-out phases of the proposed quarry.<sup>2</sup> If there is a significant precipitation event, or if USFWS staff will be draining a marsh or adjusting water elevation, the quarry will have the ability to reduce pumping rates or withhold water in another phase of the operation. Department Reply, fn. 2.

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<sup>1</sup> See DEIS Section 4.1.2.2.4; Wetland Delineation Report and Wetland Impact Assessment contained in Volume 5, Appendix 7; HydroCAD Models in Volume 7, Appendix 16; Groundwater Reports contained in Volume 4, Appendix 4; Response to Comments contained in Volume 3, Appendix 2; and Response to Comments dated September 11, 2012.

<sup>2</sup> See DEIS Section 4.1.2.2.4; and the Alpha Geoscience Groundwater Study, Volume 4, Appendix 4.

Lastly, Special Permit Condition No. 14 requires the Applicant to discharge to the alternative location specified in the draft permit upon written request from USFWS. Also, if a prolonged period of drawdown is desired with Schoolhouse Marsh and the wetlands beyond it, the Applicant will have the ability to use the alternate discharge location and bypassing Schoolhouse Marsh altogether. Please note that this condition, which was developed in consultation and agreement with the USFWS, refutes the Town's claim that no alternative discharge location is provided. See Town Petition, at 16.

Regarding evaluating an alternative discharge location outside of the INWR, it is not warranted. The Petitioners fail to offer any evidence indicating why a discharge location outside of the INWR needs to be evaluated. As discussed in the following paragraph, USFWS' concerns regarding the quantity of surface water runoff being discharged into the INWR has been addressed. Department staff also have no concerns regarding the quality of the runoff. See Department Reply, at 18-21.

The Town also repeats a comment from USFWS regarding whether its staff can manage water levels in Schoolhouse Marsh due to discharges from the proposed quarry. This concern has been resolved. To provide some background, USFWS staff will periodically allow Schoolhouse Marsh to be drawn down. See Town Petition, Exhibit A, at 4. USFWS staff were concerned that a constant source of surface water runoff could prevent the effectiveness of these drawdowns. Special Permit Condition No. 14, however, addresses this concern. As stated above, it requires the Applicant to discharge an alternative location, which does not drain into Schoolhouse Marsh, upon written request from USFWS. It is important to note that USFWS was consulted and does not have any concerns with Special Permit Condition No. 14. See Department Reply, Exhibit A; Town Petition, at Exhibit C.

3. The alleged drawdown of wetlands in the INWR is not a substantive and significant issue.

The Petitioners assert that additional studies must be performed to evaluate the proposed quarry's potential drawdown effect on INWR wetlands and Oak Orchard Springs. Town Petition, at 17–19; CSP Petition, at 4. They appear to assert that the Applicant's conclusions regarding potential drawdown are improper because they were based solely on visual observations. See Town Petition, at 17–19; see also CSP Petition, at 4. The Town also cites to a comment letter from USFWS which raises concerns regarding whether the dewatering could affect Oak Orchard Springs. Town Petition, at 18.

The Petitioners have failed to provide any proof that the dewatering of the proposed quarry will or could cause the drawdown of INWR wetlands or Oak Orchard Springs. They also offer no evidence suggesting that additional studies are warranted or would provide any additional information that is useful.

The potential hydrologic impacts to the INWR wetlands, as well as Oak Orchard Acid Springs, have been adequately evaluated and addressed in the DEIS.<sup>3</sup> In addition to visual observations, the DEIS analysis includes predicted hydrology surrounding the proposed quarry, an analysis of the wetland's geology/geomorphology, and an observation of decade-old working model at the nearby Shelby Crushed Stone quarry.<sup>4</sup> See DEIS, Volume 1, Section 4.1.2.2.3, pp. 112–113. These studies indicate that dewatering of the proposed quarry is not anticipated to have a significant impact on the surface water of these areas.

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<sup>3</sup> See DEIS Section 4.1.2.2.3; Groundwater Reports, Volume 4, Appendix 4; Response to Comments, Volume 3, Appendix 2; and Response to Comments dated September 11, 2012.

<sup>4</sup> See DEIS Section 4.1.2.2.3; Groundwater Reports, Volume 4, Appendix 4; Response to Comments, Volume 3, Appendix 2; and Response to Comments dated September 11, 2012.

Many of the INWR wetlands were created by impounding water within berms or dikes. DEIS Section 4.1.2.2.3. Their water elevations are controlled by weirs or outfall structures. In other words, the wetlands are created by impounding surface water runoff on top of the fine grained clay deposits and are not created by groundwater discharge conditions.

USGS characterizes these deposits as flat lacustrine clay, silt, and fine-grained sediments deposited by when the Glacial Lake Tonawanda was present following the last period of glaciation. Town Petition, Exhibit E, p. 1. These fine grained low permeability sediments are the substrate on which the wetlands were formed. The soil survey, surficial geology maps, corehole data, and soil probes within the INWR identify the existence of fine grained low permeability soils.<sup>5</sup> In addition, the bedrock discharge zone along Oak Orchard Creek, adjacent to Ringneck Marsh, is well below the water elevation in the marsh and does not demonstrate a connection with the bedrock aquifer. Alpha Geoscience Groundwater Study, DEIS, Volume 4, Appendix 4.

Regarding the Town's reference to the drawdown of the piezometric surface, it is misguided. See Town Petition, at 18. As stated above, the INWR wetlands are not the result of bedrock discharge conditions. They are surface water controlled. Drawdown of the potentiometric surface beneath the INWR adjacent to the proposed quarry is not anticipated to impact water elevations within the wetlands.<sup>6</sup>

Please note that the Town inaccurately characterizes the USFWS comment which raised concerns regarding the method used to analyze quarry drawdown. See id. The Town states that “[USFWS] questioned the methods used by the Applicant to approximate wetlands drawdown.” Id. This is very inaccurate. First, the Applicant did not approximate wetland drawdown. As

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<sup>5</sup> See DEIS Section 3.1.1.1, 3.1.1.2; Soils Description and Field Logs contained in Volume 4, Appendix 3; Multiple Groundwater Studies contained in Volume 4, Appendix 4; and the Wetland Delineation Report and Impact Assessment contained in Volume 5, Appendix 7.

