

Finger Lakes. IC Transcript 2-12-15 AM Session [Doc 00046]. txt

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1 STATE OF NEW YORK
2 DEPARTMENT OF ENVIRONMENTAL CONSERVATION
3 DEC PERMIT APPLICATION ID NO. 8-4432-00085
4 _____
5 IN THE MATTER OF THE APPLICATION FOR AN
6 UNDERGROUND GAS STORAGE PERMIT PURSUANT TO
7 ENVIRONMENTAL CONSERVATION LAW (ECL)
8 ARTICLE 23, TITLE 13 BY
9 FINGER LAKES LPG STORAGE, LLC,
10 APPLICANT,
11 _____
12 ISSUES CONFERENCE
13 Public Session 10 a.m.
14
15 Held on: February 12, 2015
16 Held at: Holiday Inn Express, Horseheads, NY
17
18 ADMINISTRATIVE LAW JUDGE:
19 JAMES T. MCCLYMONDS, Chief Administrative Law
20 Judge, Office of Hearing and Mediation Services
21 625 Broadway 1st Floor, Albany, NY 12233-1550
22
23 REPORTED BY:
24 DELORES HAUBER, Shorthand Reporter, Notary Public

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1 APPEARANCES:
2 DEC STAFF (Region 8, Central Office and Region 7)
LISA SCHWARTZ, ESQ., Region 8
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3 JEN MAGLIENTI, ESQ., CO
LAWRENCE WEINTRAUB, ESQ., CO
4 PETER BRIGGS, CO
TOM NOLL, CO
5 ERIC RODRIGUEZ, CO
LINDA COLLART, R8
6 PAUL GIACHETTI, R8
SCOTT SHEELEY, R8
7 DAVE BIMBER, R7
TOM WICKERHAM, R8
8 FRANK RICOTTA, R8
SCOTT FOTI, R8
9 MARK DOMAGALA, R8
JOHN SWANSON, R8
10 BOB PHANEUF, CO
SCOTT RODABAUGH, R8
11 DENNIS HARKAWIK, R8
LINDA VERA, R8
12 TOM MAILEY, CO
JOHN CLANCY, R7
13 KEVIN BALDUZZI, R7
14 APPLICANT, FINGER LAKES LPG STORAGE, LLC
KEVIN BERNSTEIN, ESQ., BOND, SCHOENECK & KING
15 ROBERT ALESSI, ESQ., DLA PIPER
BRAD BACON, ESQ., CRESTWOOD
16 SAM GOWAN
JOHN ISTVAN
17 BARRY MOON
MITCHELL DASCHER
18 FRANK PADSTORE
DAVID CREA
19 DON SIEGEL
RAY LIUZZO
20 RICK WAKEMAN
PAUL CONGDON
21 JEAN ROBERTSON
MICHAEL N' DOLO
22 JEFF MARX
BILL YOUNG
23 KIRK MOLINE
24

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1 APPEARANCES CONTINUED:
2 GAS FREE SENECA
DEBORAH GOLDBERG, ESQ., EARTHJUSTICE
3 MONEEN NASMITH, ESQ., EARTHJUSTICE
WIL BURNS, ESQ., BURNS LAW FIRM, LLC
4 KATIE THOMPSON
H. C. CLARK, Ph. D.
5 ROB MACKENZIE, M. D.
TOM MEYERS, Ph. D.
6 SUSAN CHRISTOPHERSON, Ph. D.
HARVEY FLAD, Ph. D.
7 SANDSTONE ENVIRONMENTAL ASSOCIATES

