

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

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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.

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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.<sup>1</sup>

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).

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<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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;

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

<sup>5</sup> 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.<sup>6</sup>

**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.

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<sup>6</sup> 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 Issues<sup>7</sup>

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

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<sup>7</sup> 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"<sup>8</sup> [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

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<sup>8</sup> 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 property 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.<sup>9</sup> 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.<sup>10</sup> 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

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<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup>

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

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<sup>11</sup> 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](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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.

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<sup>12</sup> 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”).

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

<sup>14</sup> 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.<sup>15</sup>

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.

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<sup>15</sup> 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.<sup>16</sup> 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 5<sup>th</sup>, 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

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<sup>16</sup> 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.<sup>17</sup>

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

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<sup>17</sup> 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.<sup>18</sup>

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,

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<sup>18</sup> 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

**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