<sup>6</sup> See DEIS Section 4.1.2.2.4; and the Alpha Geoscience Groundwater Study, Volume 4, Appendix 4.

previously stated, the wetland systems and bedrock aquifer systems are separate and distinct. Second, USFWS was concerned about how drawdown would relate to the water budget analysis and amount of water discharged to the INWR wetlands. Town Petition, Exhibit A, p. 22. It is important to note that the Applicant has committed to a 385.6 GPM maximum discharge rate which was specifically evaluated when considering potential discharge impacts to the INWR wetlands.<sup>7</sup>

With regards to Oak Orchard Acid Springs, its presumed location is within a bedrock discharge zone and located outside of the potential area of influence of quarry dewatering near Oak Orchard Creek. USGS, Alpha, and Continental Placer information indicate that the acid springs originate in the Salina Shale overlying the Lockport Dolomite, which is absent at the quarry location.<sup>8</sup> Additionally, no data or information has been presented by the Petitioners or USFWS which would indicate an impact to the springs.

4. *The quality of surface water runoff from the proposed quarry is not a substantive and significant issue.*

The Petitioners allege that more studies should be performed to determine what effect surface runoff from the mine could have on INWR. Town Petition, at 19–21; CSP Petition, at 4. They also assert that surface water runoff which is discharged into the INWR will contain sediments and pollutants. In addition, they allege that groundwater from the quarry is poor in quality. On the same note, the Town cites to a comment letter from USFWS which raised concerns regarding the quality of water from the proposed quarry.

The Petitioners have not provided any evidence that surface water runoff which is discharged into the INWR will contain sediment, dust, and other pollutants. They also fail to offer proof which demonstrates that groundwater at the proposed quarry is poor in quality. In addition,

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<sup>7</sup> See DEIS Section 4.1.2.2.4; and the Alpha Geoscience Groundwater Study, Volume 4, Appendix 4.

<sup>8</sup> See DEIS Section 4.1.2.2.4; the Alpha Geoscience Groundwater Study, Volume 4, Appendix 4; and the Response to Comments dated September 11, 2012

the Petitioners do not identify the particular impacts this allegedly poor quality groundwater would have on the INWR wetlands or other downstream areas. Lastly, they neglect to provide any evidence indicating that the quality of discharges into the INWR is a substantive and significant issue.

With that stated, groundwater and wetland water quality are adequately addressed in the DEIS.<sup>9</sup> There are no significant concerns regarding water quality. Site-specific water quality analysis indicates that the water which will be discharged from the proposed quarry and into the INWR is derived from the bedrock formation supplying residential water wells in proximity to the quarry. The existing quality of this water does not raise a significant concern.<sup>10</sup> To the extent that the Petitioners seek additional studies, they are not warranted. No evidence is provided that would suggest that the Applicant's studies are in any way deficient or incorrect.

With respect to the USGS report, the Town has mischaracterized its purpose. The Town states, "The USFWS conducted a two year study examining potential hydrology issues raised by the proposed mining project." Town Petition, at 20. The Town's statement represents that this study was conducted solely for purpose of examining potential hydrology issues associated with the proposed quarry. This is simply not true. The purpose of the study was to assist the INWR in the development of a 15-year Comprehensive Conservation Plan. See Town Petition, Exhibit E, pg. 2.

Furthermore, the USGS report does not confirm the "many fears raised by the Town[], cast doubt on nearly all of the findings of the Applicant with respect to the potential hydrogeologic effects of the mine, and make it clear that further hydrogeologic study is needed. . . ." Town Petition, at 21. The USGS report made general statements of concern about issues that should be

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<sup>9</sup> See DEIS Sections 3.1.2.2, 4.1.2.2.4, and 4.1.2.2.4; Groundwater Reports, Volume 4, Appendix 4.

<sup>10</sup> See DEIS Section 4.1.2.2.4; and the Alpha Geoscience Groundwater Study, Volume 4, Appendix 4.

addressed when evaluating a proposed quarry near the INWR. See generally Town Petition, Exhibit E. The USGS report never concludes, as the Town alleges (see Town Petition, at 20), that the potential impacts it mentions will occur.

In fact, the potential issues raised in the USGS report were specifically addressed through additional studies and multiple revisions of the DEIS based on comments and additional information requested by Department staff. Furthermore, the USGS study was completed prior to some of the revisions and preparation of some of the additional hydrogeologic studies and, as a result, could not have been considered by USGS staff at the time of their study. Lastly, as the Applicant also points out, potential impacts from the proposed quarry on the Refuge cannot be drawn from the USGS report and lacks the necessary information to make those conclusions. See Applicant Response to Comments, dated September 11, 2012.

Now, the USGS report does indicate that poor water quality exists to the south and west of the site. Town Petition, Exhibit E, pg. 21. However, it also indicates that better water exists in the proposed quarry area to the north where the Lockport Dolomite is closer to the land surface. Id.

Regarding the Petitioners' allegation that surface water runoff discharged into the INWR will contain sediment, dust, and other pollutants, it is incorrect. See Town Petition, at 19; see also CSP Petition, at 4. Special Permit Condition No. 13 requires the Applicant to contain and control all silt-laden water and/or stormwater on-site.

In addition, a Stormwater Pollution Prevention Plan (SWPPP) has been developed for the proposed quarry. DEIS, Volume 6, Appendix 14. It is specifically designed to minimize water quality impacts for industrial activities and complies with the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges from

Construction Activities (GP-0-12-0001). The SWPPP contains a spill response plan, a stormwater management plan, and minimizes petroleum products stored on-site. BMP's are also designed to minimize sediment load in quarry waters and a series of sediment basins within the project area are designed to settle and trap sediment prior to water discharge.

*5. The alleged impacts to the Iroquois Job Corps Center (IJCC) are not substantive and significant issues.*

The Petitioners claim that there should be additional studies to evaluate the alleged impacts of traffic, blasting, and dewatering on the IJCC. Town Petition, at 21–23; CSP Petition, at 4–5. However, they provide no evidence to support their request for additional studies. The Petitioners are also silent as to how these alleged impacts are substantive and significant.

