

FINAL ENVIRONMENTAL IMPACT STATEMENT

Frontier Stone, LLC Frontier Stone Quarry

Town of Shelby, Orleans County, New York
DEC Nos: 8-3436-00033/00001 & /00002

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- Appendix 1 In the Matter of the Application of Frontier Stone, LLC, Ruling on Issues and Party Status, dated July 27, 2016

(Note: The Issues Conference Ruling contains a full list of exhibits, which include a comprehensive list of record documents, including, among others, the DEIS, DEIS & hearing public comments/transcripts, and supplemental technical documents. The exhibits are included electronically with this Final Environmental Impact Statement.)

- Appendix 2 In the Matter of the Application of Frontier Stone, LLC, Decision of the Commissioner, dated May 8, 2017

I. INTRODUCTION

A. Contents of the Final Environmental Impact Statement

This final environmental impact statement (“FEIS”) has been prepared for the proposed Frontier Stone Quarry Project (“Project”) in accordance with the State Environmental Quality Review Act (“SEQR”) as contained in the New York State Environmental Conservation Law (“ECL”) (see ECL § 8-0101 *et. seq.*) and its implementing regulations (see 6 NYCRR Part 617). The FEIS contains three (3) sections. Section I summarizes the environmental review process and contains a description of the Project. Section II provides information presented by Frontier Stone, LLC (“Frontier”) to the New York State Department of Environmental Conservation (“DEC” or “Department”) after the draft environmental impact statement (“DEIS”) was deemed complete by the Department on March 28, 2014. Section III contains the Department’s responses to public comments by topic area. Copies of the public comments are contained electronically in Appendix 1, Exhibits 6 and 14.

The DEIS accepted by the Department on March 28, 2014 is incorporated herein by reference and provided electronically in Appendix 1 as Exhibit 13 of the Ruling on Issues and Party Status, dated July 27, 2016 (“Issues Ruling”). Also contained in the Appendices to this FEIS are electronic copies of the transcripts of the two public hearings held on April 30, 2014 and March 8, 2016; electronic copies of written comments received by the Department; the Issues Ruling; the Decision of the Commissioner, dated May 8, 2017 (“Commissioner’s Decision”); and several additional technical reports prepared and submitted to the Department after the acceptance of the DEIS.

B. Application History

Frontier proposed to construct a 215.5 acre hard rock quarry on a 269.45± acre site located on the south side of Fletcher Chapel Road in the Town of Shelby, Orleans County. According to the original application, the site is owned by Chester and Dorothy Zelazny.

On March 15, 2006, the Department received Frontier’s application, dated March 10, 2006, for a Mined Land Reclamation permit, pursuant to Article 23 of the Environmental Conservation Law (“ECL”), regarding its proposal to construct the quarry.

On March 28, 2006, the Department initiated SEQR lead agency coordination through its Region 8 office and was established as the SEQR lead agency.

On June 5, 2006, the Department issued a Positive Declaration and Notice of Intent to Prepare a DEIS (“Positive Declaration”) for the Project. The Positive Declaration was published in the June 22, 2006 edition of the *Environmental Notice Bulletin*. In the Positive Declaration and again in the final scope, dated January 17, 2007, the Department determined that a DEIS should be prepared for the Project based on the scope of the proposed action and its potential for significant adverse environmental impacts.

After Frontier submitted the original application, the Department adopted new water withdrawal regulations (see 6 NYCRR Part 601) which required permits for various activities, including the operation of mine dewatering equipment with a capacity to pump over 100,000

gallons of water per day. Because the proposed quarry dewatering exceeds this regulatory threshold, Frontier applied for a water withdrawal permit on June 14, 2013.

In addition to the applications for Mined Land Reclamation and water withdrawal permits, Frontier submitted necessary forms for a New York State air facility registration for emissions related to crushing equipment and for coverage under the New York State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities.

After the Department's adoption of a final DEIS scoping document, Frontier submitted various preliminary drafts and revisions of the DEIS. On March 28, 2014, the DEC accepted the DEIS for public review and issued a combined Notice of Complete Application, Availability of a DEIS, and Notice of Hearing for Frontier's applications. The complete DEIS and the applications were made available for public review and comment. A Notice of Complete Application, Availability of a DEIS and Notice of SEQR Hearing were published in the Environmental Notice Bulletin ("ENB") on April 2, 2014 and Batavia Daily News on April 3, 2014. On April 30, 2014, the Department held a public hearing at the Town of Shelby Town Hall in Medina, New York. The public written comment period ended on June 9, 2014

Based on a review of public comments received on the DEIS and applications, Department staff determined that an additional hearing pursuant to the Department's hearing regulations at 6 NYCRR Part 624 was warranted. On December 11, 2015, the Department notified Frontier of its decision. A pre-adjudicatory hearing legislative hearing and issues conference were held on March 8, 2016 and April 26-27, 2016, respectively. Petitions for party status and the issues conference record were evaluated by Administrative Law Judge ("ALJ") Scott Bassinson. On July 27, 2016, ALJ Bassinson issued the Issues Ruling which found no issues requiring adjudication and remanded the matter to Department staff to complete the SEQR process and finalize the combined Mined Land Reclamation and water withdrawal permit.

After the Issues Ruling, appeals were filed and considered by the Commissioner. On May 8, 2017, the Commissioner's Decision affirmed the ruling of ALJ Bassinson and remanded the matter to staff to complete the SEQR process and issue the requested permits consistent with the draft permits.

The Issues Ruling, including all exhibits, are included in this FEIS as Appendix 1. The exhibits in the Issues Ruling include, among other documents, the applications documents, the accepted DEIS, and supplemental studies provided by Frontier after the Department's acceptance of the DEIS. As noted above, these documents, and others provided in the issues ruling exhibits, are made part of this FEIS. In addition, the entirety of the Commissioner's Decision is included in this FEIS as Appendix 2.

C. Description of Proposed Project

Frontier plans to construct a new 215.5± acre dolomite/limestone quarry on a 269.45± acre parcel located in the Town of Shelby, Orleans County about 3.7 miles south of the Village of Medina. The property is on the south side of Fletcher Chapel Road about several hundred feet east of the Sour Springs Road. A small portion of the site also fronts Sour Springs Road. The excavation area totals 172.2± acres and mining would be divided into four (4) phases over

the estimated 75-year operational life of the mine. Quarrying would be conducted by standard drill and blast technology with front-end loaders and excavators feeding a primary crusher with shot rock. The primary crusher will follow the advancing face and rock would be conveyed to an on-site processing plant by field conveyor. Mining is proposed below the water table and the project includes dewatering of the quarry area. As proposed, the estimated maximum water withdrawal for mine dewatering is 554,264 gallons per day, which would be discharged at the southwest corner of the site to an existing agricultural drainage ditch. The reclamation objective will be to create open space with two lakes for recreation and wildlife habitat. The two lakes, separated by an existing utility line, would be approximately 35.2 and 156.1 acres in size.

After acceptance of the DEIS, several additional studies and evaluations were developed to further address potential environmental impacts of the Project. These have resulted in some refinements to the Project. The studies and project modifications are described in Section II below.

II. ADDITIONAL INFORMATION TO THE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

A. Blasting and Vibration Evaluations

In response to public comment, Frontier has developed additional information on potential blasting and ground vibration impacts after acceptance of the DEIS. This information was primarily developed to address concerns related to the potential impacts of the project on the Western New York Science, Technology and Advanced Manufacturing Park project site (“STAMP”). STAMP is an industrial manufacturing site being developed by the Genesee County Economic Development Center (“GCDEC”), located about 4.5 miles south-southwest of the proposed Frontier Stone Quarry. The high-technology manufacturing proposed on the site requires a low ground-vibration environment. Frontier provided additional evaluation of blast designs and seismic effects to determine a blast design protocol that would meet the appropriate low ground-vibration standards. These studies are provided in Appendix 1, Exhibit 15 of the Issues Ruling and discussed in Section II.B.5.b (pp. 13-14). These evaluations led to the inclusion of additional permit conditions (see nos. 18 and 20 and Figure A.2 attachment) in the draft permit dated April 28, 2016 (see Appendix 1, Exhibit 21 of the Issues Ruling). These conditions were developed by the Department and Frontier in consultation with, and acceptance by, representatives of the GCEDC. The Issues Ruling discussed, more generally, the impacts of blasting and vibration on nearby properties, including the Iroquois National Wildlife Refuge, in Section II.B.6.b (pp. 15-18).

B. Mining Setbacks and Supplemental Noise Evaluation

The Project is located adjacent to, and north of, the Iroquois National Wildlife Refuge (“Wildlife Refuge”). Many comments expressed concerns about the impact of the Project on the Wildlife Refuge. Among those concerns was the potential impact of noise on wildlife and recreation in the Wildlife Refuge areas near the quarry. According to noise evaluations prepared by Frontier, potential increases in noise over ambient could occur approximately 350 feet into the Wildlife Refuge area. To mitigate potential impacts within this area, Frontier has agreed to limit Phase 2 mining operations during the months of May, June, and July, which are the period most sensitive for most nesting birds. Condition 31 of the April 28, 2016 draft permit includes these restrictions, which prohibits mining activities within 350 feet of the southern excavation limit. The prohibited mining activities include, but not are not limited to, stripping, stockpiling, drilling, blasting, loading, and hauling. This is further summarized in Section II.B.3.b (pp. 10-11) of the Issues Ruling, which is included in Appendix 1.

C. Cultural Resources and Indian Nation Consultation

After the completion of the DEIS, the Department met with representatives of the Tuscorara Nation and Tonawanda Seneca Nation (collectively, the “Nations”) to consult regarding the Project in accordance with the DEC Commissioner’s Policy on Indian Nation Contact, Cooperation, and Consultation (CP-42). This meeting primarily involved discussion about the sharing of information about the cultural resource investigations that remain to be performed on the site. The Nations’ representatives expressed their interest in reviewing any further cultural resource investigations required for the Project. The Department supports this

exchange of information and the Nations' review, so a condition was added to the draft permit to support this. Condition No. 28 of the draft permit requires the remaining archaeological survey work in Mine Phases 2 and 3 to be completed and reports provided to the Department and New York State Office of Parks, Recreation and Historic Preservation ("OPRHP") at least one year prior to any proposed dates to commence mining in Phases 2 and 3. The Department is committed to sharing any such reports with the interested Indian Nations at the time they are received by the Department.

In addition, the Nations' representatives wanted Frontier to be aware of their human remains discovery protocol. In a typical case, if there are unanticipated discoveries, a standard protocol which OPRHP has developed is usually followed. Condition No. 29 of the draft permit contains a standard condition with the respect to the unanticipated discovery of human or archaeological remains. The Department has provided Frontier with the Haudenosaunee remains discovery protocol that Nation representatives identified at the meeting. In addition, the Department has advised Frontier that in the event there are unanticipated discoveries, Frontier would be obligated to notify the DEC per Condition No. 29 of the permit, then both the OPRHP and Indian Nation representatives would be consulted regarding the appropriate course of action in relation to both protocols.

D. Mine Dewatering and Off-site Discharges

As proposed, the quarry would be dewatered year-round, as needed, to maintain dry working conditions within the excavation area. The amount of water discharged from the mine would vary with the season, size of the excavation area, and groundwater and surface water inputs. The maximum discharge rate estimated and evaluated in the DEIS was 554,264 gallons per day during the month of March. During the drier months, this amount would drop significantly, and was estimated to be approximately 280,000 gallons per day. As noted above, the discharge location is an agricultural ditch located on the southwest corner of the mine. This ditch eventually conveys flow in a southwesterly direction to water bodies on the Wildlife Refuge. Among these water bodies are State-regulated Freshwater Wetland MD-3 (Class I) and its outlet stream. This wetland is also part of a shallow pond managed by the Wildlife Refuge (by an outlet control structure) for water fowl and other wildlife habitat, and is also known as Schoolhouse Marsh. The outlet stream passes through other mesic, wet-meadow wetlands that are managed by the Wildlife Refuge, primarily by periodic mowing, before passing under NYS Route 63 and flowing further west. The potential impacts of dewatering on this downstream wetland and system were evaluated in the DEIS.

The US Fish & Wildlife Service ("USFWS") expressed concern about the potential impacts of quarry water discharges on the downstream wetlands and their ability to continue current management practices. In discussion with USFWS and Frontier, an alternative discharge location was identified which would be used seasonally to vary the location of the discharge. The alternative location is also located on the south side of the quarry site, but directs water to a conveyance east of the primary discharge site. This alternative location drains to the Wildlife Refuge "Center Marsh", which is also designated as State-regulated wetlands No. A-5 (Class I), but the size of the wetlands and impoundments are relatively large compared to those receiving the primary discharge, which minimizes the relative impact of the discharge. In addition, the discharged water does not pass through any mesic, wet-meadow wetlands. This alternative discharge plan was reviewed by USFWS and found to be acceptable to address their concerns related to quarry dewatering. This is discussed in the Issues Ruling

(see Section II.B.6.c, pp. 18-21) and Condition 14 is included in the April 28, 2016 draft permit concerning the discharge regime.

E. Supplemental Transportation Information

As originally proposed, and described in the DEIS, access to and from the site would be accomplished from Sour Springs Road by a new entrance located approximately 1,600 feet (1/3 mile) south of the intersection with Fletcher Chapel Road. Trucks would then travel south on Sour Springs Road and turn west onto Oak Orchard Ridge Road to then reach New York State (NYS) Route 63. Once on NYS Route 63 trucks would then head north or south to their destinations. Access to the site would be by the same route. Both Sour Springs Road and Oak Orchard Ridge Road are maintained by the Town of Shelby, and this route also runs through a portion of the Wildlife Refuge. The impacts of this route were addressed in the DEIS.

In addition to the proposed access point, the DEIS evaluates the potential impacts of using an alternative access point located on the north side of the site off Fletcher Chapel Road approximately 1,500 feet east of the intersection with Sour Springs Road. Though it is located north of the Wildlife Refuge by approximately 1/3rd mile, it does not pass through any portion of it. Trucks using this route can travel directly west approximately 1.3 miles to NYS Route 63.

In response to public comment and the Town of Shelby petition for party status, Frontier has revised the proposed access point to Fletcher Chapel Road. This alternative eliminates access from Sour Springs Road, except for emergencies and incidental use that does not include haul traffic. This change is discussed in the Issues Ruling (see Section II.B.3.a, pp. 9-10) and the April 28, 2016 draft permit includes Condition No. 10 reflecting the change.

III. RESPONSIVENESS SUMMARY

A substantial number of public comments were received during the DEIS written public comment period and public hearing held on April 30, 2014. As noted above, the written comment period on the DEIS ended on June 9, 2014. After the Department's determination that a further hearing was necessary pursuant to 6 NYCRR Part 624, a legislative hearing was held on the project March 8, 2016 with a written comment deadline of March 15, 2016. In addition, formal petitions for party status were solicited by the DEC Office of Hearings and Mediation Services ("OHMS"), with a submission deadline of March 15, 2016. After the March 8, 2016 legislative public hearing, and the March 15, 2016 deadline, a Part 624 issues conference was held on April 26 and 27, 2016 to address two petitions for party status that were received, one by the Town of Shelby and the other by the Citizens for Shelby Preservation. ALJ Bassinson presided over the issues conference and provided a ruling on July 27, 2016, which is included as Appendix 1 of this FEIS. After that ruling, the Commissioner issued a decision on May 8, 2017 addressing appeals by members of the Citizens for Shelby Preservation, affirming the ALJ ruling and directing the Department to complete the SEQR requirements for the project. The Commissioner's decision is included in Appendix 2 of this FEIS.

To the extent that potential environmental impacts have been raised in the public comments on this proposal and have been evaluated and addressed in the Issues Ruling and Commissioner's Decision, those documents will be referenced below as the Department's responses. Other environmental concerns expressed in the comments received, which were not included in the petitions for party status or addressed in the Issues Ruling and Commissioner's Decision, are addressed below without reference to those documents.

A. General

The US Department of Labor ("USDOL") submitted a comment letter on the DEIS, dated June 2, 2014, expressing concerns about the potential impacts of the proposal on the Iroquois Job Corps Center ("Job Corps") and a variety of concerns about the DEIS itself. Their letter is included in the combined agency comments contained in Exhibit 14 of the Issues Ruling (see letter A-4). Specific concerns about impacts to the Job Corps are addressed below in Section III.K of this FEIS. Comments regarding the EIS process are addressed below in this section.

Comment A-1: The EIS process conducted by the DEC inadequately addresses the following components of an EIS: alternatives analysis, documentation of affected environment, short and long-term effects, cumulative effects, mitigative measures, and irreversible and irretrievable commitment of resources. Various areas of environmental impact are noted in the USDOL to reflect its concerns regarding the adequacy of the DEIS.

Response A-1: 6 NYCRR § 617.9(b) outlines environmental impact statement content. According to 6 NYCRR § 617.9(b)(5), an EIS must contain, among other things, the following elements (**emphasis added**):

- (ii) a **concise description** of the environmental setting of the areas to be affected, sufficient to understand the impacts of the proposed action and alternatives;

(iii) a statement and evaluation of the potential significant adverse environmental impacts **at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence.**

(iv) a description of the mitigation measures;

(v) a description and evaluation of the range of **reasonable alternatives to the action that are feasible**, considering the objectives and capabilities of the project sponsor.

