

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