Concerning truck traffic, as stated above, Department staff is prepared to incorporate the Town's recommendation that the Applicant use the Fletcher Chapel Road access point. See Town Petition, at 29. Trucks associated with the quarry would not have to pass the IJCC and, therefore, alleged impacts associated with truck traffic would be eliminated.

With regards to blasting, the DEIS adequately addresses its potential impacts.<sup>11</sup> No impacts to the IJCC associated with blasting are anticipated. IJCC infrastructure is over 3,000 feet away from the southern border of the proposed quarry. It is not 1,300 feet away as the Town appears to claim. See Town Petition, at 21. The Town also neglects to provide any evidence which would suggest an impact to the IJCC from blasting at that distance.

In addition, the United States Bureau of Mines (USBM) has extensively studied the effects of blast induced ground vibration and air overpressure (air blast) on structures. This resulted in

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<sup>11</sup> See DEIS Section 1.3.2.4, 1.5.5.4, 4.1.2.2.1, 4.1.2.2.2, 4.2.6.6, 5.2.6.1, Volume 5 – Appendix 13; VibraTech Ground Vibration Blasting Studies dated December 12, 2014, January 28, 2015, and July 14, 2015; MLUP Section 2.7; and Response to Comments dated September 11, 2012

the publication of RI8507 which sets threshold damage criteria for blasting.<sup>12</sup> The Applicant has provided blast design information which demonstrates that it can safely blast at the proposed quarry while maintaining ground vibration and air overpressure levels below the required threshold damage criteria. The possibility of impacting the structural integrity of the buildings would not be likely, if even feasible, while blasting under the USBM threshold. The Department requires all mining operation to adhere to the USBM standards and draft permit Special Permit Conditions No. 18, 20, and 21 require seismograph monitoring and compliance with these standards.

At a distance of over 3,000 feet, blasting impacts will be barely perceivable, if at all, at the IJCC infrastructure. Typical blasting events last for one or two seconds and would occur once to twice a week over a 30 week construction season. Total accumulated blast impacts/duration would be 30-60 seconds per year.

Lastly, Department staff routinely monitor blasting events in response to complaints. Standard seismograph monitoring of a typical production shot at over 3,000 feet from the blast would routinely not register on the seismograph unit. As a comparison, a clap of thunder which periodically occurs during the summer months would be more frequent than blasting and much more perceivable at the IJCC.

In relation to dewatering and IJCC wells, Department staff do not anticipate any significant impacts. The projected maximum amount and aerial extent of drawdown will not be realized. The drawdown projections were a worst case scenario with the proposed quarry at full build out. They did not take into consideration the multiple phases of mining or the Applicant's ability to retain water in the Phase 1 area which reduces the area of drawdown and creates a groundwater recharge

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<sup>12</sup> United States Bureau of Mines Report of Investigation 8507, Structure Response and Damage Produced by Ground Vibration From Surface Mine, *available at* <http://www.osmre.gov/resources/blasting/docs/USBM/RI8507BlastingVibration1989.pdf>.

area adjacent to the active phases. That said, even though the maximum drawdown projection will never be realized, the maximum potentiometric surface reduction in the IJCC well is projected to be 7 feet which is not a significant impact.<sup>13</sup>

Also, a groundwater monitoring program will be implemented as part of the approved plans. This program is in addition to Special Condition No. 12 which also requires groundwater monitoring. The sentinel wells included in the monitoring will serve as a safeguard by alerting the Department of any unanticipated drawdown. If this occurs, slot cuts would be made into the bedrock at the perimeter of the proposed quarry and groundwater pumped from the mine sump would be directed to the cuts creating a recharge area.

If an impact to a water supply well occurs, Special Condition No. 11 is specifically designed to immediately supply a potable water source, investigate and determine the cause of the water loss, and, if related to the proposed quarry, replace the potable supply with a new well or municipal connection.

*6. The alleged failure to consider alternatives and cumulative impacts is not a substantive and significant issue.*

The Town alleges that the DEIS is deficient because it did not fully consider alternatives and evaluate cumulative impacts and, therefore, the DEIS must be supplemented. Town Petition, at 23–26. It does not, however, identify with any certainty the alternatives it believes were not fully considered. The Town only states that “alternatives need to be considered which would fully avoid any adverse impacts to the INWR.” *Id.* at 24. In addition, it does not make an offer of proof as to the significance of the alternatives that it alleges were not considered.

The Town is less than specific regarding what cumulative impacts it alleges should have been evaluated. *See id.* at 26. It states that other mines and quarries exist within the region but it

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<sup>13</sup> *See* DEIS Section 4.1.2.2.4; and the Alpha Geoscience Groundwater Study, Volume 4, Appendix 4.

does not identify their locations or their impacts on the INWR or the Town. Furthermore, the Town does not include an offer of proof explaining why these impacts are significant.

CSP also asserts that the DEIS does not provide a complete analysis of certain alternatives and cumulative impacts but provides no discussion of what is precisely missing from these analyses. See CSP Petition, at 23. It also provides no evidence demonstrating why the purported deficiencies are substantive and significant.

To the contrary, Department staff have evaluated the DEIS and determined that its analysis of alternatives and the project's potential impacts are adequate.

*7. The alleged impacts to the STAMP project are not substantive and significant issues.*

The Applicant and representatives of the STAMP project have recently agreed upon a blasting condition. See Department Reply, Exhibit B, pg. 2. It slightly modifies the current blasting condition in the draft permit and Department staff does not object to the change. This agreement addresses the blasting/vibration concerns raised by CSP in its petition. See CSP Petition, pg. 6–7. STAMP also appears satisfied that that its potential issues have been addressed. See Department Reply, Exhibit B, pg. 1.