The list of apparent deficiencies contained in the USDOL letter are either addressed in the DEIS or are beyond the scope of what is required considering the above-cited SEQR regulation. For instance, the USDOL letter (see Attachment 2, p.2) states that:

“This document does not characterize the soil, surface water, or groundwater conditions to reflect the likely use of pesticides, herbicides, or other chemicals. This is a significant benchmark, and with the disturbance of this site, there is likely to be mobilization of contaminants which could affect residents and the surrounding community.”

To require full chemical analysis of the soil, surface water, and groundwater conditions in an agricultural setting where there is no apparent significant source of contamination is not reasonable considering the need to provide a concise description of the environmental setting and to provide an evaluation at a level of detail that reflects the severity of the impacts and reasonable likelihood of their occurrence.

In the case of agriculture lands, it is understood that agricultural chemicals have likely been used, but without some specific reason for noting a particular concern (e.g., spill records, bulk storage of chemicals), it is reasonable to presume that for productive agricultural lands such use has been within the regulatory label restrictions, and has resulted in no significant adverse soil contamination. Further, soils on the mine site will be stabilized in vegetated overburden berms, unlike active agricultural lands where exposed soils may be disturbed several times a year over the entire area.

Other deficiencies noted in the USDOL concerning the EIS process are similarly overstated. The outline of the DEIS was properly scoped in accordance with the requirements of 6 NYCRR § 617.8 and the DEIS was prepared in accordance with the scoping document to address the relevant areas of environmental impact.

Section II.B.6.e (pp. 25-27) of Issues Ruling also discusses the consideration of alternatives under SEQR. The ruling states that the applicant complied with the SEQR requirements regarding the consideration of alternatives.

Comment A-2: Baseline information in DEIS related to air, groundwater and noise resources is incomplete and short and long-term impacts, as well as cumulative effects were not addressed.

Response A-2: Potential impacts related to noise and groundwater are addressed in the Issues Ruling in Sections II.B.6.a & b (pp. 14-18) and II.B.6.c (pp. 18-21), respectively. Also, as

noted above, Section II.B.5.a of the Issues Ruling discusses potential impacts on the Job Corps. With respect to potential air quality impacts, see Section III.H below.

B. Ecological Resources

Numerous public comments raise concerns about the potential impacts of the quarry on wildlife and habitat near the site. Specifically, concerns were raised about the potential impact of quarry dewatering on the wetland systems on the Wildlife Refuge.

Comment B-1: Wildlife. Many comments concerning potential wildlife impacts were general in nature, but many also raised concerns about specific bird species known to occur on the Wildlife Refuge and other areas in general proximity to the proposed quarry site. These species included, short-eared owls, bald eagles, northern harrier, and osprey, among others. The potential impacts to wildlife were also raised in petitions for party status submitted by the Town of Shelby and the Citizens for Shelby Preservation.

Response B-1: Wildlife. It should be noted that the project site is an agricultural field used to produce row crops. In this regard, it is routinely plowed, planted, and harvested on a regular basis. Given the limited availability of wildlife habitat on the site itself, the concerns raised regarding wildlife are primarily the indirect impacts of the quarry operations on wildlife and wildlife habitat off-site. Section II.B.6.b (pp. 15-18) of the Issues Ruling (Appendix 1) addresses the potential impacts of blasting on fish, other aquatic species, and bald eagles. In addition, Section II.B.6.d (pp. 21-25) of the Issues Ruling (Appendix 1) discusses potential impacts on wildlife. The ALJ's conclusion that there were no adjudicable issues raised concerning wildlife was appealed by a member of the Citizens to Preserve Shelby. The ALJ's assessment concerning potential impacts to wildlife, however, was upheld by the Commissioner's Decision (see pp. 5-6, Appendix 2).

Comment B-2. Wetlands. Several public comments expressed concerns about the potential hydrologic impacts of quarry dewatering on Wildlife Refuge wetlands, including those from potential drawdown of the surface water table and the potential of excess water being discharged into the wetlands.

Response B-2. Wetlands. The wetlands are located south of the site on Wildlife Refuge property and support water fowl and other aquatic species. Two of the wetlands nearest the site area are known on the refuge as Schoolhouse Marsh and Center Marsh. These wetlands are also State-regulated and designated as Freshwater Wetlands MD-3 and A-5, respectively. The potential impacts of the quarry on nearby wetlands, and the mitigation measures that will be implemented to avoid significant impacts, are discussed above in Section II.D of this FEIS, and in Section II.B.6.c (pp. 18-21) of the Issues Ruling (Appendix 1).

C. Recreation and Tourism

Numerous public comments raise concerns that the quarry would negatively impact area tourism and specific locations where the public views wildlife on or near the Wildlife Refuge. These are addressed below.

Comment C-1: The quarry will adversely affect the Wildlife Refuge and area tourism.

Response C-1: To the extent that the direct potential impacts to the Wildlife Refuge are addressed in this FEIS above in Sections II.B, II.D, and II.E, and below in Section III.J, they are not addressed further here. Commenters express concerns about area tourism primarily based on the potential direct impacts to the refuge. Significant impacts to area tourism are not expected given the limited scope of direct potential impacts from proposed quarry operations, as described in the DEIS, hearing record, and addressed elsewhere in this FEIS.

Comment C-2: Traffic on Sour Springs Road and Oak Orchard Road through the Wildlife Refuge will adversely impact Wildlife Refuge visitors, particularly those using the Schoolhouse Marsh and Ringneck Marsh wildlife viewing areas. In addition, other local roads are used for wildlife viewing and additional truck traffic will negatively impact wildlife viewing from local roads.

Response C-2: Traffic impacts on Sour Springs Road and Oak Orchard are addressed elsewhere in this FEIS in Sections II.E and III.G. The use of other local roads for wildlife viewing may occur informally. There is no known designated parking area or pull-off located on Fletcher Chapel Road for this purpose. Any use of Fletcher Chapel Road for wildlife viewing on the road shoulder would occur at the risk of the viewer and would be subject to the applicable traffic laws. To the extent quarry traffic may legally operate on such roads, there would be no impact to designated areas of wildlife viewing on Fletcher Chapel Road. NYS Route 63 runs north and south through the Wildlife Refuge and there is at least one designated parking area off NYS Route 63. However, NYS Route 63 is a major area highway that already carries a high volume of traffic and the additional quarry traffic is not expected to adversely impact Wildlife Refuge recreational use in areas proximate to NYS Route 63.

D. Surface Waters

Numerous public comments raised concerns about the impact of the proposed quarry on surface waters, including water quantity and quality.

Water Quantity: Concerns related to the potential impact of quarry discharges on surface water quantity, and wetlands in particular, are addressed elsewhere in this FEIS (see Sections II.D and III.B).

Water Quality: With regard to water quality, the discharge of quarry water off-site is subject to the effluent limitations and monitoring requirements pertaining to Sector J of the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges

Associated With Industrial Activity¹. This is also noted in Section II.B.6.b (p. 20) of the Issues Ruling. Limits or monitoring for the following parameters are included in the permit for Sector J activities: total suspended solids and pH. There are no known sources of surface or groundwater contamination on or near the site that would warrant the monitoring of additional effluent parameters beyond those required under the SPDES General Permit. In addition, in the event additional parameters or limitations are deemed necessary by the Department as the operation of the quarry proceeds, Standard Condition 18 in Appendix H of the SPDES General Permit contains a reopener clause that states the following:

“If there is evidence indicating potential or realized impacts on water quality due to any stormwater discharge associated with industrial activity covered by this permit, the owner or operator of such discharge may be required to obtain an individual permit or an alternative general permit in accordance with Appendix H.13 of this permit or the permit may be modified to include different limitations and/or requirements.” (Appendix H.13 contains provisions for requiring an individual permit or alternative general permit.)

A USFWS letter dated June 6, 2014 raises concerns about a decrease in the quality of groundwater as the mine gets deeper (see Attachment 2, p. 2, of letter A-6 in Appendix 1, Exhibit 14) and potential impacts to the Oak Orchard Acid Springs (see Attachment 2, pp. 2-3). The evaluation provided in the DEIS shows that these impacts are unlikely. However, the above SPDES permit provision could also be used to address either of these unlikely scenarios.

E. Groundwater

Several comment letters were received raising concerns over potential drawdown effects on the Job Corps, residential and agricultural water supply wells. As discussed in Section II.D of this FEIS, and Section II.B.5.a. (pp. 12-13), and Section II.B.6.c (pp. 18-21) of the Issues Ruling (Appendix 1), potential groundwater impacts have been thoroughly evaluated, and where applicable, mitigation measures proposed. In addition, the Department has included a residential well supply agreement as Condition No. 11 of the permit, which requires the replacement of potable water supplies if an unforeseen impact occurs. Furthermore, the permit also contains Condition No. 12, which requires groundwater quantity monitoring throughout the life of the operation. Groundwater monitoring will be used to safeguard against potential water well impacts, and validate drawdown surrounding the quarry to determine whether the implementation of mitigation techniques - “slot” or “box” cuts - are required. The slot cuts will be excavated into the top of rock in between the excavation area and adjacent water supply wells. Water would be pumped from the quarry sump to the cuts to create a recharge area and groundwater mound to prevent water table declines adjacent to the quarry.

F. Noise

Numerous comments raise concern about the potential noise impacts of the quarry from operational noise and blasting. The impacts of noise and blasting will be minimized and limited by the following factors: limitations on the hours of operation & blasting, distance, topography,

¹ As of this writing, SPDES Multi-Sector General Permit #GP-0-12-001 expired on September 30, 2017 and the replacement permit, #GP-0-17-004, had not yet been issued. Formal notice of #GP-0-17-004 has already been provided and its issuance is imminent. Both permits contain similar provisions to those described in Section III.D of the FEIS responsiveness summary.

and seasonal restrictions in mining Phase 2. The impact of operational on the Wildlife Refuge is addressed elsewhere in Sections II.B above and Section II.3.b (pp. 10-11) of the Issues Ruling. In addition, the Issues Ruling further discusses noise and blasting impacts and found that no adjudicable issue exists (see Sections II.6.a (pp. 14-15) II.6.b (pp. 15-18)). The evaluation contained in Section 4.2.6 of the DEIS (Appendix 1, Exhibit 13, DEIS Vol. 1) also demonstrates that noise levels attenuated by distance and topography no significant noise impacts are anticipated at three of the nearest residential receptors. This section of the DEIS also evaluated and found no significant noise impacts on three more distance receptors: the Job Corps, the Wildlife Refuge Schoolhouse Marsh overlook, and the Wildlife Refuge Ringneck Marsh overlook.

G. Transportation

Numerous public comment letters raised concerns about the proposed quarry access route via Sour Springs Road and Oak Orchard Road. As described in Section II.E of this FEIS, and discussed in the Issues Ruling (see Section II.B.3.a, pp. 9-10), an alternative access point on Fletcher Chapel Road has been selected as the preferred alternative. This alternative addresses impacts on the Sour Springs Road and Oak Orchard Roads. The April 28, 2016 draft permit includes Condition No. 10 reflecting the change.

H. Air Quality

Public comments were received that raised concerns about the potential impacts of the quarry operations on air quality. Section 4.1.3 of the DEIS (Appendix 1, Exhibit 13, Vol. 1) evaluates the project's potential air quality impacts. Sources of potential air pollutants are described in the DEIS, including processing equipment operations, customer trucks, site preparation, and blasting. As noted in the DEIS, processing equipment would run on electric motors using line power, eliminating potential impacts from stationary combustion sources. The main potential air pollutant associated with the quarry operation is particulate matter. The DEIS properly assessed potential emissions of fine particulate matter in accordance with the DEC Commissioner's Policy on "Assessing and Mitigating Impacts of Fine Particulate Matter Emissions" (CP-33). In each assessment scenario, estimate fine particulate matter emissions were below the policy's 15 tons per year threshold requiring further modeling. Further, the DEIS describes the project's proposed processing equipment capacities and the applicant acknowledges that they will be subject to the requirements of an Air Facility Registration pursuant to 6 NYCRR Part 201.

I. STAMP

Numerous public comment letters raised concerns that the quarry proposal would adversely affect STAMP which is proposed approximately 4.5 miles south-southwest of the quarry site in the Town of Alabama, Genesee County. Based on concerns about environmental impacts to STAMP, the viability of the project was raised as a concern. Comments regarding the potential adverse impacts to the STAMP project are addressed above in Section II.A of this FEIS, and in Sections I.B.2.b (pp. 3-4) and II.B.5.b (pp. 13-14) of the Issues Ruling (Appendix 1). In addition, the Department has added Condition No.'s 18, 19, and 20 to the permit which

require seismograph and seismic accelerometer monitoring of all blasts, submission of shot reports to ensure compliance, and adherence to ground vibration limits designed to minimize potential impacts to the STAMP property.

J. Iroquois National Wildlife Refuge

Numerous public comment letters raise various concerns about the project's potential impacts on the Wildlife Refuge. Among these concerns are impacts to wildlife, recreation, tourism, wetlands, and water quality from noise, blasting, traffic, water discharges and other quarry operations. In addition, correspondence dated June 6, 2014 was also received from the Service in response to the DEIS (see Appendix 1, Exhibit 14, letter A-6), expressing concerns about the same potential impacts.

While the USFWS did not submit further comment or a petition for party status during the Part 624 hearing and issues conference, petitions for party status submitted by others also raised concerns about the potential environmental impacts of the project on the Wildlife Refuge. Responses to comments regarding potential adverse impacts to the Wildlife Refuge are provided in the various sections of the Issues Ruling as noted below:

- Section I.B.2.a (p. 13) – General
- Section II.B.3.a (pp. 9-10) – Traffic Impacts & Site Access
- Section II.B.3.b (pp. 10-11) – Noise Impacts & Seasonal Setback
- Section II.B.6.a (pp. 14-15) – Operational Noise
- Section II.B.6.b (pp. 15-18) – Blasting Noise, Dust & Vibration Impacts
- Section II.B.6.c (pp. 18-21) – Quarry Water Discharges
- Section II.B.6.d (pp. 21-25) – Wildlife

Comments regarding potential impacts to recreation and tourism are address separately in Section III.C of this FEIS.

K. Iroquois Job Corps Center

The US Department of Labor (“USDOL”) submitted a comment letter on the DEIS dated June 2, 2014 expressing concerns about the potential impacts of the proposal on the Iroquois Job Corps Center (“Job Corps”) and a variety of concerns about the DEIS itself. Their letter is included in the combined agency comments contained in Exhibit 14 of the issues ruling (see letter A-4).

While the USDOL did not submit further comment or a petition for party status during the Part 624 hearing and issues conference, petitions for party status submitted by others also raised concerns about the potential environmental impacts of the project on the Job Corps. Section II.B.5.a (pp. 12-13) of Issues Ruling, which is included in Appendix 1, discusses and addresses the following potential environmental impacts concerning the Job Corps:

- Effects of noise, dust, and diesel emissions resulting from increased truck traffic;
- Potential disruption to educational activities;
- Effects of blasting on Job Corps structures and wells; and
- Potential drawdown effects on Job Corps wells and lack of alternative water supply.

The USDOL comment letter raises the same concerns stated above, and those will not be addressed further here as they are addressed in the Issues Ruling. The additional concerns raised in the USDOL comment letter are addressed below.

Comment K-1: The location of a heavy industrial use close to student housing is a safety hazard.

Response K-1: As indicated in the USDOL letter, the Job Corps is located approximately 3,000 feet south of the proposed quarry site. Between the Job Corps and the quarry is the Wildlife Refuge. The site of the proposed quarry is currently private property and the USDOL letter does not indicate how or whether the students at the Job Corps center currently access this property, or for what purpose. Since the property will remain in the hands of a private owner, it is not expected to offer any opportunity for public access or use that would create a safety hazard to Job Corps students.

Comment K-2: Quarry water discharges will negatively affect the Wildlife Refuge and the wetlands therein, significantly impacting the quality of life for the Job Corps students and staff.

Response K-2: The impacts of quarry water discharges are addressed elsewhere in this FEIS (Section II.D above) and the Issues Ruling (see Section II.B.6.c, pp. 18-21). To the extent those responses address potential impacts of dewatering on the Wildlife refuge, there are no significant adverse impacts expected to result on the quality of life for Job Corps students and staff.

Comment K-3: The EIS process conducted by the DEC was inadequate.

Response K-3: See the responses in Section III.A above.

L. Need for the Project

Public comments were received that questioned the need for the project given other quarries that are located in the area. Permitting mineral resource supply sources assure the availability of various construction aggregate near market areas. These materials are essential for various infrastructure projects, including the construction and maintenance of roadways, bridges, and buildings. These resources are non-renewable and must be developed where they are accessible, and exist in sufficient quantity and quality to make it economically viable for their development. Because the resources are non-renewable, and mining is a consumptive industry, various facilities may exist within an area to ensure the long-term supply of aggregate products as other sources are exhausted. These operations have a finite life span, and once the resources are depleted additional reserves must be sought to meet the demand for aggregate products. In the case of the Frontier Stone site, the resources are present in sufficient quantity and quality, it is close to market areas, and the company has an option on the property making it accessible.