**B. The Petitions Have Not Identified Any Substantive and Significant Issues Related to the Draft Permit.**

The Town is wrong to suggest that any contested draft permit condition presents an issue for adjudication. See Town Petition, at 26. An alleged deficiency in a permit condition must still be substantive and significant. Town fails to demonstrate that the allegedly deficient permit conditions are substantive and significant. First, the Town offers no proof support their assertions that the draft permit conditions it cites are in fact deficient. It only speculates about or questions their sufficiency. It also attempts to corroborate its assertions with vague or conclusory statements.

Second, the Town's petition contains no evidence demonstrating that alleged deficiencies of the draft permit conditions are actually substantive and significant. The Town does not identify a witness that will testify about these allegedly deficient permit conditions.

*1. Permit Condition 5 is not a substantive and significant issue.*

The Town alleges that this condition is insufficient with regards to mitigating impacts to the INWR and, as a result, additional studies should be performed to determine the proper setback. Town Petition, at 27.

The Town provides no justification for an increased setback or additional studies. Also, it fails to recommend a setback, identify what specific studies would be performed to determine the proper setback distance, and state what precise impacts should be evaluated by these identified studies. In addition, the Town is silent as to how this is allegedly a substantive and significant issue.

Having said that, this condition complies with the mining regulation for setback distances. See 6 NYCRR § 422.2(c)(iii). Also, the MLUP Map indicates that there will actually be a 100 foot undisturbed buffer area between the southern property line and the proposed Life-of-Mine boundary, and hardrock excavation will not occur within 200 feet of the southern property line.

The Department will be prepared to address in further detail at the issuance conference the reasons why there is not an adjudicable issue related to mining setbacks.

*2. Permit Condition 6 is not a substantive and significant issue.*

The Town asserts that this condition does not properly address dust associated with trucks leaving the mine and alleges that methods for mitigation or reducing such dust pollution should be investigated and permit conditions added. Town Petition, at 28. CSP makes the same claim. CSP

Petition, at 5. The Town also requests community air monitoring and a contingency plan. Town Petition, at 28.

The Petitioners do not offer evidence which suggests that additional studies related to dust are needed. They also fail to corroborate their statement that trucks leaving the proposed quarry have the ability cause dust pollution on a far greater scale than other sources of dust within the quarry site. In addition, the Petitioners provides no proof demonstrating that this is in fact a substantive and significant issue.

That stated, dust control measures are addressed in the DEIS and MLUP.<sup>14</sup> Measures including surfacing the haul roads exiting the site, limiting disturbed areas, application of water on internal haulageways and working areas, an increased setback from receptors, vegetated perimeter berms, standard BMPs, operating practices, among others.

Also, the Applicant has demonstrated that, in accordance with the Department Commissioner's Policy CP-33, particulate matter impacts from the project are insignificant and, therefore, additional assessment is not required.<sup>15</sup> DEIS, Section 4.1.3, pp. 126–129.

Finally, the Department does not routinely require community air monitoring at construction projects as the Town claims.

3. Permit Condition 10 is not a substantive and significant issue.

The Town requests that this condition be modified to require the Applicant to reassess road conditions, prior to the proposed project and as it proceeds, and to provide funding for road maintenance and repair *via* an agreement with the Town. Town Petition, at 28–30. It also states

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<sup>14</sup> See DEIS Section 3.1.3, 4.1.3, 5.1.3, Volume 4 – Appendix 5, Volume 5 – Appendix 12, and MLUP Section 2.5.

<sup>15</sup> See DEIS Section 4.1.3; Air Monitoring Data contained in Volume 4, Appendix 5; and NSSGA Air Study contained in Volume 5, Appendix 12.

that the draft permit should require the Applicant to use the Fletcher Chapel Road access point instead of Sour Spring Road. CSP raises the same issues. See CSP Petition, at 5.

The DEIS evaluated the potential traffic impacts of both access points. Neither access point is expected to adversely impact traffic operations. That said, Department staff is prepared to incorporate the Town's recommendation that the Applicant use the Fletcher Chapel Road access route. Access *via* Sour Springs Road would be limited to emergencies only.

With regards to a road-use or cost-sharing agreement, the Town and the Applicant are free to negotiate these agreements. However, the imposition of an applicant funding requirement for local road repair and maintenance is not reasonably related to impacts identified in the DEIS. See 6 NYCRR § 617.3(b); see also Matter of Cerame v. Perinton Zoning Bd. Of Appeals, 27 A.D.3d 1911 (4<sup>th</sup> Dept. 2006) (rejecting an attempt by zoning board to require a letter of credit to cover road repairs in connection with a project because it was not related to any of the environmental significance criteria). It is also important to note that the Town petition actually fails to explain how normal use of local roads could constitute a significant adverse environmental impact.

4. Permit Condition 11 is not a substantive and significant issue.

The Town alleges several deficiencies with the DEIS as it relates to groundwater wells and requests that the Applicant evaluate connecting nearby properties, including the IJCC, to a municipal water source. Town Petition, at 31; CSP Petition, at 6. The Town also wants additional studies of potential impacts of ground disturbance activities on groundwater quality and this condition be amended to include the IJCC.

The Town fails to offer proof demonstrating that this is a substantive and significant issue. That said, the DEIS accurately characterizes the potential for impacts in residential water supply wells adjacent to the proposed quarry. Identification of the potential for impact to the closest

supply wells has led the Department to require additional study and information throughout the 10-year review of the application materials.

This has also caused the Department to require additional mitigation measures to address potential impacts. These include installation of rock cuts to allow for groundwater recharge at the northern and eastern quarry perimeters and Special Conditions Nos. 11 and 12, which require a residential well supply agreement and a well monitoring program, respectively. This approach was most recently confirmed in Seneca Meadows, Inc., 2012 WL 1384772, at \*18–19 (Mar. 26, 2012). Here, as in Seneca Meadows, there is only a potential for well impacts. See DEIS, Section 4.1.2.2., pp. 102–110. Also, Special Permit Condition No. 12 applies to all properties in the proposed quarry’s vicinity. See Seneca Meadows, at \*19.

As just stated, despite the potential for well impacts, it should be understood that the projected maximum amount and aerial extent of drawdown will not be realized. For more information, please refer to the discussion related to groundwater above.

5. Permit Condition 12 is not a substantive and significant issue.

The Town argues that water level and quality within the INWR should be monitored. Town Petition, at 33. It also asserts that additional SPDES monitoring is needed. CSP argues the same things. See CSP Petition, at 4.

Water level and quality as it relates to the INWR has already been addressed in this document. Neither are a significant concern. See id. The Petitioners do not provide any proof which contradicts Department staff’s conclusion that there will not be significant impacts.

6. Permit Condition 14 is not a substantive and significant issue.

The Town, as well as CSP, assert that there should be an alternative discharge location outside of the INWR. Town Petition, at 35; CSP Petition, at 4. The Town also states that a

contingency discharge plan should be developed in the event that discharges to the INWR must be terminated. Town Petition, at 35.

These conditions are not needed. There are no significant concerns regarding the quality of surface water runoff into the INWR. The Petitioners have not provided any evidence that contradicts that conclusion. Also, by raising concerns about the proposed alternative discharge point, the Town contradicts its previous allegation that no alternative discharge point exists for the proposed quarry. See Town Petition, at 16.

7. Permit Condition 15 is not a substantive and significant issue.

The Town asserts that this condition should require that the Applicant pay for pre-blasting surveys of potentially affected buildings conducted by third parties. Town Petition, at 36. It also alleges that the Town should pay for a pre-blast survey for the IJCC. Furthermore, the Town states that INWR should be warned prior to blasting.

The Town has misread this condition. The Applicant is required to pay for pre-blasting studies performed by third parties required under this condition.

With regards to a pre-blast survey for the IJCC, it is not warranted. The Division of Mineral Resources requires a pre-blast survey within 1500 feet for new or modified mining permits which use blasting as an extraction method. The 1500 foot radius coincides with the Applicant's statement that blasting effects would be negligible at 1,700 feet from the blasting. The Town even admits that the IJCC is outside of this 1,700 foot boundary.<sup>16</sup>

For more information, please refer to the discussion related to blasting above.

8. Permit Condition 17 is not a substantive and significant issue.

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<sup>16</sup> This admission contradicts its previous statement that the IJCC is only 1,300 feet from the proposed quarry. See Town Petition, at 21.

The Town alleges that conditions should be modified so that blasting outside of normal hours of operation (9am to 4pm, Monday through Friday) is prohibited except for emergencies. Town Petition, at 36. It also asserts that daily or weekly blasting limits should be imposed to minimize unidentified negative effects to Town residents, local wildlife, nearby buildings, and the INWR. Id.

The Town does not provide any evidence that these conditions are needed or propose any specific daily or weekly limits on blasting. It also fails to identify the particular impacts that these blasting limits are supposed to minimize.

9. Permit Condition 21 is not a substantive and significant issue.

The Town alleges that further study on the noise limit for blasting is “clearly” required. Town Petition, at 38. It also asserts that sound limits within the Town and the INWR as a result of blasting should be reduced to a more reasonable decibel level.

The Town provides no evidence that further study is warranted or that this issue is substantive and significant. It also fails to recommend a decibel level.

The Town is incorrect in characterizing air blast and resulting noise levels off-site. Air blast or air overpressure are air vibrations which are measured as time-histories of air overpressure. These air vibrations are pressure waves traveling through the atmosphere. Air overpressure is the additional pressure generated from a blast above normal atmospheric pressure. Air vibration are audible to the human ear at frequencies above 20 hertz and are referred to as sound or noise. Air vibrations with frequencies less than 20 hertz are inaudible and called air blast. Air blast should not be confused with acoustical noise, which the Town has apparently done.

The frequency range for a normal commercial blast is 1 to 20 hertz. Removing the inaudible portion of the air blast significantly reduces the audible intensity of the shot that can be

heard. The noise levels and blasting impacts are accurately characterized in the previously referenced citations for blasting.

**CONCLUSION**

For the reasons set forth above, Department staff respectfully request that the Petitioners be denied full party status in this matter. The Department, however, reserves its right to provide additional information and elaborate as to why no adjudicable issues exist at the issues conference. Finally, if the Town is granted full party status, which it should not, CSP should be denied full party status because it alleges the same adjudicable issues as the Town.

Respectfully submitted:

On behalf of the New York State  
Department of Environmental Conservation,



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Dudley D. Loew  
Senior Attorney

6274 East Avon, Lima Road  
Avon, New York 14414  
(585) 226-5368

Dated: April 8, 2016

## Sheeley, Scott E (DEC)

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**From:** Roster, Tom <tom\_roster@fws.gov>  
**Sent:** Wednesday, November 25, 2015 6:07 AM  
**To:** Sheeley, Scott E (DEC)  
**Cc:** Gibbs, John (DEC); Wasilco, Mike R (DEC); Kennedy, Heidi E (DEC); Jones, Scott (DEC); Army, Steve (DEC); Kevin Brown; John Hellert; Harkawik, Dennis P (DEC); Loew, Dudley D (DEC)  
**Subject:** Re: Frontier Stone Quarry Proposal - Draft Condition; DEC No. 8-3436-00033/00001

Scott, thanks.

We have no concern with the attached draft language.

Tom

On Fri, Nov 13, 2015 at 2:07 PM, Sheeley, Scott E (DEC) <[scott.sheeley@dec.ny.gov](mailto:scott.sheeley@dec.ny.gov)> wrote:

Good Afternoon Tom,

As discussed this morning, the DEC has been in contact with representatives of Frontier Stone, LLC concerning the proposed Frontier Stone Quarry mine dewatering discharges. In follow-up to our contact with them this week about the discharges, they have provided a letter dated November 11, 2015 describing an alternative mine dewatering discharge location, which is attached. It is our understanding that this alternative discharge location was discussed with you or your staff during a meeting sometime last year with Frontier Stone representatives, and that the purpose of using an alternative discharge location would be to cooperate with USFWS by avoiding discharges to the Schoolhouse March complex during drawdown and low moisture management periods.

To incorporate this alternative dewatering discharge location & scenario into the Mined Land Reclamation permit that the DEC may at some point issue for this project, we have prepared a draft permit condition that would be included in any such approval. The draft permit would also include the November 11, 2015 letter and attachments as "approved documents", which is the list of materials that the applicant would have to comply with in any final permit that may be issued. This draft condition is being forwarded to you for your information and any response you may wish to provide.