M. Cultural Resources

Public comments were also received expressing concern about the project's potential impacts on cultural resources.

The project has been developed in accordance with the requirements of the State Historic Preservation Act ("SHPA"). As documented in Sections 3.2.7, 4.2.7, and 5.2.7 of the DEIS (FEIS Appendix 1, Exhibit 13, Volume 1), Phases 1 and 4 of the mine site (the first portions of the site to be developed) have been evaluated for archaeological resources and none that are eligible for the State or National Registers of Historic Places has been documented to occur on the site, nor will there be any impacts to any sites listed or eligible for inclusion in the State or National Registers of Historic Places. This is reflected in the March 5, 2007 determination of the New York State Office of Parks, Recreation and Historic Preservation ("OPHRP"). This letter is included also included in Appendix 10 of the DEIS (FEIS Appendix 1, Exhibit 13, Volume 5, p. 281).

Further, as addressed in Section II.C of this FEIS, additional archaeological survey work is required before progressing into mine phases 2 and 3, and additional coordination will be undertaken with both OPRHP and interested Indian Nations. Requirements concerning cultural resources are included in permit conditions 28 and 29 of the April 28, 2016 draft permit.

N. Local Land Use & Zoning

Public comments were received expressing concern that the site requires a zoning decision from the Town of Shelby. In addition, the Town of Shelby submitted a DEIS comment letter dated June 9, 2014 raising concerns about the proposed project's conformance with current zoning (see Appendix 1, Exhibit 14, agency comment letter A-5). The Town of Shelby also submitted a petition for party status to participate in the Department's issues conference. However, that petition did not specifically propose any issues regarding Town zoning requirements.

The zoning requirements of the Town of Shelby have been acknowledged in the development of the DEIS (see Sections 3.2.2, 4.2.2, and 5.2.2.), and in the applicant's submission of the necessary zoning applications to the Town of Shelby. Further, any permit that may be issued by the Department does not relieve a permittee from obtaining all other applicable and necessary local, State, or federal approvals. This is reflected in Item C contained in the April 28, 2016 draft permit under "Notification of Other Permittee Obligations". Nonetheless, as evaluated in the DEIS, explained elsewhere in this FEIS, and in the Issues Ruling, the various off-site environmental impacts associated with the proposed quarry have been evaluated and appropriate measures have been identified to avoid, minimize, and mitigate such impacts, including those to the Wildlife Refuge, Job Corps, and other neighboring properties.

APPENDICES

APPENDIX 1

**ISSUES CONFERENCE RULING JULY 28, 2016
AND EXHIBITS**

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

In the Matter of the Application of **FRONTIER STONE, LLC**
For a Mined Land Reclamation Permit under Article 23 of the
New York Environmental Conservation Law (“ECL”),
Parts 420-425 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York (“6 NYCRR”),
And a Water Withdrawal Permit under ECL Article 15 and 6
NYCRR Part 601, for property located in the Town of Shelby,
Orleans County, New York.

DEC Permit Application
Nos. 8-3436-00033/00001
and 00002

RULING ON ISSUES AND PARTY STATUS

Frontier Stone, LLC (“Applicant”) has submitted an application relating to a proposed new dolomite/limestone quarry of approximately 215.5 acres on a parcel of approximately 269.45 acres located in the Town of Shelby, Orleans County (“site”). The site is located directly north of the Iroquois National Wildlife Refuge (“Wildlife Refuge”). The excavation area of the proposed quarry totals approximately 172 acres, and mining would be divided into four phases over the estimated 75 year operational life of the mine. Quarrying would be conducted by standard drill and blast technology with front-end loaders and excavators feeding a primary crusher with shot rock. The primary crusher will follow the advancing face, and rock would be conveyed to an on-site processing plant by field conveyor. Mining is proposed below the water table and the project includes dewatering of the quarry area. As proposed, the estimated maximum water withdrawal for quarry dewatering is 554,264 gallons per day, which would be discharged at the southwest corner of the site to an existing agricultural drainage ditch. The reclamation objective will be to create open space with two lakes for recreation or wildlife habitat. The two lakes, separated by an existing utility line, would be approximately 35 and 156 acres, respectively, in size.

Applicant seeks from the Department of Environmental Conservation (“Department”) a mined land reclamation permit pursuant to ECL article 23 and 6 NYCRR Parts 420-425 and a water withdrawal permit pursuant to ECL article 15 and 6 NYCRR Part 601. The project will also require coverage under the Department’s State Pollutant Discharge Elimination System (“SPDES”) General Permit for Stormwater Discharges Associated with Industrial Activities (GP-0-12-001), Sector J, and registration pursuant to the Department’s air pollution control regulations at 6 NYCRR part 201.

I. **PROCEDURAL BACKGROUND**

A. **State Environmental Quality Review Act (“SEQRA”) and Part 621**

The Department is lead agency, and the Town of Shelby is an involved agency, under SEQRA. The Department determined that the project is a Type I Action as designated by 6

NYCRR § 617.4(b) (6) (i), and issued a positive declaration on June 5, 2006 requiring preparation of a draft environmental impact statement (“DEIS”). A public scoping meeting was held on June 27, 2006, and a final scope was issued on January 24, 2007. A DEIS was prepared by the engineering firm Continental Placer, Inc. (“CPI”) on behalf of Applicant and, after revisions, Department staff accepted the DEIS on March 28, 2014 and determined that it was adequate for public review and comment. Department staff also determined that Applicant’s application was complete for purposes of further DEC review and public comment pursuant to 6 NYCRR § 621.7. The Department thereafter published a combined notice of complete application, notice of acceptance of the DEIS, and notice of a public hearing and public comment period in the April 2, 2014 Environmental Notice Bulletin (“ENB”).

Pursuant to 6 NYCRR Part 621, a legislative hearing on the permit applications and DEIS was held on April 30, 2014, and written public comments were accepted until June 9, 2014. Following the legislative hearing, and the receipt and review of written comments, Applicant commissioned Vibra-Tech Engineers to conduct a study of potential impacts of vibration, caused by blasting at the proposed quarry, on a proposed semiconductor and nanotechnology manufacturing and research park known as the Science and Technology Advanced Manufacturing Park (“STAMP”), to be located approximately five miles south of the proposed quarry. In addition, Applicant coordinated with representatives of the U.S. Fish and Wildlife Service (“USFWS”) to discuss and address USFWS concerns regarding potential impacts of the quarry on the Refuge.

B. This Proceeding

On December 21, 2015, Department staff referred Applicant’s permit applications to the Department’s Office of Hearings and Mediation Services to initiate the permit hearing process pursuant to 6 NYCRR Part 624. See Issues Conference Exhibit (“Ex.”) IC-1. Department staff prepared and circulated a draft combined permit dated January 29, 2016. See Ex. IC-16A. A notice of legislative hearing and issues conference was published in the February 3, 2016 ENB, see Ex. IC-3, and was published in *The Daily News* in Batavia, New York on February 10, 2016. See Ex. IC-4. The legislative/public comment hearing was held on March 8, 2016, and written comments on the applications, the DEIS, and the draft combined permit were accepted until March 15, 2016. Twenty-seven (27) members of the public spoke during the legislative/public comment hearing, see Ex. IC-6, and ninety (90) written comments were submitted by members of the public.

1. Petitions for Party Status

On March 15, 2016, petitions for full party status were filed by (i) the Town Board of the Town of Shelby and the Town of Shelby (“Town”), see Ex. IC-17 (Petition for Full Party Status of Town Board and Town of Shelby (“Town Petition”)); and (ii) Wendi Pencille, Kenneth Printup, and Francis M. Domoy Ph.D., in their individual capacities and on behalf of an organization referred to as Citizens for Shelby Preservation (“CSP”). See Ex. IC-18 (Petition for Party Status of Citizens for Shelby Preservation, Wendi Pencille, Kenneth Printup and Francis Domoy (“Citizen Petition”). As authorized in the February 3, 2016 ENB Notice, Department staff and Applicant each filed responses to the petitions for party status on April 8, 2016. See

Department of Environmental Conservation Staff's Response to Petitions for Full Party Status ("Staff Response"), Ex. IC-19, and Frontier Stone, LLC's Response to Party Status Petitions ("Applicant Response"), Ex. IC-20.

2. Relevant Non-Parties

a. U.S. Fish and Wildlife Service and U.S. Department of Labor

The record reflects that the USFWS, which has responsibility for the Wildlife Refuge, received notice of the proposed project, and submitted written comments on the DEIS prior to the commencement of this Part 624 proceeding. The USFWS also received notice regarding this proceeding, see Ex. IC-2, but did not provide oral comments at the March 8, 2016 legislative/public comment hearing, did not submit written comments during the comment period, and did not file a petition for party status.

Department staff and Applicant have coordinated with the USFWS and addressed USFWS concerns. See e.g. Ex. IC-13E (DEIS Vol. 5), Appendix 7, Wetlands Impact Assessment, at 1; see also Transcript of April 26, 2016 Issues Conference ("IC Tr."), at 127:18-128:10; 130:10-18; Draft Combined Permit, Ex. IC-21, at page 5 of 12, Special Condition No. 14; Exs. IC-15J and IC-15K.

The U.S. Department of Labor ("USDOL"), which has responsibility for the Iroquois Job Corps Center ("Job Corps") located south of the proposed quarry, also submitted written comments on the DEIS. Although the USDOL received notice regarding this Part 624 proceeding, see Ex. IC-2, it did not provide oral comments at the legislative/public comment hearing, did not submit written comments during the comment period, and did not file a petition for party status.

Petitioners have cited in their petitions many of the comments of the USFWS and USDOL, and the Town has appended to its petition the comment letters from each of those agencies. See Town Petition Exs. A (USFWS letter and comments) and B (USDOL letter and comments). The record does not reflect, however, that petitioners contacted or otherwise coordinated with the USFWS or USDOL with respect to the matters discussed in the agencies' letters and comments, or with respect to petitioners' proposed issues in this proceeding. Nor have petitioners stated that a representative of either agency would testify on behalf of petitioners at any adjudicatory hearing.

b. The STAMP Project

As stated above, the STAMP project is a proposed semiconductor and nanotechnology manufacturing and research park located approximately five miles south of the proposed quarry. Equipment used in such manufacturing is particularly sensitive to ground vibration. See Ex. IC-15C. The Genesee County Industrial Development Agency d/b/a Genesee County Economic Development Corporation ("GCEDC") is involved in preparing and marketing the STAMP to potential semiconductor and nanotechnology tenants. See Ex. IC-15C (letter from counsel for GCEDC describing role in STAMP project). Following an ambient vibration study conducted by

Colin Gordon Associates Inc. (“Colin Gordon”), a consultant retained by GCEDC, Applicant’s consultant Vibra-Tech conducted a field test to determine the vibration impacts on the STAMP project of blasting at the proposed quarry. Applicant and its consultant thereafter coordinated with the STAMP consultant and Department staff to reach agreement regarding a special condition in the permit relating to blasting and potential impacts on the STAMP project. See Draft Combined Permit, Ex. IC-21, at Special Conditions 18, 19, 20; see also Exs. IC-15C through IC-15I; IC Tr. at 80:23-85:20; 89:6-21; 91:18-93:17.

Department staff provided notice of this Part 624 proceeding to GCEDC. See Ex. IC-2. No representative of the GCEDC or other person associated with the STAMP project provided oral comments at the legislative/public comment hearing, submitted written comments during the comment period, or filed a petition for party status.

Although the Citizen Petitioners expressed concern in their petition, see Citizen Petition at 2, 6-7, and at the issues conference, see IC Tr. at 81:22-83:17, relating to impacts on the STAMP project, they have not proffered any witness related to the STAMP project, or any expert or other witness with respect to the impacts of vibration from blasting. See IC Tr. at 89:22-90:3.

3. Issues Conference

As announced in the February 3, 2016 ENB notice, an issues conference was held on April 26, 2016 at the Ridgeway Town Hall in Medina, New York. The purpose of the issues conference was to hear argument on whether party status should be granted to petitioners, to narrow or resolve disputed issues of fact, to hear argument regarding whether disputed issues meet the standards for adjudicable issues, and to hear argument on the merits of any legal issues whose resolution is not dependent on facts in dispute. See 6 NYCRR § 624.4(b) (2).

Participating at the issues conference were (i) Applicant, represented by Kevin Brown, Esq., of Brown Sharlow Duke & Fogel, P.C., and Gregory Brown, Esq., of Brown & Palumbo, PLLC, both of Syracuse, New York; (ii) Department staff, represented by Dudley Loew, Esq., of the Department’s Region 8 Office of General Counsel, Avon, New York; (iii) the Town, represented by Mark Sweeney, Esq., of Hodgson Russ LLP, of Albany, New York; and (iv) Wendi Pencille, Kenneth Printup, Francis M. Domoy Ph.D., on behalf of themselves individually and on behalf of CSP.

At the issues conference, argument was heard regarding proposed issues for adjudication and additional matters. As discussed below, Applicant and staff also informed the undersigned and the parties that they had agreed to additional conditions in the draft combined permit, and that a revised draft combined permit would be made available soon after the issues conference. The revised draft combined permit was circulated on April 28, 2016, and has been marked as Issues Conference Exhibit IC-21. In addition, at the issues conference, petitioner Pencille submitted some documents relating to bird field surveys, see Ex. IC-22, and staff provided a satellite photograph reflecting the relative locations of the proposed quarry and existing bald eagle nests. See Ex. IC-23; see also IC Tr. 96:9-13. No additional written submissions were authorized following the issues conference.

II. DISCUSSION

A. Standards for Party Status and Identification of Issues for Adjudication

An entity or person seeking full party status and an adjudicatory hearing must file a written petition which: (i) identifies the proposed party, the proposed party's environmental interest in the proceeding, any interest relating to relevant statutes administered by the Department, and the precise grounds for opposition or support; (ii) identifies an issue for adjudication that is "substantive" and "significant," see 6 NYCRR § 624.4(c)(2)-(3); and (iii) "present[s] an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue." 6 NYCRR § 624.5(b)(2)(ii).

An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." 6 NYCRR § 624.4(c)(2). An issue is 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).

In determining whether an adjudicable issue exists, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ." 6 NYCRR § 624.4(c)(2). Where, as here, Department staff has reviewed the application and determined that the project, as conditioned by the permit, conforms to all applicable statutory and regulatory requirements, a petitioner has the burden of persuasion at the issues conference to provide an appropriate offer of proof that supports the petitioner's proposed issues. See 6 NYCRR § 624.4(c)(4).

Conclusory statements are not sufficient to raise an adjudicable issue, and a potential party's assertions "should arise from the opinions of the expert or other qualified witnesses." Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, March 3, 1982, at 2. "Conducting an adjudicatory hearing where offers of proof, at best, raise potential uncertainties, or where such a hearing would dissolve into an academic debate is not the intent of the Department's hearing process." Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 26, 2012, at 4 (internal quotations and citations omitted). "Offers of proof may take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application." Matter of Buffalo Crushed Stone, Inc., Decision of the Commissioner, November 17, 2008, at 6; see also Matter of Halfmoon, at 2.

Even where an offer of proof is supported by a factual or scientific foundation, however, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions. See Matter of Ontario County, Decision of the Acting Commissioner and SEQRA Findings Statement, November 19, 2015, at 3.

Where, as here, the Department, as lead agency for purposes of SEQRA, has required the preparation of a DEIS, the question of whether to adjudicate issues concerning the sufficiency of the DEIS is governed by the same standards that apply to adjudication generally. See 6 NYCRR § 624.4(c)(6)(i)(b). Challenges to SEQRA issues require determining whether Department staff identified the relevant areas of environmental concern, took the required “hard look” at those issues, and made a reasoned elaboration of the basis for its determination. See Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 26, 2012, at 4-5.

B. The Petitions and Offers of Proof

1. Petitioners’ Environmental Interest

a. Citizen Petitioners

The Citizen Petition, submitted timely and jointly by CSP and three individuals, identifies CSP as an “unincorporated organization of concerned local residents and taxpayers with an interest in protecting the [Iroquois National Wildlife] Refuge and surrounding area” Citizen Petition at 1. Although the petition states that a list of CSP members is provided as Attachment 1 to the petition, see id., no membership list was submitted with the petition or at the issues conference. Nor does the Citizen Petition append any other documents relating to the organization, such as organizing documents, meeting notices, prior activities, or publications. Petitioners’ submissions are insufficient to warrant the grant of party status to CSP.¹

With respect to the Citizen Petitioners in their individual capacity, the Citizen Petition states that Mr. Domoy is a “farm land owner affected by this proposed project,” Citizen Petition at 1, and a “resident land owner [in the] Town of Shelby.” Id. at 7. At the issues conference, Mr. Domoy stated further that his farm is approximately 1,200 feet from the edge of the proposed quarry, and he expressed concern regarding potential impacts of the mining operation on a water well at his property that he uses for agricultural purposes. See IC Tr. at 106:20-107:11; 108:17-109:4.