Please note that we have included a proposed limit on the daily volume of discharge of 554,400 gallons. This amount equates to the upper amount the applicant has listed in their DEC water withdrawal application and is equal to 385 gallons per minute (gpm) when averaged over an entire 24 hour period. This amount is a higher rate than the 259 gpm rate analyzed in the applicant's November 11, 2015 letter. 259 gpm is the rate the applicant has estimated based on an annual average, while 385 gpm is the highest expected rate in March. The amounts estimated by the applicant for July and September are 195 gpm and 197 gpm, respectively, so if diversion is requested in the summer/fall period, the daily volume of pumping could be lower than highest or average rates estimated.

We have also copied the applicant's representatives on this e-mail and draft condition for their information as well, since we have not previously shared this condition with them and it does not reflect any input on their part. This draft condition is also based on the Department's understanding of the discussions between the Applicant and USFWS.

If you wish to provide a response to this draft condition please do so by close-of-business on November 30, 2015. If you would like to discuss this condition, or feel you need additional time, please contact me as indicated below.

Thank you.

Sincerely,

**Scott E. Sheeley**

Regional Permit Administrator, Division of Environmental Permits

New York State Department of Environmental Conservation

Region 8, 6274 E. Avon-Lima Rd., Avon, NY 14414

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Thomas P. Roster, Project Leader

Iroquois National Wildlife Refuge

Erie National Wildlife Refuge

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Join the conversation!

Iroquois National Wildlife Refuge

Erie National Wildlife Refuge

**Frontier Stone Quarry, DEC Application ID 8-3436-00033/00001**

**Proposed Special Condition to be included in the draft Mined Land Reclamation Permit to address off-site water discharges to state-regulated wetlands on Iroquois National Wildlife Refuge:**

“Upon written request by the United States Fish and Wildlife Service (USFWS), the Permittee shall use the alternative mine dewatering route identified as “drainage basin 2” in the letter dated November 11, 2015 from John Hellert to Scott Sheeley. Use of the alternative discharge location shall:

- Occur for the full period specified by the USFWS request,
- Be the minimum seasonally necessary to achieve proper mine dewatering, but at no time exceed a rate of 554,440 gallons per day, and
- Meet all effluent limits and requirements of the Permittee’s coverage under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-12-001).”

## Sheeley, Scott E (DEC)

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**From:** Mark Masse <mmasse@gcedc.com>  
**Sent:** Wednesday, April 06, 2016 2:57 PM  
**To:** Sheeley, Scott E (DEC)  
**Cc:** Adam S. Walters; Loew, Dudley D (DEC)  
**Subject:** RE: Comments to Frontier Stone Mining Permit

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Scott,

As long as the conditions the GCEDC and Frontier Stone have agreed to are incorporated into the permit the GCEDC is satisfied that potential issues have been addressed related to the STAMP project.

The only remaining open issue is the execution of a license for access to the STAMP site so that Frontier Stone may install and operate the permanent seismic accelerometer monitoring station as required in the Draft Permit. We are comfortable that this matter can be addressed in the future as the project moves along.

Thanks,

Mark A. Masse, CPA  
Senior Vice President of Operations



Genesee County Economic Development Center  
Leadership Genesee Class of 2002  
99 MedTech Drive  
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Fax: (585) 343-0848  
Email: [mmasse@gcedc.com](mailto:mmasse@gcedc.com)  
Web site: [gcedc.com](http://gcedc.com)

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**From:** Sheeley, Scott E (DEC) [mailto:[scott.sheeley@dec.ny.gov](mailto:scott.sheeley@dec.ny.gov)]  
**Sent:** Wednesday, April 06, 2016 1:09 PM  
**To:** Mark Masse ([mmasse@gcedc.com](mailto:mmasse@gcedc.com)) <[mmasse@gcedc.com](mailto:mmasse@gcedc.com)>  
**Cc:** Adam S. Walters <[AWalters@phillipslytle.com](mailto:AWalters@phillipslytle.com)>; Loew, Dudley D (DEC) <[dudley.loew@dec.ny.gov](mailto:dudley.loew@dec.ny.gov)>  
**Subject:** FW: Comments to Frontier Stone Mining Permit

To: Mark Masse, Genesee County Economic Development Center

Good Afternoon Mark,

As indicated in the e-mail exchange below, the Department and Frontier Stone, LLC have recently resolved some additional minor comments from your counsel's office and consultants regarding the blasting conditions that would be incorporated into any Mined Land Reclamation permit the DEC may issue in the future for the Frontier Stone Quarry proposal.

I would like to know from your office whether this now addresses all potential issues that the Frontier Stone Quarry proposal may present related to the GCEDC STAMP project. As you know, the Department is currently proceeding through a Part 624 hearing process and this information would be help to the Department going forward.

Sincerely,

**Scott E. Sheeley**

Regional Permit Administrator, Division of Environmental Permits

**New York State Department of Environmental Conservation**

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---

**From:** Kimberly R. Nason [mailto:[knason@phillipslytle.com](mailto:knason@phillipslytle.com)]

**Sent:** Wednesday, April 06, 2016 12:00 PM

**To:** 'Kevin Brown'; Sheeley, Scott E (DEC)

**Cc:** Adam S. Walters; Loew, Dudley D (DEC)

**Subject:** RE: Comments to Frontier Stone Mining Permit

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Kevin and Scott,

This works for us. We do not have a graph without VC-F incorporated, so I think the annotation that VC-F does not apply should be fine.

Thank you,  
Kim

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**From:** Kevin Brown [mailto:[kevin.brown@brownsharlowlaw.com](mailto:kevin.brown@brownsharlowlaw.com)]

**Sent:** Wednesday, March 30, 2016 12:07 PM

**To:** Kimberly R. Nason; [sesheele@gw.dec.state.ny.us](mailto:sesheele@gw.dec.state.ny.us)

**Cc:** Adam S. Walters; Loew, Dudley D (DEC)

**Subject:** RE: Comments to Frontier Stone Mining Permit

Kimberly and Scott

We reviewed the proposed changes to draft permit blasting conditions for STAMP with our client and Vibra-Tech.