Neither of the other two petitioners – Ms. Pencille or Mr. Printup – discusses in the Citizen Petition her or his individual interests relating to the proposed quarry, such as whether they live in close proximity to the proposed quarry, or may suffer impacts to their homes, wells, etc. from mining operations. See generally id. at 1-7. The record does reflect, however, that staff mailed notices of this proceeding to Ms. Pencille and Mr. Printup, identifying their addresses as located in Medina, New York, within a few miles of the proposed quarry. See Ex. IC-2; see also Transcript of March 8, 2016 Legislative/Public Comment Hearing, at 46:7-12 (Mr. Printup statement that he lives a third of a mile from the proposed site).

¹ Although I am denying party status to CSP, I will consider and address the proposed issues raised in its joint petition with the three individuals because, as I hold below, the record demonstrates that the individual petitioners have sufficient environmental interest in the proceeding.

Construing liberally the petition and the record, and noting that these individuals are not represented by counsel, I find that the individual petitioners have demonstrated a sufficient environmental interest to consider herein the proposed issues discussed in the Citizen Petition.

b. Town Petitioner

The proposed project will be located in the Town of Shelby. As set forth in its petition, the Town's environmental interests include its status as an involved agency under SEQRA, its interest in and responsibility for land use regulation within the Town, and its responsibility for protecting the health, safety and welfare of its residents. The Town has established its environmental interest.

2. The Petitions

Petitioners are generally concerned with the impacts of: (i) noise and dust generated by blasting, operations, and truck traffic; (ii) water drawdown to dewater the quarry; (iii) surface water discharge from the proposed quarry; and (iv) vibration from blasting. Petitioners' concerns relate to the impacts of the foregoing on: (i) residents near the proposed quarry; (ii) groundwater and surface water quantity and quality, wetlands, wildlife, and recreational activities in the Wildlife Refuge; (iii) the Job Corps; and (iv) the STAMP project.

a. The Town Petition

The Town Petition groups its many proposed issues into two main categories: (1) deficiencies of the DEIS; and (2) insufficient draft permit conditions. See generally Town Petition at 5-25 (SEQRA/DEIS proposed issues); id. at 26-38 (permit conditions); see also id. at 39-40 (summary of proposed issues).

With respect to the proposed SEQRA-related issues, the Town Petition states:

Many of the SEQRA issues call for additional information or studies by the Applicant or disinterested third parties, and can therefore be resolved by submission of that information by the applicant, or corrections within the FEIS.

Id. at 3-4.

The Town Petition states that the Town (i) "will submit legal authority supporting the denial and/or requiring significant modification of the draft mining permit based on documented environmental concerns;" and (ii) "will also present documentary evidence demonstrating that the impact of the mine requires denial and/or modification of the requested mining permit," including evidence that "will concern the hydrogeologic, wildlife, aesthetic, noise, wetlands and other impacts." Id. at 7. The Town has not, however, submitted any studies, surveys or other materials prepared on its behalf to support its petition for party status, relating to any of the

proposed issues discussed in the Town’s petition.² See also IC Tr. at 62:5-9 (no expert or anyone on behalf of the Town has conducted their own studies).

The Town Petition states that the Town “intends to call the [sic] *some or all* of the following witnesses at the Hearing: (1) Mark P. Millspaugh, P.E., Sterling Environmental Engineers, P.C.; and (2) Merle Draper, Town Supervisor for the Town of Shelby.” Town Petition at 8 (italics added). The Town Petition does not, however, commit to call either possible witness, and does not identify the issue(s) about which any such witness would testify or describe the nature of any proposed testimony.

The Town seeks further study of: (i) the impact of noise on birds and other wildlife in the Wildlife Refuge, see Town Petition at 15; (ii) the potential impact of runoff on the Wildlife Refuge, see id. at 17; (iii) impacts of quarry dewatering on wetlands, id. at 18; (iv) the drawdown impact on wetlands and impact on Oak Orchard Acid Springs, id. at 19; (v) the effect of runoff on Wildlife Refuge wetlands, id. at 20; (vi) hydrogeology, including addressing comments of USFWS, id. at 21; (vii) traffic-related noise, dust, safety and diesel emissions in the area of the Job Corps, id. at 22; (viii) alternative water sources for the Job Corps, id. at 23; and (ix) contingency measures regarding potential impacts to groundwater quantity and quality. See id. at 32. The Town Petition also requests that Applicant conduct additional studies to determine an appropriate increase in the setback of the quarry from the property line, see id. at 27, and that Applicant conduct baseline and periodic road assessments of the proposed truck route. See id. at 29-30.

b. The Citizen Petition

The Citizen Petitioners discuss many of the same issues as those discussed in the Town Petition. According to the Citizen Petitioners, the project (1) would cause irreparable harm to (a) wildlife and the environment, by threatening endangered and other species, and by adversely affecting hydrogeology, surface water runoff and water quality; and (b) recreational and educational activities at and near the Wildlife Refuge; and (2) threatens (a) to adversely affect private water wells, buildings and land uses near the project; and (b) the long-term viability of the STAMP project. See Citizen Petition at 1-7.

Following the discussion in the Citizen Petition of these proposed issues for adjudication, the petition includes a section entitled “Legal Issues for Resolution,” in which the Citizen Petition states:

The above-noted deficiencies in the DEIS for the Project raise legal issues, the resolution of which is not dependent on disputed facts and that can be resolved on their merits following argument at the issues conference.

Id. at 7.

² The Town appended various comment letters and reports prepared by federal agencies, but is not offering any witness from those agencies to testify in this proceeding.

The Citizen Petition does not identify a potential expert or other witness who would testify at an adjudicatory hearing, the issue(s) about which any such witness would testify, or the nature of any proposed testimony. The Citizen Petitioners have not submitted any studies, surveys or other materials prepared on their behalf to support their petition for party status.

The Citizen Petition seeks additional studies, regarding (i) impacts on wildlife in and near the Wildlife Refuge, including short-eared owls and upland sandpipers, see Citizen Petition at 2-3; (ii) whether increasing setbacks would mitigate adverse impacts to the Wildlife Refuge, see id. at 2; (iii) the effects of water drawdown on wetlands in and near the Wildlife Refuge, see id. at 4; (iv) independent study or peer review of Applicant's Hydrogeologic Report, see id.; and (v) noise limits for blasting. See id. at 6.

3. In Response to the Petitions and Comments,
Department Staff and Applicant Have
Revised the Draft Combined Permit

a. Site Access

Applicant initially proposed to access the mining site through Sour Springs Road, including use of Oak Orchard Ridge Road, an east-west road through the Wildlife Refuge that connects Route 63 with Sour Springs Road. See Ex. IC-13A (DEIS Vol. 1), § 1.3.2.7, at 14; id. § 3.2.3, at 85. The DEIS acknowledges that truck traffic on Oak Orchard Ridge Road would increase as a result of mining activity, and that there would be a “potential for annoyance to wildlife watchers at the Schoolhouse Marsh overlook.” Id. at 14-15. In addition, the DEIS determined that mining-related truck traffic would not cause significant noise disturbance to breeding or nesting birds. See Ex. IC-13D (DEIS Vol. 4), Appendix 6, at 27-28; see also Ex. IC-11K (Response to Comments, dated September 11, 2012), at 36, Response to Comment 30.

At the request of the Department, Applicant conducted an updated traffic study in 2012 to evaluate utilizing Fletcher Chapel Road to access the site, as an alternative to the proposed access through Sour Springs Road. See Ex. IC-13E (DEIS, Vol. 5), Appendix 8, Traffic Impact Study dated June 2012 (SRF Associates) (“2012 Traffic Study”), and id. at Figure 1 (map showing both proposed and alternative road site access points); see also Ex. IC-11K (Response to Comments dated September 11, 2012, at 3. The evaluation included consideration of using the Fletcher Chapel Road access for 100% of the truck trips to and from the quarry. See id. at Figure 5B. The 2012 Traffic Study “concluded that Fletcher Chapel Road can ‘adequately accommodate the projected traffic volumes and resulting impacts to the study area intersection without significant adverse impacts to traffic operations.’” Ex. IC-13A (DEIS Vol. 1), at 229; see also Ex. IC-11K (Response to Comments, dated September 11, 2012), at 2, Response to Comment 3.

The Town Petition requested that, to reduce the amount of truck traffic through the Wildlife Refuge, Department staff modify the draft combined permit to require Applicant to use the Fletcher Chapel Road route for access to the mining site. See Town Petition at 29. The Town stated that such a modification would potentially “mitigate noise, air quality, and safety

concerns and would maintain the aesthetic, recreational, and educational aspects of the [Wildlife Refuge].” Id.

Department staff agreed to incorporate the Town’s suggestion, and modified the combined draft permit so that the Fletcher Chapel Road entrance would be the primary access to the mine site, and the Sour Springs Road entrance would “only be used for emergencies and incidental uses ... and shall not be used for haul traffic.” Ex. IC-21, at page 4 of 12, Special Condition No. 10; see also IC Tr. at 62:18-63:5. Applicant has agreed to this revised special condition. See IC Tr. at 64:11-25. Counsel for Applicant also stated that this change to the Fletcher Chapel Road-only alternative would mean that there will be no quarry traffic on Oak Orchard Ridge Road and Sour Springs Road, or otherwise through the Wildlife Refuge. See id. at 65:25-67:9 (Counsel for Applicant stating: “So there will be no traffic, quarry traffic, through the refuge with this agreement”).

b. Phase 2 Seasonal Setback

Applicant’s Mined Land Use Plan states that there will be no project-related activity within 25 feet of property lines. See Ex. IC-13B (DEIS Vol. 2), § 2.4.3, at 17. The 25 foot setback is incorporated into the draft combined permit. See Ex. IC-21 at page 4 of 12, Special Condition No. 5.

Applicant’s noise analysis determined that noise from the project would extend approximately 350 feet into the Wildlife Refuge. See Ex. IC-13A (DEIS Vol. 1), at 14, 60, 132, 189, 210, and Plate 3. Both the Town and the Citizen Petitioners argue in their petitions that the 25 foot setback set forth in Special Condition No. 5 in the draft combined permit is inadequate to protect wildlife and recreational activities in the Wildlife Refuge from impacts of the mining activity. See Town Petition at 27; Citizen Petition at 3.³ In addition, the Town has appended to its petition USFWS correspondence and comments on the DEIS, in which the USFWS noted Applicant’s acknowledgment that noise from the mining activity “will extend into the refuge approximately 350 feet” with impacts on wildlife. The USFWS proposed “to move the southernmost limit of the quarry north 350 feet, thus reducing intrusion into the Refuge.” Town Petition, Ex. A, Attachment 1 to letter, at 7th unnumbered page; see also id. at 7th-8th unnumbered pages (“If the quarry’s southernmost area that is excavated was moved 350 feet to the north, there is the potential for no additional noise emanating into the Refuge”).

In its written response to the petitions, Department staff states that the 25 foot setback in Special Condition No. 5 complies with governing regulations. See Staff Response at 25 (citing 6 NYCRR § 422.2(c)(iii) [should be 422.2(c)(3)(iii)]). At the issues conference, Department staff stated that staff and Applicant had agreed that, during the months of May, June and July, there would be no mining activity within the Phase 2 mining area within 350 feet of the southern excavation area limit, which borders on the Wildlife Refuge. See IC Tr. at 141:21-143:8. This agreement has been incorporated into the combined draft permit as Special Condition No. 21. See Ex. IC-21, at page 8 of 12. According to Applicant, the purpose of this additional permit condition is to reduce noise levels to ambient at the property line of the Wildlife Refuge, and

³ Petitioners made no offer of proof of harm caused by noise.

thereby eliminate noise impacts in the Wildlife Refuge during bird breeding season. See IC Tr. at 142:15-143:8.

4. Petitioners' Offers of Proof

Both petitions state that many of petitioners' concerns may be resolved through more studies or at the issues conference. See generally Town Petition at 3-4; Citizen Petition at 7. The focus of the petitions seems to be "the identification of some defect or omission in the application," Buffalo Crushed Stone, Inc., at 6, rather than a contention, supported by evidence or expert reports, that analyses and reports prepared by Applicant and its consultants, and staff's review thereof, employed flawed methodologies, resulted from erroneous calculations or improper factual assumptions, or were based on faulty equipment or modeling.

As stated above, neither petition identifies an expert who would testify on any specific topic of concern to petitioners; the Citizen Petition identifies no potential witnesses, and the Town Petition identifies two possible witnesses, but without a commitment to call either witness, and without discussion of such witnesses' areas of expertise or issues about which they would testify at an adjudicatory hearing. At the issues conference, however, petitioner Pencille provided a description of her own educational background and work experience, and stated that she was an expert on the short-eared owl, one of the species discussed in the petitions. See IC Tr. at 26:15-27:17. Ms. Pencille questioned the adequacy of the field studies conducted by Applicant's consultant to determine whether the short-eared owl and northern harrier were present at or near the site, and submitted some documents at the issues conference that she argued supports her position. See id. at 12:20- 15:6; 16:17-17:17. Ms. Pencille also discussed noise impacts on birds with facial disks, such as the short-eared owl and the northern harrier. See id. at 24:24-25:24. At the issues conference, the Citizen Petitioners offered no experts or witnesses with respect to the other topics discussed in their petition.

Although the Town stated in its petition that Mark Millspaugh was a *potential* witness, the petition (i) did not identify Mr. Millspaugh's specific area(s) of expertise, and did not include a resume, list of publications, or copies of or citations to prior testimony; (ii) did not identify which of the proposed issues for adjudication he would testify about at an adjudicatory hearing; (iii) did not describe the nature of his testimony with respect to such issue(s); and (iv) did not supply or state whether Mr. Millspaugh had prepared any materials relating to any particular proposed issue.

At the issues conference, the Town stated that Mr. Millspaugh is a professional engineer and an environmental engineer, and committed to calling him as a witness if there were an adjudicatory hearing. See IC Tr. at 47:20-23. The Town also stated that Mr. Millspaugh would testify at an adjudicatory hearing concerning (i) "these variety of issues that would be SEQR type issues that would be identified in our petition," IC Tr. at 47:13-19; (ii) "the runoff issues and discharges that are going to be taking place for the wildlife refuge," and the impact of the quantity and quality of the discharge water on the ecosystem within the Refuge and threatened and endangered species, see id. at 53:9-25; 55:10-17; and (iii) potential impacts of water drawdown in the quarry on water supply at the Job Corps. See id. at 117:4-18.

Neither in its petition nor at the issues conference, however, did the Town identify any of Applicant's specific factual assumptions, methodologies, calculations, analyses or conclusions with which Mr. Millspaugh disagreed and about which he proposed to testify. For example, although counsel stated that, "[a]s a PE [professional engineer], yes, he [Mr. Millspaugh] would have experience and understanding of the issues associated with blasting" id. at 48:13-17, counsel did not identify any aspects of Applicant's blasting studies and analyses with which Mr. Millspaugh took issue, or considered incorrect or unsupported.⁴

The petitions are essentially general, rather than specific, challenges to the adequacy of Applicant's analyses, and the Department's review thereof.

5. Proposed Issues Specific to the Job Corps and the STAMP

a. Proposed Issues Regarding the Job Corps

Petitioners allege that Applicant failed to consider adequately (i) the effects on the Job Corps of noise, dust, and diesel emissions resulting from increased truck traffic; (ii) potential disruption to educational activities; (iii) the effects of blasting on Job Corps structures and wells; and (iv) the potential drawdown effect on Job Corps wells and lack of an alternative water supply. See Town Petition at 21-23, and 39; see also Citizen Petition at 5 (same issues).

As set forth above, the Job Corps is a program administered by the USDOL. The USDOL submitted comments on the DEIS, and was notified of this Part 624 proceeding but did not provide oral or written comments or seek party status.

Petitioners have offered no expert report or witness testimony regarding truck traffic or educational activities, and have offered no expert report or witness testimony to controvert the studies and analyses conducted on behalf of Applicant regarding operational noise and blasting noise and vibration, or regarding the potential effects of dewatering of the quarry during mining operations.

The Job Corps is located on Tibbits Road in the Wildlife Refuge, approximately 3,400 feet south of the proposed mining site. See Ex. IC-13A (DEIS Vol. 1), at 164. The elimination of truck traffic on Oak Orchard Ridge Road and Sour Springs Road, which are relatively near the Job Corps, see IC-21, at page 4 of 12, Special Condition No. 10, ameliorates any truck traffic-related noise and other concerns with respect to the Job Corps.⁵ With respect to operational noise, the DEIS and additional documents demonstrate that noise from blasting and operations will not have a significant impact on the Job Corps. See Ex. IC-13A (DEIS Vol. 1), at 153-173;

⁴ The Town stated that Mr. Millspaugh would not be offered as a noise expert. See IC Tr. at 48:9-12.