On behalf of Frontier Stone LLC we agree to the proposed changes with one exception that is to request that the additional graph be revised to delete the VC-F reference or in the alternative the graph can be modified with an annotation that VC-F criteria are not applicable.

Regards

Kevin

Kevin J. Brown, Esq.

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[kevin.brown@brownsharlowlaw.com](mailto:kevin.brown@brownsharlowlaw.com)

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**From:** Kimberly R. Nason [<mailto:knason@phillipslytle.com>]  
**Sent:** Thursday, March 24, 2016 3:16 PM  
**To:** '[sesheelee@gw.dec.state.ny.us](mailto:sesheelee@gw.dec.state.ny.us)'; '[kevin.brown@brownsharlowlaw.com](mailto:kevin.brown@brownsharlowlaw.com)'  
**Cc:** Adam S. Walters  
**Subject:** Comments to Frontier Stone Mining Permit

Scott and Kevin,

Please find attached comments to the draft permit blasting conditions, dated January 8, 2016, based upon discussions with STAMP's expert from Colin Gordon Associates. Note that we have also attached an additional figure.

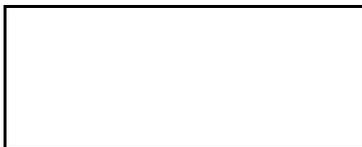
Please let us know if you have any questions.

Thank you,  
Kimberly Nason

**Kimberly R. Nason**  
Associate



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**1. Conformance With Plans** All activities authorized by this permit must be in strict conformance with the approved plans submitted by the applicant or applicant's agent as part of the permit application. Such plans were approved by Steven M. Army, Mineral Resources on < DATE TO BE INSERTED > and consist of the following items:

- \* Mining Permit Application dated February 7, 2014.
- \* Organizational Report dated February 7, 2014.
- \* Environmental Assessment Form dated February 7, 2014.
- \* Draft Environmental Impact Statement for A Mined Land Use Plan Mining Permit Volume 1 last revised January 27, 2014, Volume 2 last revised October 15, 2013, Volume 3-7 dated January 29, 2014.
- \* Response to Comments, DEIS Review and Comments dated September 11, 2012.
- \* DEIS Information Request dated March 21, 2013.
- \* Response to Comments dated September 24, 2013.
- \* Vibra-tech Prediction of Blast Induced Ground Vibration Report dated December 12, 2014.
- \* Vibra-Tech Response to Comments dated January 28, 2015.
- \* Vibra-Tech Prediction of Ground Vibrations-Western New York Science and Technology Manufacturing Park dated July 14, 2015.
- \* Frontier Stone Quarry Proposed Dewatering Route to Basin 2, dated November 11, 2015.

## **15. Pre-Blast Survey**

Prior to engaging in blasting, the permittee shall conduct a pre-blast survey for residential and commercial structures, not owned or leased by the permittee, that are within 1500 feet from the final Life of Mine boundary.

Landowners within 1,500 feet of the Life of Mine boundary shall be notified in writing that they have the right to have a qualified third-party conduct a pre-blast survey prior to any blasting taking place at the quarry. This letter shall describe the procedure for making a pre-blast survey request to the company.

The survey shall document the condition of the dwelling or structure and catalogue preblasting damage and other factors that could reasonably be affected by blasting at the mine site. Assessment of appurtenances, such as pipes, cables, transmission lines and water well systems, shall be limited to surface condition and readily available data.

Copies of the completed pre-blast survey reports will be provided to the person requesting the survey, and to the Department. Survey reports and documentation of all contacted parties (including those that refused preblast surveys) shall be maintained by the Department.

**16. Licensed Blaster Required** All blasting shall be undertaken by a blaster licensed by the New York State Department of Labor and monitored with a properly calibrated seismograph. The permittee shall maintain copies of all blasting records. Such records shall be made available to the department upon request.

**17. Blasting Hours** Blasting shall be conducted between the hours of 9:00 a.m. to 4:00 p.m. Exceptions to this will require prior written notification by the permittee and prior written approval from the Department. No blasting will occur on weekends or legal holidays.

**18. Seismograph Monitoring** All blasts shall be monitored with a properly calibrated seismograph. Seismographs shall be installed at the nearest residential receptor, and any locations identified within the approved Mined Land Use Plan or locations determined by the Department. In addition, the permittee shall establish a permanent seismic accelerometer monitoring station at the Western, New York Science, Technology, and Advance Manufacturing Park located on Route 63/77 in the Town of Alabama, NY (“STAMP Site”). This station shall be located in the northwest corner of the STAMP Site in order to monitor vibrations from blasting.

Both standard seismograph, and seismic accelerometer monitoring shall continue as long as the permit is in place, and all blast records shall be maintained throughout the life of the project, and shall be provided to the Department upon request.

**19. Seismograph, Seismic Accelerometer, and Shot Reports** All seismograph, seismic accelerometer records, and shot reports, shall be submitted to the Department within 72 hours of each blasting event for the term of this permit.

**20. Ground Vibration Limits**

a. Ground vibration shall not exceed the limits as per the attached ground vibration limits graph from the U.S. Bureau of Mines Report of Investigation 8507 (Figure B-1, Safe levels of blasting vibration for houses using a combination of velocity and displacement). Maximum peak particle velocity shall not exceed these limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area.

b. From the date of issuance of this mining permit, ground vibrations at the STAMP Site from blasting shall not exceed the VC-E vibration criteria, defined as the rms vibration velocity limit of 3.1  $\mu\text{m/s}$  (125  $\mu\text{in/s}$ ) in the 1/3 octave bands from between 1 and 80 Hz<sup>1</sup>, in the interior of such building(s), detailed in the document “Evolving criteria for research facilities: I -

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<sup>1</sup> Note that NIST-A is identical to VC-E at frequencies above 20 Hz, but maintains a constant rms displacement amplitude at lower frequencies. See Figure A.2, Generic Vibration Criterion (NIST-A) Curve for Critical Areas in Nanotechnology Facilities.