⁵ With respect to traffic-related dust and air quality, staff considered the issue, reviewed the available evidence and concluded that the proposed project met the requirements of Commissioner's Policy ("CP") 33, Assessing and Mitigating Impacts of Fine Particulate Matter Emissions. See IC Tr. at 73:11-74:9. If the permit is granted, Applicant would operate under an air registration certificate. See IC Tr. at 70:20-71:10. Petitioners have provided no offer of proof contradicting or undermining the basis for staff's conclusion.

id. Plate 3 (showing reduction of noise to ambient levels north of the Job Corps); see also IC Tr. 86:6-20.

With respect to dewatering/water drawdown of the quarry during operations, the DEIS contains a thorough, worst case, analysis of the potential impacts, including an evaluation of impacts to groundwater quantity, based upon, among other things a 72-hour pumping test and analysis of several wells. See Ex. IC-13D (DEIS Vol. 4), at Appendix 4. This analysis reflected that the maximum drawdown at Well ID DH 1-05, the well furthest from and south of the pumping well, was approximately 7 feet. See id., CPI Groundwater Assessment, at 5, 11 (Table 4-6); id. at Figure 4-1, Appendix A at Figure A4, and Appendix C (Tabulated Groundwater Levels); see also IC Tr. at 115:9-116:25; 121:5-10. According to counsel for Applicant, the Job Corps well is 75 feet deep, and a worst-case 7 foot impact would not be significant. See id. at 120:18-121:10.

Moreover, the draft combined permit reflects that Applicant has accepted permit conditions to replace, if necessary, water supplies affected by the drawdown, see Ex. IC-21, at Special Condition No. 11, and staff stated at the issues conference that this permit condition would apply with respect to the Job Corps if there were unanticipated impacts. See IC Tr. at 117:19-118:7; 118:14-119:10.

Petitioners have provided no offer of proof controverting the methodologies employed with respect to the 72-hour pumping test conducted on behalf of Applicant, or the results or analysis thereof. They have provided no basis to conclude that the drawdown would have significant adverse impacts, or that the permit conditions are not sufficiently protective.⁶

RULING: No issue exists for adjudication with respect to the Job Corps.

b. Proposed Issues Regarding the STAMP

The Citizen Petitioners express concern regarding the impacts of blasting on the vibration-sensitive nanotechnology manufacturing planned for the STAMP. See Citizens Petition at 6. In their petition, the Citizen Petitioners state that they

believe[] that the test blast conducted by Frontier to assess potential impacts on the surrounding area is deficient and suspect,” and that “this test is not representative of actual Project operations and is an insufficient basis for rendering conclusions about potential impacts to the community and to the STAMP center.... [I]t is CPS’ [sic] understanding that Frontier has failed to cooperate with STAMP representatives in addressing these engineering concerns.

Citizens Petition at 6.

⁶ Because there is no municipal water supply near the Job Corps, counsel for the Town argued that, should drawdown cause significant impacts to the Job Corps well, the process of evaluating an extension of the nearest municipal water supply would be “a tremendous undertaking with its own impacts.” IC Tr. 119:11-15. Staff stated, however, that there are other options for providing water to the Job Corps including, for example, creating more storage capacity within an existing well. See IC Tr. at 118:14-119:10.

As set forth above, the record reflects that Applicant's consultant Vibra-Tech coordinated with the STAMP consultant Colin Gordon regarding Vibra-Tech's study and, along with Department staff, Applicant and STAMP representatives reached agreement regarding a special condition in the permit relating to blasting and potential impacts on the STAMP project. The condition includes monitoring every blast to ensure meeting applicable vibration standards. See Draft Combined Permit, Ex. IC-21, at Special Conditions 18, 19, 20; see also Exs. IC-15C through IC-15I; IC Tr. at 80:23-82:21; 84:4-85:20; 89:6-21; 92:11-93:17.

At the issues conference, petitioner Pencille raised for the first time a question about whether the studies adequately considered the effect on blast vibrations of potential changes in the water table resulting from mining operations. Ms. Pencille stated that the STAMP's engineers had not considered the water table issue. See IC Tr. at 82:3-83:6. Ms. Pencille stated, however, that she was not offering any witness from the STAMP to testify regarding this topic, and provided no studies or other materials that would undermine the validity of the studies and other materials submitted by Applicant.

Petitioners have offered no expert report or witness testimony to controvert the studies and analyses conducted on behalf of Applicant.

RULING: No issue exists for adjudication with respect to the STAMP.

6. Other Proposed Issues⁷

a. Operational Noise

The Citizen Petition generally states that operation of the quarry "will ... result in significant noise ... which will negatively affect not only CSP members who live and recreate near the Refuge, but the unique and fragile wildlife that live and forage in this area as well." Citizen Petition at 2. The Citizen Petition further argues that the DEIS "fails to adequately address the significant adverse impacts to wildlife in and near the Refuge that would be caused by noise ... from ... mining operations," id. at 3, and that noise will affect hunting in the Refuge. See id. at 5. At the issues conference, Petitioner Pencille stated that noise may impact birds such as the short-eared owl and the northern harrier, because their hearing is more sensitive due to having facial disks. See id. at 24:24-25:24.

The Town Petition similarly offers general statements regarding noise from the quarry, including alleging impacts on recreation and wildlife. See Town Petition at 11.

As part of the DEIS, Applicant's consultant conducted an operational noise impact analysis in accordance with Department noise policy, "Assessing and Mitigating Noise Impacts," DEP-00-1 (rev. Feb. 2, 2001) ("DEP-00-1"). Applicant's analysis included determining ambient noise levels, studying comparable operation equipment noise, identifying receptor locations, analyzing several operational scenarios, conducting a noise assessment to determine potential

⁷ Proposed issues relating to the Job Corps and the STAMP, fully addressed above, are not discussed again in this section.

impacts at receptors, and an assessment including attenuation calculations based upon noise barriers such as perimeter berms. See Ex. IC-13A (DEIS Vol. 1), § 3.2.6, at 86-89, § 4.2.6, at 153-173. Applicant also identified noise mitigation measures. See id. § 5.2.6, at 215.

Applicant's analysis concluded that noise from mining operations would reduce to ambient levels within 350 feet of the Wildlife Refuge boundary. See Ex. IC-13D (DEIS Vol. 4), at Appendix 6, § 2.7.3, at 26-27; see also id. Table 8; id. at 190-191, Plates 2 and 3; Applicant Response at 5-7. Applicant also responded to comments regarding literature relating to noise impacts on wildlife. See Ex. IC-11K, Response to Comments, at 46-47.

The Citizen Petition does not state in what respect Applicant's studies and analyses are, in their view, deficient, or what is allegedly missing from the DEIS regarding addressing the "significant adverse impacts" referred to in the Citizen Petition. The Citizen Petitioners have identified no expert or other witness to testify regarding noise. The Town Petition also fails to identify any specific error or omission in Applicant's noise studies. At the issues conference, the Town stated that its witness Mr. Millspaugh would not testify as a noise expert. IC Tr. at 48:9-12.

At the issues conference, Department staff stated that it considered the potential impacts of noise to be generated by the proposed project, using DEP-00-1. See IC Tr. at 77:20-79:14. In addition, the draft combined permit incorporates by reference the DEIS and responses to comments. See Ex. IC-21, at page 3 of 12, Special Condition No. 1. As set forth above, Applicant has also agreed to an additional permit condition prohibiting mining activities with the Phase 2 mining area within 350 feet of the Wildlife Refuge during May, June and July, so that operational noise will not impact birds in the Wildlife Refuge during breeding season. See IC Tr. at 141:21-143:8.

The noise analysis performed on behalf of Applicant, and included in the DEIS, provides an adequate basis for the Department to make findings on this proposed project. Petitioners have no offer of proof to call into question Applicant's noise analysis, or the conclusion that impacts have been mitigated to the maximum extent practicable.

RULING: No issue exists for adjudication with respect to operational noise.

b. Blasting Noise, Dust and Vibration

The Citizen Petition argues that the DEIS does not address adequately the "impacts to wildlife in and near the Refuge that would be caused by noise, dust and vibrations from blasting." Citizen Petition at 3. The Citizen Petition questions whether "efforts were taken to mitigate the effect of blasting noise, other than to constrain it to certain time period[s]," and seeks further study. Id. at 6.

Similarly, the Town Petition argues that the DEIS does not address the impacts of blasting on wildlife, including wetland and aquatic species, and birds including bald eagles. With respect to wetland and aquatic species, the Town states that "[s]hock waves caused by blasting have uniquely harmful effects on fish in that they can rupture swim bladders and stun-

disorient fish as the waves move through the water.” Town Petition at 13 (citing identical USFWS comment). With respect to possible impacts of blasting on bald eagles, the Town refers to the USFWS National Bald Eagle Management Guidelines (“Eagle Guidelines”), which state that blasting should be avoided within ½ mile of active bald eagle nests. See id. at 14-15. The Town questions the DEIS assertion that blasting effects will be negligible on buildings more than 1,700 feet from the blast, and states that Applicant should pay for third-party pre-blast surveys. See id. at 36.

The DEIS identifies steps that Applicant will take to minimize the noise and vibration from blasting, including the use of timing delays which sequence the blasting, limiting the number of blasts by increasing the yield of each blast, blasting during the middle of the day when ambient noise is highest, and blasting on days with the least amount of cloud cover to limit noise reflection. See Ex. IC-13A (DEIS Vol. 1), § 5.2.6.1, at 215-216; see also Ex. IC-13D (DEIS Vol. 4), § 2.7.3, at 27. In addition, the draft combined permit authorizes blasting only between the hours of 9:00 a.m. to 4:00 p.m. on weekdays; blasting is prohibited on weekends or legal holidays. Any exceptions require prior written approval of the Department. See Ex. IC-21, page 6 of 12, Special Condition No. 17. The draft combined permit also contains special conditions relating to seismograph monitoring, reporting, ground vibration limits, and air blast limits. See id., Special Condition Nos. 18-21.

With respect to blasting impacts on fish and other aquatic species, staff states that “[p]otential 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.” Staff Response at 13 (italics added). Bernard Carr, a principal environmental scientist with Applicant’s consultant Terrestrial Environmental Specialists, Inc. (“TES”), also states that studies showing that blasting may damage swim bladders involve marine blasting – that is, blasting under water – and the mining project here does not involve marine blasting. See Affidavit of Bernard P. Carr, sworn to April 7, 2016 (“Carr Aff.”), at 3-4, ¶¶ 13-17; see also IC Tr. at 99:10-100:6. At the issues conference, staff stated: “[T]here is no evidence which indicates that blasting in a deep water quarry is going to have any affect [sic] on fish.” IC Tr. at 100:8-12.

The petitioners did not provide any evidence, proposed testimony, or other offer of proof to support a claim that the positions of Applicant and Department staff, with respect to potential blasting impacts on fish, were in error or were otherwise flawed.

With respect to bald eagles, staff’s written response to the petitions states that no impacts on eagles are expected, and that the closest known eagle nest is approximately 2.5 miles from the proposed quarry. See Staff Response at 13. In an October 25, 2006 letter, the USFWS stated that bald eagle nesting was observed two miles from the proposed project area. See Ex. IC-13D (DEIS Vol. 4), Appendix A. At the issues conference, staff provided a satellite photograph reflecting that there are four existing bald eagle nests in the vicinity of the proposed quarry. The closest nest (Mohawk nest) is 2.7 miles from the proposed quarry. See Ex. IC-23; see also IC Tr. 96:9-13.

In addition, Applicant's written response to the petitions states that the proposed project "far exceeds the buffers in the [Eagle] Guidelines, which provide for a 660-foot buffer from mining operations and the avoidance of blasting within ½ mile of active nests during breeding season." Applicant Response at 17. Applicant's consultant also stated that the four eagle nests in the Wildlife Refuge are not within ½ mile of the proposed quarry, and that there are adequate foraging locations within the "[Wildlife Refuge] and associated NYSDEC wildlife complex"⁸ [that] encompasses approximately 17,000 acres." Carr Aff. at 6, ¶ 26.

At the issues conference, Applicant stated that the DEIS evaluated potential impacts on eagles, and included consideration of the Eagle Guidelines. See IC Tr. at 95:8-17; see also Ex. IC-13A (DEIS Vol. 1), at 59 (citing USFWS request for assessment of potential for bald eagles on site, and concluding that eagles not likely on site because site is primarily agricultural land and open fields), 60-61 (discussion of bald eagles), 131-132 (discussion of Eagle Guidelines); Ex. IC-13D (DEIS Vol. 4), Appendix 6, at 11, 14, 21 (no expected impacts on eagle habitat), 25-26 (literature review of effects of military blasting, noise and vibration on raptors)

With respect to the potential impact of blast vibration on structures, the draft combined permit addresses pre-blast surveys. See Ex. IC-21, at pages 5-6 of 12, Special Condition No. 15. The special condition requires Applicant to conduct pre-blast surveys for residential and commercial structures within 1,500 feet from the final life of mine boundary, requires Applicant to notify such landowners in writing of (i) their right to have a qualified third-party conduct a pre-blast survey; and (ii) the process by which the landowner may request a third-party pre-blast survey. The surveys must, among other things, document the condition of the structure and catalogue pre-blast damage. Finally, copies of the completed pre-blast survey reports must be provided to the person requesting the survey and to the Department. See id. Department staff stated in its response to the petitions that Applicant is required to pay for pre-blast surveys. See Staff Response at 29.

With respect to dust resulting from blasting, the Citizen Petition makes a general claim that the DEIS fails to adequately address impacts to wildlife, but offers no specifics with respect to the alleged failure. See Citizen Petition at 3.

According to staff, Applicant conducted a study on dust in accordance with Commissioner's Policy ("CP") 33, Assessing and Mitigating Impacts of Fine Particulate Matter Emissions, and met the requirements of that policy. See IC Tr. at 73:11-74:9; see also Ex. IC-13A (DEIS Vol. 1), § 3.1.3.2, at 54-58; see also id. § 4.1.3, at 126-130; Ex. IC-13E (DEIS Vol 5), Appendix 12. If the permit is granted, Applicant would operate under an air facility registration certificate. See IC Tr. at 70:20-71:10. Petitioners have provided no offer of proof contradicting or undermining Applicant's analyses or the basis for staff's conclusion.

Neither petition provides an analysis contrasting with the analyses conducted on behalf of Applicant regarding noise, dust and vibration from blasting. Nor do the petitions provide

⁸ The Wildlife Refuge is flanked by Oak Orchard Wildlife Management Area and the Tonawanda Wildlife Management Area. According to a Department website, the three adjoining properties "make up almost 20,000 acres of wildlife habitat." <http://www.dec.ny.gov/outdoor/55691.html>.

proposed evidence or testimony to contradict Applicant's and staff's factual representations that bald eagles are not nesting within ½ mile of the site. Applicant and staff considered and addressed potential impacts of blasting to fish and wildlife including bald eagles. Petitioners have not provided a basis to question the findings of Applicant's analysis, or staff's ability to make the requisite findings with respect to the proposed project, or the conclusion that impacts have been mitigated to the maximum extent practicable.

RULING: No issue exists for adjudication with respect to noise, dust and vibration from blasting.

c. Quarry Dewatering and Surface Water Discharge

Because mining at the site will occur below the water table, Applicant intends to pump out water from, or "dewater," the quarry (also referred to as "drawdown" of the water in the mining area). The water to be pumped out of the quarry will be discharged from the site as surface water into the Wildlife Refuge. The drawdown may impact surrounding wells and wetlands in the Wildlife Refuge, and the resulting discharge may impact the Wildlife Refuge wetlands.

The Citizen Petition asserts that "the DEIS fails to adequately address the effect of the quarry's dewatering and quarry discharges on wetlands," and that Applicant's conclusions regarding impacts on wetlands "appear to be based on visual observations alone." Citizen Petition at 4. The Citizen Petitioners request additional study, and that Applicant be "required to fund an independent study or peer review of the conclusions reached in the Hydrogeologic Report [DEIS Vol. 4]." Id.

The Citizen Petitioners "believe" that Applicant's estimates of the quantity of water to be pumped out of the quarry is "significantly understated," and that "potential sediment and other contamination" in the quarry discharges "would present a significant adverse impact to the Refuge." Id. The Citizen Petitioners also request that Department staff require groundwater quantity and quality monitoring in the Wildlife Refuge, and third-party monitoring of discharge volumes and water quality. See id. Finally, the Citizen Petitioners apparently seek an alternative that does not result in discharge to the Wildlife Refuge at all. See id. The Citizen Petitioners have not identified any expert to testify in support of any of their allegations, and have not submitted any studies or reports prepared on their behalf or otherwise to support their positions.

The Town Petition states that the Town is "concerned about the effect of increased surface water runoff to [the Wildlife Refuge] wetlands." Town Petition at 15. The Town argues that, notwithstanding Applicant's admission that discharges from the quarry will increase the amount of surface water discharge to the Wildlife Refuge, Applicant "completely fails to address what the impact of that increase will be." Id. The Town requests further study on the potential impact of the surface water discharge. See id.

The Town also questions the basis for Applicant's determinations regarding potential impacts of the water drawdown, and seeks additional study of the potential impacts of the

drawdown on wetlands. See id. at 17-18. The Town also seeks further studies of the impact of the quarry discharges on the water quality of the Wildlife Refuge wetlands. See id. at 19.

At the issues conference, the Town stated that its witness Mr. Millspaugh would offer testimony concerning, among other things, “the runoff issues and discharges that are going to be taking place for the wildlife refuge,” and the impact of the quantity and quality of the discharge water on the ecosystem within the Refuge and on threatened and endangered species. See id. at 53:9-25; 55:10-17. The Town did not, however, identify specifically any aspects of the “runoff issues and discharges,” or specify any particular impact about which Mr. Millspaugh would testify. Nor did the Town specify any facet of Applicant’s analyses with which Mr. Millspaugh disagreed or would otherwise take issue.

To determine potential impacts of the drawdown and discharge, Applicant’s consultants conducted groundwater/hydrogeological studies, a wetlands delineation report, a wetland impact assessment, and a HydroCad analysis, and prepared a stormwater pollution prevention plan (“SWPPP”). See Ex. IC-13A (DEIS Vol.1), § 1.2.3, at 7, § 1.3.2.2, at 12-13, § 1.5.2.2, at 18-19, § 3.1.2.2, at 46-50, § 3.1.4.3, at 62-63, §§ 4.1.2.1 and 4.1.2.2, at 97-110, §§ 4.1.2.2.3 and 4.1.2.2.4, at 112-125, and § 5.1.2, at 201-208; see also Ex. IC-13D (DEIS Vol. 4), Appendix 4; Ex. IC-13E (DEIS Vol. 5), Appendix 7; Ex. IC-13F (DEIS Vol. 6), Appendix 14; Ex. IC-13F (DEIS Vol. 7), Appendix 16.

Staff incorporated into the draft combined permit several special conditions relating to both the dewatering and the discharge. With respect to the potential impacts of the pumping to dewater the quarry, Special Condition No. 11 provides, among other things, that, if “it is suspected that mining operations have impacted the quantity or quality of groundwater at and in the vicinity of the mine site,” the Department may require Applicant to “immediately supply water at its expense to the impacted property or properties ... undertake tests or investigations to aid in determining the cause of the identified impacts,” and, if the Department determines that the mining operation has negatively impacted groundwater, “provide an alternative permanent source of water to the impacted property or properties” including connecting any impacted propert[y][ies] to a municipal water supply system if available. See Ex. IC-21, page 5 of 12, Special Condition No. 11; see also id., page 9 of 12, Condition No. 9 of Water Withdrawal Permit (requiring permittee “to provide an adequate supply of water to those residents whose private drinking water wells are significantly diminished or rendered non-productive by the permittee’s use of the sources of water supply”).

Special Condition No. 12 requires, as part of a groundwater quantity monitoring program, the installation of four new sets of monitoring wells (bringing to nine the total number of monitoring wells at the site), and requires monthly monitoring for the first two years of operation and then quarterly monitoring thereafter. See Ex. IC-21, page 5 of 12.

Special Condition No. 13 prohibits the creation or use of ditches, swales, etc. for discharge of waters off-site from the quarry “except those explicitly described and shown in the narrative and graphic portions of the approved” MLUP. See Ex. IC-21, page 5 of 12. The condition also requires compliance with all applicable SPDES permit requirements.

Special Condition No. 14 requires Applicant, upon request from USFWS, to use an alternative mine dewatering route identified as “drainage basin 2.” See Ex. IC-15J (November 2015 letter from Applicant’s consultant CPI to the Department). This condition was intended to address USFWS concerns that, during the summer months, additional water discharged from the quarry to the Wildlife Refuge may impact a particular area of the Wildlife Refuge of special interest to the USFWS. See id.⁹ Special Condition No. 14 also prohibits the discharge of more than 554,264 gallons per day, and requires compliance with all effluent limits and other requirements in the Applicant’s SPDES general permit. See Ex. IC-21, page 5 of 12, Special Condition No. 14. The USFWS approved the alternative discharge location, and the language of Special Condition No. 14. See Ex. IC-15K; see also IC Tr. at 35:24-36:9.

The Water Withdrawal Permit also addresses many of the dewatering and discharge issues. For example, Condition No. 4 prohibits the withdrawal of more than 554,264 gallons of water per day for any use on the site, including mine dewatering and dust suppression. See Ex. IC-21, page 9 of 12, Condition No. 4. Other conditions require the installation of meters to measure water withdrawal and set forth recordkeeping and reporting requirements regarding water withdrawal. See id., Condition Nos. 5-8.

At the issues conference, petitioner Printup questioned Applicant’s estimate of the amount of water that will be discharged from the quarry. See IC Tr. at 29:25-33:5. Mr. Printup stated that two other quarries that he contacted are not as deep as the proposed quarry will be, but are pumping out many millions of gallons of water. See id. at 30:12-31:10 (Redlands quarry pumps 2.88 million gallons per day, and Barre Stone Products pumped 2.5 million gallons per day during 2015). Mr. Printup was also concerned that the water to be pumped out of the quarry, including the chemicals in the water, could have a large impact on the Wildlife Refuge, and “think[s] that it needs to be looked into a little further.” Id. at 32:12-33:5.

As set forth above, Applicant conducted several studies to predict the impacts of dewatering on nearby wells and the wetlands in the Wildlife Refuge. Applicant also conducted analyses to estimate the quantity of water to be discharged from the quarry, to determine the water quality of the discharge, and to identify the potential impacts of the discharge on the Wildlife Refuge. Department staff and Applicant agreed to several permit conditions to address these issues, including a condition that limits the quantity of gallons that may be discharged.¹⁰ In addition, water quality must be monitored, and is subject to limitations as well. See e.g. IC Tr. at 71:11-72:4; see also Ex. IC-21, page 5 of 12, Special Condition Nos. 13 and 14 (Applicant must comply with SPDES effluent limits and requirements).

Department staff considered the statutory and regulatory requirements applicable to water-related issues involving the proposed quarry (i.e., water withdrawal, drawdown, discharge), and evaluated off-site wetland impacts and potential impacts of the drawdown on

⁹ The USFWS refers to this area as the “schoolhouse Moist Soil Unit.” See Town Petition, Ex. A, Attachment 1 to letter, at 4th unnumbered page. Dewatering and mowing the Moist Soil Unit is a “management technique [that] provides habitat for spring migrant shorebirds and fall migrant waterfowl.” Id.; see also IC Tr. at 127:18-129:10.

¹⁰ In response to a question by Ms. Pencille at the issues conference, staff stated that failure to comply with permit conditions could result in civil enforcement action, and Applicant acknowledged that violations of permit conditions could result in a summary abatement order shutting down the operation. See IC Tr. at 90:8-91:8.

wells. Staff thereafter “determined that the permit conditions that were included adequately addressed those concerns.” IC Tr. at 100:18-103:7.

The petitions offer nothing but speculation regarding dewatering and discharge. The record reflects that Applicant conducted studies and analyses, that Department staff reviewed Applicant’s studies and analyses, and otherwise considered all issues relevant to dewatering and discharge. Department staff has fashioned several permit conditions relating to these issues, and Applicant has agreed to all such conditions.

RULING: No issue exists for adjudication with respect to dewatering of the quarry or discharge of water from the quarry.

d. Impacts on Wildlife

Applicant’s consultant Terrestrial Environmental Specialists, Inc. (“TES”) prepared a Vegetation and Wildlife Resources Report and Impact Analysis of Ecological Resources (“TES Report”). See Ex. IC-13D (DEIS Vol. 4), Appendix 6. Following comments by Department staff and the USFWS, TES prepared a Supplement to Ecological Resources Report, and conducted further field surveys on the proposed site and in the surrounding area including the Wildlife Refuge. See TES Report at 1.

TES obtained information regarding the short-eared owl, classified in New York as an endangered species, from the Buffalo Ornithological Society database, including visual sighting data from the Wildlife Refuge and the Town of Shelby from 1968-2010. See id.; see also id. Appendix D, Table D-3. This data shows that short-eared owls are “regular winter visitors” to the Town of Shelby. See TES Report at 12. The TES Report states that “[a] well-known winter roost site is located on Posson Road, which is approximately 1.2 miles east of the [proposed project] site.” Id. According to TES, the land in the area of Posson Road “is fallow and is dominated by grasses and herbaceous plant species.” Id.¹¹

TES conducted winter and breeding season short-eared owl surveys on December 13, 2006, February 20, 2007, and May 31, 2007, and did not locate any short-eared owls on the site. TES Report at 12, 14. TES also noted that the proposed quarry will not be active during the winter months when short-eared owls “overwinter” in the area. See id. at 21.

During its surveys, TES observed northern harriers, classified in New York as a threatened species, foraging on the site on three occasions. See TES Report at 8; see also id. at

¹¹ The short-eared owl “inhabits marshes, grasslands and tundra.” See Birds of North America Online (Holt and Leasure 2006), <http://bna.birds.cornell.edu/bna/species/062/articles/introduction>; see also <http://www.dec.ny.gov/animals/7080.html> (Short-eared Owl Fact Sheet on Department website); <http://www.acris.nynhp.org/guide.php?id=6949&part=2> (New York Natural Heritage Program website, describing short-eared owl habitat as “[o]pen areas such as grasslands (hayfields, fallow farm lands, and pastures) and fresh and salt-water marshes”); http://www.fws.gov/uploadedFiles/Region_5/NWRS/Central_Zone/Montezuma/ShortEaredOwlFacts.pdf (USFWS fact sheet, stating that short-eared owls “prefer open country of grasslands and marshes”).

13.¹² No nests were found at the site. See id. at 8. TES acknowledges that this species “would have less agricultural habitat in which to forage after mining has occurred,” but stated that “there is extensive open farmland surrounding this site for this species to forage.” Id. at 21; see also id. Figure 10 (Wildlife Refuge Comprehensive Conservation Plan Regional Land Use Map, showing extent of farmland and other land uses in the area).

Petitioners express concern regarding the project’s impact on wildlife, focusing on the short-eared owl, northern harrier and bald eagle.¹³ The Town states that Applicant’s studies regarding the presence of these species at or near the site are old and should be updated. The Town also cites USFWS comments regarding the accuracy of Applicant’s treatment of certain literature, and USFWS comments regarding the potential impact of noise on avian populations. See Town Petition at 11-12. The Citizen Petition asserts that the TES Report “fails to adequately address impacts on the Short-Eared Owl or other threatened species known to nest or forage in and around the project area.” Citizen Petition at 3.

The Town stated at the issues conference that its proffered witness Mr. Millspaugh “has extensive experience in ... the area[] of threatened and endangered species,” IC Tr. at 47:20-48:8, and that Mr. Millspaugh “can speak to the accuracy of” a U.S. Geological Survey report attached to the Town Petition regarding water discharge impacts on wetlands in the Wildlife Refuge, see Town Petition Ex. E, and “utilizing his experience, come to a conclusion whether or not there is going to be an impact on the wildlife that is there” from the quarry water discharge into the Wildlife Refuge Id. at 53:25-54:5.

The Town has not, however, (i) provided any materials that identify any of Mr. Millspaugh’s experience in the area of threatened and endangered species; (ii) stated the nature of Mr. Millspaugh’s proposed testimony concerning the USGS report, or in what respect the report was or was not accurate; or (iii) described the nature of any conclusion Mr. Millspaugh might come to regarding wildlife impacts.¹⁴ Nor has the Town’s expert or anyone else on behalf of the Town conducted their own studies with respect to wildlife. See id. at 60:22-62:9.

Petitioner Pencille stated at the issues conference that she holds a bachelor’s of science degree in animal science from Cornell University, and has 30 years of experience working with raptors in New York as a state and federally licensed wildlife rehabilitator, specializing in birds of prey. See IC Tr. at 26:15-21. She also stated that she has assisted in many bird counts in New York. See id. at 26:21-22.

¹² The northern harrier inhabits marshes, fields and prairies. See e.g. <http://www.audubon.org/field-guide/bird/northern-harrier> (Audubon Society field guide); <http://www.dec.ny.gov/animals/7090.html> (Northern Harrier Fact Sheet on Department website, stating that “[c]ommunal flocks roost on the ground during winter and migratory periods in agricultural fields, abandoned fields and salt marshes”).

¹³ Issues involving the bald eagle are discussed in § II.B.6.b above, and will not be repeated here.

¹⁴ At the issues conference, counsel for Applicant stated that Applicant’s hydrogeologist consultant Dr. Gowan incorporated the USGS study into his analysis. See IC Tr. at 59:14-19. Applicant also responded to various aspects of the USGS report. See Ex. IC-13C (DEIS Vol. 3), Appendix 2, (Response to Comments, dated September 11, 2012), at 50-52; Ex. IC-11K (same).

At the issues conference, Ms. Pencille provided (i) a document, marked “Draft,” dated December 22, 2014, and entitled “Project Applicant Survey Protocol for State listed Wintering Grassland Raptor Species” (“Draft Survey Protocol”); and (ii) a document comprised of an email attaching a chart apparently reflecting results of winter raptor field surveys conducted by or on behalf of the Department in the vicinity of the proposed site from 2008-2016. See Ex. IC-22. Ms. Pencille stated that she received these documents from the Department the day before the issues conference. IC Tr. at 13:3-7.

At the issues conference, Petitioner Pencille argued that Applicant’s studies regarding the short-eared owl and northern harrier “are not scientifically supportable,” and requests “either additional studies or additional mitigation measures.” IC Tr. at 18:17-19:7. Ms. Pencille acknowledged that she had not done any studies or had other people conduct studies that showed the TES Report to be incorrect; rather, she asserted that the Department’s documents that she provided at the issues conference demonstrate that the TES Report is incorrect. In addition, Ms. Pencille asserted that the field surveys conducted by TES did not comply with the Draft Survey Protocol, see id. at 19:8-20:21, and that the winter raptor field surveys conducted by or on behalf of the Department “contradict their claims that there are no Short-Eared Owls there.” Id. at 12-19.

There is nothing in the record to support a claim that TES was required to conduct its field studies in accordance with the terms of the Draft Survey Protocol. It is a draft, not a final document, and is not a Departmental policy or regulation. Moreover, staff stated at the issues conference that, “[r]egarding the protocol, I believe we did not request additional surveys because there’s no grassland area there. It’s I believe rural crop fields which are presently at the site. And it’s not something that we required.” IC Tr. at 21:3-8.¹⁵

With respect to its own surveys, staff stated at the issues conference that “the Department, they did their own ... independent surveys which included Short-Eared Owls and there was no evidence they used the site for roosting or any other activity.... The core wintering area is .5 miles east of the proposed site.” IC Tr. at 23:24-24:9. In its papers filed in response to the petitions, staff elaborated further on the issue:

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.

¹⁵ The project site is primarily agricultural cropland, and has been used to grow corn, soybeans and wheat. See Ex. IC-13D (DEIS Vol. 4), at Appendix 6, § 1.3.3.1, at 6; see also id. Figure 7 (map) and Table 1 (98.1% of site is agricultural cropland). As set forth above, short-eared owl inhabits marshes, grasslands and tundra, not cropland.

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 [the] 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 provide [sic] 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.

Staff Response at 11.

Thus, Applicant's consultant conducted several field surveys, and staff and volunteers conducted many more, up to and including part of 2016. None of those surveys resulted in a finding that short-eared owls or northern harriers used the proposed project site for roosting. Although northern harriers were observed foraging at the site, there is ample information in the record to demonstrate that the areas surrounding the project site are appropriate for foraging. See discussion above.

The field survey email and attached chart submitted by Ms. Pencille at the issues conference are not to the contrary.¹⁶ These documents do not reflect that short-eared owls were observed at the project site. During the period covered in the survey chart, a short-eared owl was sighted only once on Fletcher Chapel Road. See Ex. IC-22, chart at page 3. According to the email to which the chart is attached, "March 5th, 2013 was the only date we had a SEOW [presumably short-eared owl] observed from our Fletcher Chapel road point, and that bird flew from the east." Ex. IC-22, first page. The survey chart reflects four sightings of short-eared owls on South Wood Road between 2011 and 2016, and several sightings on Posson Road, which is further east from the project site than South Wood Road. See Ex. IC-22, chart; Ex. IC-13B (DEIS Vol. 2), at Figure 1 (map reflecting location of proposed site and surrounding roads, including Fletcher Chapel Road, South Wood Road and Posson Road); see also Ex. IC-22 at last page (list of short-eared owl sightings in 2013, all on Posson Road). Similarly, the field survey email and attached chart reflect only one sighting of a northern harrier on Fletcher Chapel Road between 2008 and 2016, and several sightings on Posson Road throughout the period. See Ex. IC-22.

The documents submitted by Ms. Pencille at the issues conference are consistent with the DEIS and staff's position as set forth in its response to the petitions and as stated at the issues

¹⁶ These documents contain what appear to be acronyms for various species, but contain no key to the acronyms. For purposes of discussion of these documents, I will presume that "SEOW" entries refer to short-eared owls, and "NOHA" entries refer to northern harriers.

conference. Petitioners have submitted nothing to demonstrate that there is a substantive and significant issue requiring adjudication relating to the short-eared owl or northern harrier.¹⁷

The studies and analyses performed on behalf of Applicant, and included in the DEIS, provide an adequate basis for the Department to make findings on this proposed project. Moreover, the documents submitted by Ms. Pencille at the issues conference are not contrary to the analysis and conclusions in the DEIS, or the determinations by Department staff.