Vibration,” and shall be consistent with the findings and recommendations detailed in the Vibra-Tech report dated July 14, 2015, contained in the document list of this permit.

c. In the event that a tenant commits to establish either semiconductor or nanotechnology based or similar research, development and/or manufacturing institutional buildings at the STAMP Site, the permittee must submit an approvable production blast analysis (PBA) and proposed production blast condition (PBC) within 6 months of permittee obtaining actual notice of the signing of such a deal. The PBA must at a minimum include:

- i. If the application(s) is for nanotechnology based research, development and/or manufacturing institutional building(s), the PBA shall establish a PBC to limit ground vibration from the production blast so as not to exceed NIST-A vibration criteria, defined as defined as the rms vibration velocity limit of 3.1 micro-m/s in the 1/3 octave bands from 20 to 80 Hz, with a constant rms displacement amplitudes at frequencies below 20 Hz, as detailed in 0.025 μm (1 μin) between 1 and 20 Hz; 3.1 μm/s (125 μin/s) between 20 and 100 Hz, and as further detailed in Figure A.2 and the Vibra-Tech report dated July 14, 2015, contained in the document list of this permit, and the document “Evolving criteria for research facilities: I - Vibration.” in the interior of such building(s). This limitation may be specific to STAMP Site building locations.
- ii. The PBA must include analysis of procedures to be included in the PBC to confirm compliance with the PBC.
- iii. This will be considered to be a modification to this permit, and a new condition will be added to reflect these requirements.

**21. Air Blast Limits** Air blast shall not exceed 133 dB at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area.

**22. No Flyrock Beyond the Property Line** There shall be no flyrock beyond the property line including flyrock that travels in the air or along the ground. In the event of flyrock beyond the property line, all blasting shall cease immediately and the flyrock incident shall be reported within 24 hours to the Regional Mined Land Reclamation Specialist. Blasting shall not resume until written approval to resume blasting is obtained from the Department.

**23. Prevent Injury Blasting** shall be conducted in a manner to prevent injury to persons and damage to public or private property outside the permit area.

**24. Storage of Explosives** Storage of explosives on site shall conform to State of New York, Department of Labor Industrial Code Rule 39, found at 12 NYCRR 39:

Part 39.6 General Provisions for the Storage and Handling of Explosives Part 39.8  
Construction and Maintenance of Magazines  
Part 39.9 Location of Magazines

# Figure B-1 Acceptable Blasting Levels

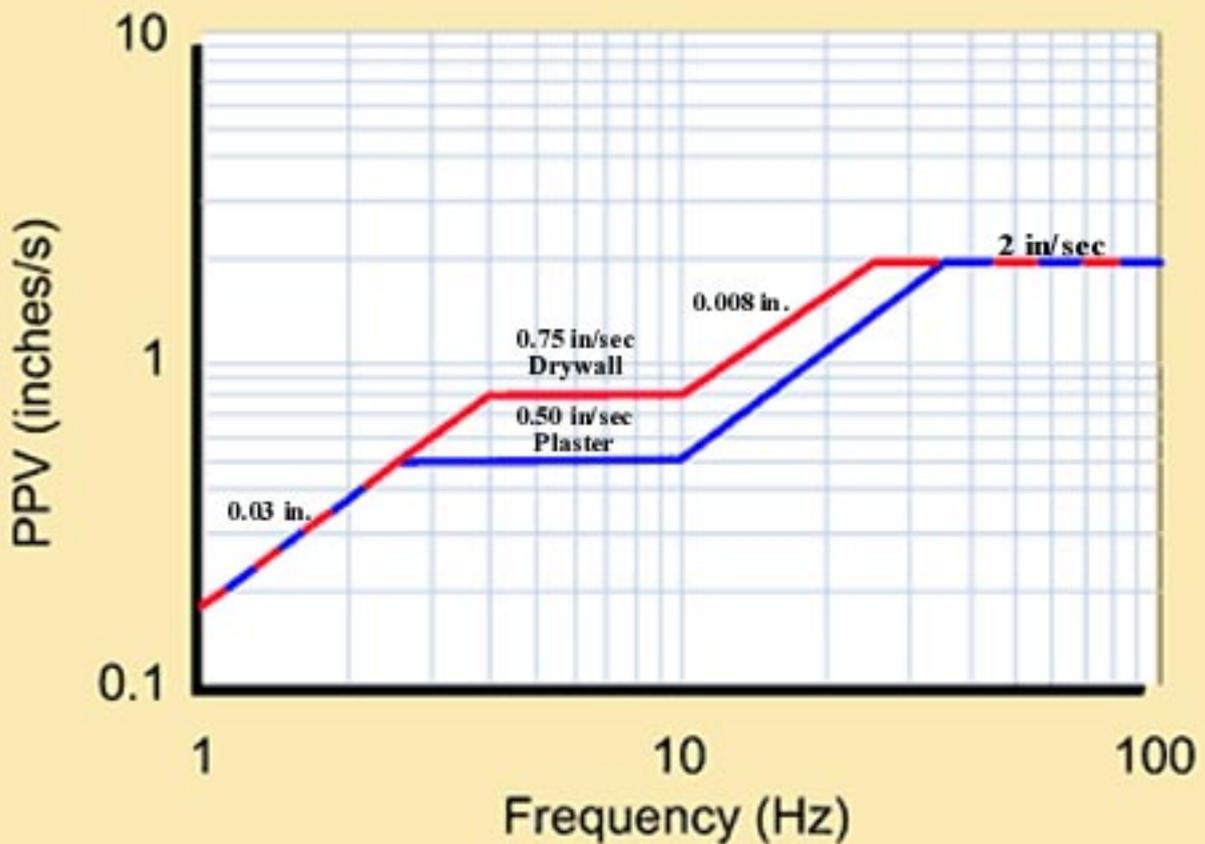


Figure A.2. Generic Vibration Criterion (NIST-A) Curve for critical areas  
In nanotechnology facilities - Showing also several of the VC criteria for reference