RULING: No issue exists for adjudication with respect to impacts of the proposed project on short-eared owls, northern harriers or other wildlife.

e. Consideration of Alternatives

The Town Petition alleges that Applicant did not consider adequately alternative sizes for the proposed quarry or alternative reclamation designs, and argues that Applicant's rejection of the no-action alternative was not supported. See Town Petition at 23-24; see also IC Tr. 46:12-47:2. Similarly, the Citizen Petitioners allege that "the DEIS did not provide a meaningful or complete analysis of the no-action alternative, analysis of potential alternative water discharge practices or alternative sites." Citizen Petition at 7. The Citizen Petitioners also argue that the DEIS "fails to consider potential use of other areas along the entire 200 miles of Lockport Formation in NY State." *Id.*; see also IC Tr. at 27:19-28:11 (alternative sites not evaluated); 134:13-135:2 (petitioner Pencille requesting that the project be moved to another location).

SEQRA requires that an environmental impact statement include "a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor." 6 NYCRR § 617.9(b)(5)(v). Such evaluation must include a "no action alternative," the discussion of which "should evaluate the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action." *Id.* The alternatives analysis "may also include" analysis of alternative sites, technology, scale/magnitude, design, timing, use, and types of action. *Id.* Moreover, "[s]ite alternatives may be limited to parcels owned by, or under option to, a private project sponsor." *Id.*

In this matter, Applicant complied with SEQRA requirements regarding consideration and evaluation of alternatives. Applicant evaluated alternative (i) designs including reclamation design; (ii) technology; (iii) size, (iv) development schedule; (v) land use; (vi) sites; and (vii) operational measures. Applicant also evaluated the no action alternative. See Ex. IC-13A (DEIS Vol. 1, § 7.0, at 221-229. Although petitioners claim that Applicant's analyses and evaluations

¹⁷ Although the petitions mention other wildlife, including the upland sandpiper, Henslow's sparrow, horned lark, and northern long-eared bat, see e.g. Citizen Petition at 3, Town Petition at 9, 11-13, they do not contain an offer of proof supporting an issue for adjudication. Staff's written responses to the petitions, and comments at the issues conference, address adequately petitioners' few points with respect to these species. See Staff Response at 12-13 (discussing upland sandpiper, Henslow's sparrows, horned larks, and bats); IC Tr. at 56:18-57:11; 60:17-21 (bats). In any event, the DEIS fully addresses these and other species. See Ex. IC-13D (DEIS Vol. 4), Appendix 6, TES Report, §§ 1.3.4.2-1.3.4.4, at 7-9; see also *id.* at §1.3.5.2, at 10-13 (discussing bald eagle, cerulean warbler, short-eared owl, northern harrier, horned lark, Henslow's sparrow, osprey).

are unsupported, not “meaningful,” and are incomplete, they do not provide specifics to support these generalized claims.

For example, Citizen Petitioners argue that the DEIS fails to consider locating the quarry at other areas along the Lockport Formation in New York, see Citizen Petition at 7, and stated at the issues conference that Applicant has “the option to purchase and find land that’s suitable along the Lockport Formation.” IC Tr. at 28:5-11. The proposed project would be located on land leased by Applicant from the landowners Chester and Dorothy Zelazny. See e.g. Ex. IC-13B (DEIS Vol. 2), at 1. Because Applicant is a private entity, it lacks the power of eminent domain, and consideration of sites that Applicant does not own or have under option is therefore unnecessary. See 6 NYCRR § 617.9(b)(5)(v); see also Matter of Seneca Meadows, Inc., Rulings of the Administrative Law Judge on Issues and Party Status, March 26, 2012, at 75.¹⁸

With respect to reclamation, Department regulations require that a reclamation plan describe the applicant’s proposed land-use objective to be achieved in the final stage of reclamation. See 6 NYCRR § 422.3(a). The regulations require that:

[a]cceptable basic reclamation requirements ... shall provide for the development of the affected land either to a condition or physical state which is similar to and compatible with that which existed prior to any mining *or which encourages the future productive use of the land.*

6 NYCRR § 422.3(b) (italics added). Acceptable land-use objectives for reclamation include, among other things, “recreation ... or other uses acceptable to the department.” 6 NYCRR § 422.3(3)(d)(1).

According to Applicant’s Reclamation Plan, see Ex. IC-13B (DEIS Vol. 2), § 3.0, following completion of mining at the site, “[t]he site will be reclaimed by grading and revegetation and the creation of lakes” approximately 35.2 and 156.1 acres in size. Id. § 3.1, at 23. Pursuant to the reclamation plan, “[t]he reclamation objective will be to create a recreational lake/wildlife habitat.” Id. see also Ex. IC-13A (DEIS Vol. 1), § 1.2.1, at 3; id. § 1.2.4, at 8. The first 50 feet of shore below the water surface will be less than 5 feet deep. See Ex. IC-13A (DEIS Vol. 1), § 1.2.1, at 3.

The Town takes issue with Applicant’s reclamation plan and its evaluation of alternative reclamation designs, arguing that “[i]t appears that alternatives were not fully considered.” Town Petition at 24. The Town does not argue that the site must be restored to its original condition, and does not identify possible alternatives that were allegedly not considered.

As set forth above, the regulations require only that a site be returned to a condition that encourages productive use, and specifically authorizes “recreation” and a land-use objective. See 6 NYCRR § 422.5(d)(1). Applicant’s proposed reclamation plan conforms to regulatory requirements; Applicant also evaluated alternative slopes for the perimeters of the lakes,

¹⁸ There is nothing in the record to support a claim that Citizen Petitioners’ use of the word “option” at the issues conference was intended to convey that there are any parcels “under option to” Applicant; rather, it is most probable that petitioner was referring generally to Applicant’s financial ability to purchase or lease real property.

choosing a plan in which the first 50 feet of shore below the water surface will be less than 5 feet deep. See Ex. IC-13A (DEIS Vol. 1), § 7.1, at 222; see also id. § 1.2.1, at 3. Department staff reviewed Applicant's alternatives analysis and determined it was sufficient. See Staff Response at 24; see also IC Tr. at 29:11-13.

RULING: No issue exists for adjudication, and no supplementation of the DEIS is required, with respect to consideration and evaluation of alternatives.

III. SUMMARY OF RULINGS

Petitioners have not provided offers of proof sufficient to establish that there are any substantive and significant issues requiring adjudication. Indeed, to the extent they have offered any proof, the offers have been rebutted by “the application, the draft permit and proposed conditions, the analysis of Department staff including staff’s pre-issues conference review of an application, the SEQRA documents, [and] the record of the issues conference ... among other relevant materials and arguments.” Matter of Buffalo Crushed Stone, at 6-7.

I hold that no substantive or significant issues exist requiring adjudication. Party status is therefore denied to petitioners Town Board of the Town of Shelby and the Town of Shelby, Citizens for Shelby Preservation, Wendi Pencille, Kenneth Printup and Francis M. Domoy. Moreover, no issues warrant the supplementation of the application or DEIS.

I have considered petitioners’ other arguments and criticisms, and find them to be without merit. I remand this matter to Department staff to complete the SEQRA process, including but not limited to preparation and issuance of a SEQRA findings statement pursuant to 6 NYCRR § 617.11, and to finalize and issue the combined permit.

IV. APPEALS

A ruling of an ALJ (i) to include or exclude any issue for adjudication; (ii) on the merits of any legal issue made as part of an issues ruling; or (iii) affecting party status, may be appealed to the Commissioner. See 6 NYCRR § 624.8(d)(2)(i)-(iii). Although the regulations state that appeals must be filed in writing within five days of the disputed ruling, see 6 NYCRR § 624.6(e)(1), I am extending the time period so that appeals in this matter will be due by 4:00 PM on August 18, 2016. Replies are authorized, and will be due by 4:00 PM on September 8, 2016. Appeals and replies must be filed with the undersigned ALJ and served on all parties. See 6 NYCRR § 624.6(e)(3).

The original and two copies of each appeal and reply thereto must be filed with Commissioner Basil Seggos (Attention: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. The copies received will be forwarded to Chief Administrative Law Judge James T. McClymonds and the undersigned. In addition, one copy of each submittal must be sent to all others on the service list at the same time and in the same manner as the submittals are sent to the Commissioner. Service

of papers by facsimile transmission (FAX) or by electronic mail is not permitted, and any such service will not be accepted.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: July 27, 2016
Albany, New York

Attachment: Issues Conference Exhibit List

APPENDIX 1

ISSUES CONFERENCE RULING EXHIBITS 1-23 PROVIDED WITH CD OR ELECTRONICALLY-POSTED FEIS

Matter of Frontier Stone, LLC

NYSDEC Application Nos. 8-3436-00033/00001 and 00002

ISSUES CONFERENCE EXHIBIT LIST

1. Referral Memorandum to Office of Hearings and Mediation Services, dated December 21, 2015, with attachments
2. February 2, 2016 email from S. Sheeley, attaching cover letters and address list re: ENB Notice
3. ENB Notice, dated February 3, 2016
4. Affidavit of Publication, The Daily News, notice published on February 10, 2016
5. Package enclosing cover email dated February 2, 2016, and CD containing Document List and documents identified therein
6. Transcript of March 8, 2016 Legislative/Public Comment Hearing and Comment Letters
7. Document File List @ January 7, 2016
8. CD Folder I:
 - A. March 13, 2006 cover letter attaching mining permit application documents
 - B. April 27, 2006 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.) – Notice of Incomplete Application
9. CD Folder II:
 - A. March 28, 2006 letter from D. Bimber (DEC) to M. Draper (Town of Shelby) – Lead Agency Determination
 - B. April 20, 2006 letter from D. Schubel (Shelby Town Attorney) to DEC Region 8 Office – Lead Agency Determination
10. CD Folder III:

- A. June 5, 2006 DEIS Scoping Outline
- B. June 5, 2006 SEQR Positive Declaration/Determination of Significance
- C. June 7, 2006 letter from D. Bimber to M. Draper – Notice of Determination of Significant Adverse Environmental Impact
- D. June 22, 2006 ENB Positive Declaration and Public Scoping Notice
- E. Transcript of June 27, 2006 Public Scoping Meeting
- F. July 13, 2006 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.) – Extension of the Public Comment Period for Scoping
- G. Packet of Scoping Comment Letters
- H. January 24, 2007 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.), attaching DEIS Final Scoping Outline dated January 17, 2007

11. CD Folder IV:

- A. March 5, 2007 letter from N. Herter (NYSOPRHP) to J. Hellert (Continental Placer, Inc.)
- B. June 13, 2008 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.) – dEIS Review and Comments, with attachment
- C. July 8, 2008 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.) – dEIS Review and Comments, with attachments
- D. Undated letter to D. Bimber from Frontier Stone – Response to the Department’s June 13, 2008 comments on Frontier Stone LLC’s DEIS
- E. August 12, 2008 letter from T. Roster (USFWS) to D. Bimber (DEC), attaching comments on DEIS
- F. December 22, 2009 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.) – dEIS Review and Comments
- G. Undated letter to D. Bimber from Frontier Stone – Response to the Department’s December 22, 2009 comments on Frontier Stone LLC’s DEIS
- H. February 13, 2010 letter from S. Metivier (USACOE) to J. Hellert (Continental Placer, Inc.) – Permit Requirements for Proposed Work
- I. December 8, 2011 letter from D. Bimber (DEC) to J. Hellert (Continental Placer, Inc.) – dEIS Review and Comments
- J. March 1, 2012 letter from T. Roster (USFWS) to D. Bimber (DEC) – dEIS Review and Comments
- K. September 11, 2012 Response to Comments, prepared by Continental Placer, Inc.
- L. September 27, 2012 letter from S. Sheeley (DEC) to J. Hellert (Continental Placer, Inc.) – Notice of Incomplete Application
- M. January 16, 2013 letter from J. Hellert (Continental Placer, Inc.) to S. Sheeley (DEC)
- N. February 15, 2013 letter from S. Sheeley (DEC) to J. Hellert (Continental Placer, Inc.) – DEIS Information Request
- O. March 21, 2013 letter from J. Hellert (Continental Placer, Inc.) to S. Sheeley (DEC) – DEIS Information Request, with attachment

- P. May 3, 2013 letter from S. Sheeley (DEC) to J. Hellert (Continental Placer, Inc.) – Notice of Incomplete Application
- Q. Undated Response to DEC NOIA – Response to comment 5. Air Quality
- R. June 14, 2013 letter from J. Hellert (Continental Placer, Inc.) to S. Sheeley (DEC) – Water Withdrawal Application, with attachment
- S. September 12, 2013 letter from S. Sheeley (DEC) to J. Hellert (Continental Placer, Inc.)
- T. September 24, 2013 letter from J. Hellert (Continental Placer, Inc.) to S. Sheeley (DEC), with attachment
- U. November 15, 2013 letter from S. Sheeley (DEC) to J. Hellert (Continental Placer, Inc.), attaching consent to extend time frames
- V. December 23, 2013 letter from S. Sheeley (DEC) to J. Hellert (Continental Placer, Inc.)

12. CD Folder V:

- A. Combined Notice of Complete Application, Notice of Acceptance of DEIS, Notice of Public Hearing and Public Comment Period, dated March 28, 2014
- B. March 28, 2014 cover letter from S. Sheeley (DEC) – Combined Notice of Complete Application, Draft EIS Acceptance, and Public Hearing
- C. March 28, 2014 letter from S. Sheeley (DEC) to D. Mahar (Frontier Stone, LLC), with attachments
- D. March 28, 2014 letter from S. Sheeley (DEC) to C. Cooper (Lee-Whedon Memorial Public Library) – Frontier Stone Quarry, DEIS
- E. March 28, 2014 letter from S. Sheeley (DEC) to B. Snyder (Seneca Nation) – Combined Notice of Complete Application, Draft EIS Acceptance, and Public Hearing
- F. March 28, 2014 letter from S. Sheeley (DEC) to Chief Roger Hill (Tonawanda Seneca Nation) – Combined Notice of Complete Application, Draft EIS Acceptance, and Public Hearing
- G. March 28, 2014 letter from S. Sheeley (DEC) to M. Draper (Town of Shelby) – Combined Notice of Complete Application, Draft EIS Acceptance, and Public Hearing, with attachment
- H. March 28, 2014 letter from S. Sheeley (DEC) to Chief Leo Henry (Tuscarora Nation) – Combined Notice of Complete Application, Draft EIS Acceptance, and Public Hearing
- I. ENB Notice dated April 2, 2014 - Combined Notice of Complete Application, Notice of Acceptance of DEIS, Notice of Public Hearing and Public Comment Period
- J. May 6, 2014 letter from S. Sheeley (DEC) to C. Cooper (Lee-Whedon Memorial Public Library) – Frontier Stone Quarry Draft Environmental Impact Statement
- K. May 6, 2013 [sic – should be 2014] letter from S. Sheeley (DEC) to C. Malcomb, Esq. (Hodgson Russ, LLP) – Frontier Stone Quarry Draft Environmental Impact Statement

- L. May 6, 2014 letter from S. Sheeley (DEC) to D. Rich (Shelby Town Clerk) – Frontier Stone Quarry Draft Environmental Impact Statement
- M. Notice of Extension of Public Comment Period for Draft Environmental Impact Statement and Notice of Complete Applications, dated May 6, 2014
- N. May 7, 2014 email from S. Sheeley (DEC) to E. Campbell (USDOL) re notice of extension of public comment period
- O. ENB Notice dated May 7, 2014 – Notice of Extension of Public Comment Period for Draft Environmental Impact Statement and Notice of Complete Applications

13. DEIS

- A. Volume 1 – Revised through January 27, 2014
- B. Volume 2 – Revised through October 15, 2013
- C. Volume 3 – January 29, 2014
- D. Volume 4 – January 29, 2014
- E. Volume 5 – January 29, 2014
- F. Volume 6 – January 29, 2014
- G. Volume 7 – January 29, 2014

14. CD Folder VI:

- A. Transcript of April 30, 2014 Public Hearing
- B. Packet of Comments from various agencies
- C. Packet of Comments from citizens

15. CD Folder VII:

- A. Packet of correspondence re UPA extensions
- B. July 23, 2014 email from S. Sheeley (DEC) to K. Brown, Esq. (counsel for Frontier Stone) – Ground Vibration Study
- C. July 28, 2014 letter from A. Walters (counsel for Genesee County IDA) to K. Brown (counsel for Frontier Stone)
- D. STAMP blasting vibration report by Vibra-Tech, dated December 12, 2014
- E. January 23, 2015 letter from A. Walters (counsel for Genesee County IDA) to S. Sheeley (DEC) – Public Comment on Draft Environmental Impact Statement, with attachment
- F. January 28, 2015 letter from Vibra-Tech Engineers, Inc. to J. Hellert (Continental Placers, Inc.) – Requested Response Colin Gordon/DEC Questions, with attachments
- G. February 2, 2015 email from J. Hellert (Continental Placers, Inc.) to S. Army and S. Sheeley (DEC) – Vibra-Tech’s Response to Questions from NYDEC and Colin Gordon, with attachments

- H. March 6, 2015 letter from K. Brown Esq. (counsel for Frontier Stone) to S. Sheeley (DEC)
- I. July 14, 2015 letter from Vibra-Tech to J. Hellert (Continental Placers, Inc.) – Prediction of Ground Vibration – Western New York Science and Technology Manufacturing Park
- J. November 11, 2015 letter from J. Hellert (Continental Placers, Inc.) to S. Sheeley (DEC) – Frontier Stone Quarry Proposed Dewatering Route to Basin 2
- K. November 24, 2015 email from T. Roster (USFWS) to S. Sheeley (DEC) – Frontier Stone Quarry Proposal – Draft Condition, with attachment
- L. December 11, 2015 letter from S. Sheeley (DEC) to K. Brown, Esq. (counsel for Frontier Stone) – Notification of Part 624 Hearing Determination
- M. January 6, 2016 email from K. Brown Esq. (counsel for Frontier Stone) to D. Loew, Esq. (DEC) – Signed Water Withdrawal Application, with attachment

16. CD Folder VIII:

- A. Draft Combined Permit, January 29, 2016

17. March 15, 2016 cover letter enclosing Petition for Full Party Status, Town Board of the Town of Shelby, and the Town of Shelby, with Exhibits A-F

18. Undated cover letter enclosing Petition for Party Status, W. Pencille, K. Printup, F. Domoy Ph.D.

19. April 8, 2016 cover letter enclosing Department of Environmental Conservation Staff's Response to Petitions for Full Party Status, with Exhibits A and B

20. April 8, 2016 cover letter enclosing Frontier Stone, LLC's Response to Party Status Petitions, with Exhibits 1-4

21. Draft Combined Permit, April 28, 2016

22. Draft Project Applicant Survey Protocol for State listed Wintering Grassland Raptor Species, dated Dec. 12, 2014, attaching undated email with attached winter raptor survey summary

23. Satellite photograph regarding eagles' nests

APPENDIX 2
COMMISSIONER'S DECISION
MAY 8, 2017

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

-of-

the Application for a Mined Land Reclamation
Permit under Article 23 of the New York
Environmental Conservation Law (ECL), Parts 420-425
of Title 6 of the Official Compilation of Codes, Rules
and Regulations of the State of New York (6 NYCRR),
and a Water Withdrawal Permit Under ECL Article 15
and 6 NYCRR Part 601, for Property Located in the
Town of Shelby, Orleans County, New York,

-by-

FRONTIER STONE, LLC,

Applicant.

DEC Application Nos.
8-3436-00033/00001 and 00002

DECISION OF THE COMMISSIONER

May 8, 2017

DECISION OF THE COMMISSIONER

I. BACKGROUND

Frontier Stone, LLC (applicant) has filed applications with the New York State Department of Environmental Conservation (Department) for a mined land reclamation permit pursuant to ECL article 23 and 6 NYCRR parts 420-425, and a water withdrawal permit pursuant to ECL article 15 and 6 NYCRR part 601, relating to a proposed new dolomite/limestone quarry of approximately 215.5 acres on a parcel of approximately 269.45 acres located in the Town of Shelby, Orleans County (Site). The project would also require coverage under the Department's State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges Associated with Industrial Activities (GP-0-12-001), and registration pursuant to the Department's air pollution control regulations at 6 NYCRR part 201.

The excavation area of the proposed quarry totals approximately 172 acres, and mining would be divided into four phases over the estimated 75 year operational life of the mine. Mining is proposed below the water table and the project includes dewatering of the quarry area. The reclamation objective will be to create open space with two lakes for recreation or wildlife habitat. The two lakes would be approximately 35 and 156 acres, respectively, in size.

The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to Administrative Law Judge (ALJ) D. Scott Bassinson. On July 27, 2016, the ALJ issued his rulings on issues and party status (Issues Ruling). The ALJ determined that no substantive and significant issues requiring adjudication were raised by the petitions, and denied party status to petitioners Town Board of the Town of Shelby and the Town of Shelby, and Wendi Pencille, Kenneth Printup, and Dr. Francis M. Domoy in their individual capacity and on behalf of an organization referred to as Citizens for Shelby Preservation (see Issues Ruling at 2, 27). The ALJ set the deadline for the filing of appeals from the Issues Ruling as August 18, 2016, and authorized responses to any appeals, to be filed by September 8, 2016.

On July 29, 2016, petitioner Pencille – who is not represented by counsel in this proceeding – sent an email to the Commissioner's mailbox, discussing the potential impacts of the project on short-eared owls and northern harriers, and requesting that I deny the permit. By letter dated August 2, 2016, copied to all parties and petitioners, Assistant Commissioner for Hearings Louis A. Alexander acknowledged receipt of Ms. Pencille's email. The Assistant Commissioner, by email dated August 22, 2016, subsequently informed the parties and other petitioners that Ms. Pencille's July 29, 2016 communication would be treated as an appeal.¹

On August 3, 2016, Dr. Domoy – also not represented by counsel in this proceeding – sent an email to Assistant Commissioner Alexander, stating that the Department had not considered the project's potential impacts on groundwater used for agricultural purposes. By email dated August 4, 2016, copied to all parties and petitioners, Assistant Commissioner Alexander acknowledged receipt of Dr. Domoy's email, and asked whether Dr. Domoy intended that his August 3, 2016 email be considered an appeal from the ALJ's Issues Ruling. By email

¹ Applicant objected to Ms. Pencille's communication being treated as an appeal by the Assistant Commissioner. Based upon my review of the record, applicant's objection is rejected.

dated August 8, 2016, Dr. Domoy confirmed that his August 3, 2016 email should be treated as an appeal. Assistant Commissioner Alexander's August 22, 2016 email to all parties and petitioners acknowledged that Dr. Domoy's email would be treated as an appeal.

Applicant and Department staff each filed a reply, dated September 7, 2016 and September 8, 2016, respectively, to petitioners' appeals. See Frontier Stone, LLC's Reply (Applicant Response) dated September 7, 2016; Department of Environmental Conservation Staff's Response to Appeals of the Ruling on Issues and Party Status dated September 8, 2016 (Staff Response). No further papers were received from petitioners or the parties.

Thus, currently pending before me are: (1) an appeal by petitioner Domoy from the Issues Ruling relating to potential impacts of the project on groundwater used for agricultural production; and (2) an appeal by petitioner Pencille from the Issues Ruling in which she challenges the ALJ's determination that no adjudicable issues were raised regarding impacts of the project on short-eared owls or northern harriers.

For the reasons set forth below, Dr. Domoy's and Ms. Pencille's arguments on appeal are rejected, and the ALJ's Issues Ruling is affirmed. I hereby adopt the ALJ's hearing report as my decision in this matter subject to my comments below.

II. DISCUSSION

A. Applicable Standard

In accordance with the Department's permit hearing procedures, a potential party must demonstrate that an issue it proposes for adjudication is both "substantive" and "significant" (see 6 NYCRR 624.4[c][1][iii]).

An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). In determining whether an issue is substantive, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (id.). An issue is 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]).

Pursuant to 6 NYCRR 624.4(c)(4), where, as here, Department staff has determined that applicant's project, "as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue . . . to demonstrate that it is both substantive and significant." A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issue. Furthermore, any assertions made must have a factual or scientific foundation. Speculation, expressions of concern, or conclusory statements alone are insufficient to raise an adjudicable issue. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the

analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions (see Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 4-5; see also Matter of Chemung County Landfill, Decision of the Commissioner, August 4, 2011, at 5-6; Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 5-9).

The Department is the lead agency under the New York State Environmental Quality Review Act (SEQRA) and has required applicant to prepare a DEIS. Accordingly, pursuant to 6 NYCRR 624.4(c)(6)(i), the determination whether to adjudicate issues relating to the sufficiency of a draft environmental impact statement or the ability of the Department to make SEQRA findings is made in accordance with the same standards that apply to the identification of issues generally (see 6 NYCRR 624.4[c][6][i][b]).

Where an issues ruling is appealed, the Commissioner will review the application of the substantive and significant standard to determine whether any issues merit adjudication (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 10-11).

B. Petitioners' Appeals

1. Petitioner Domoy's Appeal

The relevant text of petitioner Domoy's appeal is set forth below:

In regards to the hearing related to party status and the issue related to ground water for agricultural irrigation, DEC staff did not evaluate the ground water usage for agricultural production, only on residential wells in which no DEC data was presented ... Our farm requires a consistent supply of water for all crops but mostly for commercial vegetable production. Being that the proposed mine is adjacent to our farmland as well as approximately between 900-1000 feet from mine, de-watering of the quarry will definitely lower ground water depth for irrigation purposes.

Currently the proposed project is zoned agricultural/residential with the majority of the land currently under ag production with a diversified crop base. DEC staff will require a very extensive ground water analysis to assure available ground water supplies for zoned land use. DEC staff have indicated no regard for the present land use only for mining purposes. The long term sustainable benefits of agriculture are strategic to the area providing water resources are maintained for food supplies.

In summary, DEC staff have relied on third party research directly connected to the mining industry rather than the existing land use for the proposed site.

(Email from Dr, Francis M. Domoy dated August 3, 2016).

In response, applicant states that it “conducted an extensive hydrogeologic investigation to assess the existing surface water and groundwater systems and the potential quarry impact on local groundwater resources,” which investigation did not “hinge on,” or distinguish between, the end uses of wells on adjacent or nearby properties (Applicant Response at 6). Applicant recounts details of the investigation, including that a conservative projection of the furthest extent of the drawdown is up to 7,000 feet, but that it is not anticipated that such projected drawdown will occur “because it was based on condition when all phases are mined,” and an assumption that no water is retained in any of the four phases (see id. at 6-7). The mining plan calls for the initial phases to be filled after they are complete, “thereby raising the water levels in the adjacent aquifer system such that the maximum drawdown projected by a pump test will never occur” (id. at 7).

Department staff agrees with applicant, citing applicant’s groundwater study and stating that it “does not anticipate a significant adverse impact on groundwater or Mr. Domoy’s wells” (Staff Response at I, second unnumbered page). Staff states that the projected maximum amount of groundwater drawdown “will not be realized” because the pump test by applicant “is a worst case scenario with the proposed quarry at full build out” (id.).

Both applicant and Department staff also point out that the draft permit specifically addresses Dr. Domoy’s concerns. First, Special Condition No. 12 of the draft permit requires applicant to monitor groundwater quantity by installing sentinel wells to alert applicant and Department staff of any unanticipated drawdown (see Applicant Response at 7; Staff Response at I, second and third unnumbered pages; see also Issues Ruling at 19 [stating that Special Condition No. 12 requires the installation of four new sets of monitoring wells]; Issues Conference Exhibit [Ex. IC-] 21 [Draft Permit], at 5).

Second, Special Condition No. 11 requires applicant to “immediately supply water at its expense to the impacted property or properties” if, after an initial assessment by Department staff, it is “suspected” that mining operations have impacted the quantity or quality of groundwater in the vicinity of the mine site (see Draft Permit at 4-5, Special Condition No. 11a). If it is determined that the mine in fact has negatively impacted groundwater in the vicinity of the site, applicant “must, at its expense, provide an alternate, permanent source of water to the impacted property or properties” (id. at 4-5). Moreover, this requirement is not contingent upon whether the impacted wells are used for agricultural purposes or for drinking water. Indeed, Special Condition No. 11 contains additional requirements when the impacted water is used for drinking (see id.), with the implication that the general requirements regarding well impacts applies to both drinking water wells and wells used for other purposes.

At the issues conference, Dr. Domoy specifically raised, and both applicant and Department staff addressed, his concern regarding potential impacts of dewatering on wells that he used for agricultural purposes (see Issues Conference Transcript [IC Tr.] at 106:20-112:8). None of the petitions provided any study or proposed expert testimony specifically contradicting any of applicant’s studies or conclusions. In the Issues Ruling, the ALJ (i) cited applicant’s studies regarding potential impacts of dewatering the quarry; (ii) discussed the draft permit conditions requiring additional monitoring wells and the provision of water by applicant to impacted properties; (iii) stated that the petitions offered “nothing but speculation regarding

dewatering;” and (iv) concluded that no issue exists for adjudication with respect to dewatering (see Issues Ruling at 18-21).

Dr. Domoy’s appeal relating to the potential impacts on groundwater used for agricultural purposes has failed to demonstrate that a substantive and significant issue was raised.

2. Ms. Pencille’s Appeal

The relevant text of petitioner Pencille’s appeal appears below:

Judge Scott Bassinson, at the advice of counsel, Dudley Loew discounted, as insignificant, the studies performed by their own Department (NYSDEC,) [sic] of the endangered Short Eared Owls and threatened Northern Harriers on the proposed quarry site. A single sighting of a Short Eared Owl or Northern Harrier represents far more than a single bird. Bird counts represent populations. . . .

I am asking you to confirm the significance of the studies we presented with your own NYSDEC wildlife biologists to get an objective understanding of the significance of the data we provided. The judge relied on the claims made by TES, whose qualifications as experts do not even compare to my own, let alone the qualifications of those wildlife biologists who work for the DEC.

I am asking you to deny this permit and to protect the endangered species on the proposed quarry site. . . .

(Email from Wendi V. Pencille dated July 29, 2016).

At the issues conference, Ms. Pencille provided the ALJ with a copy of an email and attached chart she had obtained from the Department, relating to winter raptor surveys conducted by Department staff from 2008-2016 (see Issues Ruling at 23). The ALJ reviewed the email and chart submitted by Ms. Pencille, the field surveys conducted by applicant’s consultant (part of the Draft Environmental Impact Statement [DEIS]), the petitions and written responses submitted prior to the issues conference, and statements of the parties and petitioners at the issues conference.

In concluding that petitioners did not raise any substantive or significant issue requiring adjudication regarding the short-eared owl or northern harrier, the ALJ stated, among other things, that: (i) none of the field surveys, including the Department surveys submitted by Ms. Pencille, resulted in a finding that short-eared owls or northern harriers use the project site for roosting; (ii) the core wintering area for these birds is 0.5 miles east of the site; and (iii) agricultural cropland, the current use of the site, is not prime habitat for these species (see Issues Ruling at 21-25).

In response to Ms. Pencille's appeal, Department staff notes that the DEC surveys referred to and relied upon by Ms. Pencille actually indicate that the proposed quarry will not have a significant adverse impact on short-eared owls or northern harriers (see Staff Response at II, third and fourth unnumbered pages). Staff reiterates its findings that the core wintering area for these birds is approximately 0.5 miles east of the proposed quarry (see id. [citing Ex. IC-22, Chart]), and that the subject property, which consists primarily of agricultural row crops, is not habitat for these species; short-eared owls inhabit grasslands and marshes, and northern harrier habitat consists of a wide variety of open grasslands, shrub lands and salt and freshwater marshes (see id. at II, fourth unnumbered page). Finally, Department staff states that Ms. Pencille failed to provide any other offer of proof to support her assertions (see id.).

Applicant states in response to Ms. Pencille's appeal that her petition did not mention the northern harrier, and that the ALJ's ruling finding of no substantive and significant issue deserves deference (see Applicant Response at 4-5). Applicant reiterates that, as conditioned by the draft permit, it will meet the statutory and regulatory criteria applicable to the project (see id. at 2).

As discussed in the Issues Ruling, applicant's consultant conducted winter and breeding season short-eared owl surveys, and did not locate any short-eared owls on the site. In addition, the staff surveys submitted by Ms. Pencille do not reflect that short-eared owls were observed at the project site; one short-eared owl was observed flying near the site during the several years of the surveys (see Issues Ruling at 24 [citing and quoting from Ex. IC-22 (Department email and attached chart)]). The staff surveys also reflected only very limited sightings of northern harrier during the survey period of 2008-2016 (see id.).

Neither Ms. Pencille nor other petitioners submitted other studies or field surveys to contradict the results of the surveys conducted by applicant's consultant and Department staff. As the ALJ found, the surveys submitted by applicant as part of the DEIS, and the Department staff surveys submitted by Ms. Pencille, are consistent with one another. Ms. Pencille's single statement on her appeal that "[a] single sighting of a Short Eared Owl or Northern Harrier represents far more than a single bird" is not sufficient to meet a petitioner's burden of demonstrating that a substantive and significant issue exists that would warrant an adjudicatory hearing.

Ms. Pencille's appeal relating to the potential impacts on short-eared owls and northern harriers has failed to demonstrate that a substantive and significant issue was raised.

CONCLUSION

Based on my review of the record, I find that no issues requiring adjudication are raised in this matter and affirm the ALJ's Issues Ruling. I hereby remand this matter to Department staff and direct staff to issue the requested permits consistent with the draft permits prepared by Department staff and in accordance with the applicable SEQRA requirements.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: May 8, 2017
Albany, New York