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8 SENECA LAKE PURE WATERS ASSOCIATION
RACHEL TREICHLER, ESQ.
9 RAY VAUGHAN
ALBERT NIETO
10 ED PRZYBYLOWICZ
KAREN EDELSTEIN
11 BILL HECHT
RICHARD YOUNG
12
13 SENECA LAKES COMMUNITIES
KATE SINDING, ESQ.
DANIEL RAICHEL, ESQ.
14 JONATHON KROIS, ESQ.
15 FINGER LAKES WINE BUSINESS COALITION
JOHN BARONE, ESQ. TOOHER & BARONE
16 MEAVE TOOHER, ESQ. , TOOHER & BARONE
17 SCHUYLER COUNTY LEGISLATORS
LEGISLATOR MICHAEL LAUSELL
18 LEGISLATOR VAN HARP
19 NATIONAL PROPANE GAS ASSOCIATION
JEFFRY PETRASH, ESQ.
20
21 NEW YORK PROPANE GAS ASSOCIATION AND PROPANE GAS
ASSOCIATION OF NEW ENGLAND
MATTHEW GRIESEMER, ESQ. , FREEMAN HOWARD
22
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1 ADMINISTRATIVE LAW JUDGE: It's 10:00
2 and we're going on the record. Good
3 morning. My name is James McClymonds. I
4 am the chief administrative law judge with
5 the Office of Hearings and Mediation
6 Services of the New York State Department
7 of Environmental Conservation and the
8 presiding administrative law judge for the
9 adjudicatory hearings being conducted on
10 the application of Finger Lakes LPG
11 Storage, LLC, for permits to construct and
12 operate a new underground, liquified

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13 petroleum gas or LPG storage facility

14 proposed to be located in the Town of
15 Reading, Schuyl er County.

16 This morning we are conducting an
17 issues conference pursuant to Section
18 624.4(b) of Title 6 of the Official
19 Compilation of Codes, Rules and Regulations
20 of the State of New York or (6 NYCRR). For
21 the record, this issues conference is being
22 held on Thursday, February 12th, 2015 at
23 the Holiday Inn Express, 266 Corning Road,
24 Horseheads, New York. I would now like to

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1 take appearances of counsel, starting with
2 Department staff.

3 MS. SCHWARTZ: Your Honor, appearing
4 for Department counsel Li sa Schwartz,
5 regional attorney, Jenn Maglienti and Larry
6 Weintraub of general counsel in central
7 office. Do you want us to introduce
8 supporting program staff? Have quite a
9 few.

10 ADMINISTRATIVE LAW JUDGE: Sure,
11 please do.

12 MS. SCHWARTZ: From our Division of
13 Minerals Resources Peter Briggs, Tom Noll,
14 Eric Rodriguez, Linda Collart, Paul
15 Giachetti. From our Division of
16 Environmental Permits, Scott Sheeley, Dave
17 Bimber. Also assisting from Department of,

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18 Division of Environmental Permits, John
19 Clancy and Kevin Balduzzi. From our
20 Division of Air Resources Tom Wickerham.
21 Our regional engineer Frank Ricotta. For
22 the Division of Materials Management, Scott
23 Foti, Mark Domagala, Bob Phaneuf. From our
24 Division of Water Scott Rodabaugh. Also

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1 with the Office of General Counsel the
2 regional attorney is Dennis Harkawick.
3 With our communications office Linda Vera
4 and Tom Mailey. And that's who we have
5 here in the room and who we have here for
6 Department staff.

7 ADMINISTRATIVE JAW JUDGE: Thank you.
8 And for Applicant Finger Lakes LPG Storage.

9 MR. BERNSTEIN: Kevin Bernstein,
10 Bond, Schoeneck & King for the Applicant.
11 Also have a number of experts in the
12 reserved seats and we will just introduce
13 them at the appropriate time as the
14 proposed issues come up.

15 MR. ALESSI: Robert Alessi, DLA Piper
16 also for the Applicant. Thank you.

17 ADMINISTRATIVE JAW JUDGE: Thank you.

18 MR. BACON: Brad Bacon with the
19 Applicant.

20 ADMINISTRATIVE LAW JUDGE: I'm sorry
21 Fred Bacon.

22 MR. BACON: Brad Bacon with the

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23 Applicant.

24 ADMINISTRATIVE LAW JUDGE: Thank you.

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1 And for full party status petitioner Gas
2 Free Seneca.

3 MS. GOLDBERG: I'm Deborah Goldberg
4 of Earthjustice. I'm here with my
5 colleagues Moneen Nasmi th and Wil Burns, of
6 the Burns Law Firm, representing Gas Free
7 Seneca. And we will also introduce
8 experts. I'm sorry. I would also like to
9 introduce Katie Thompson, litigation
10 assistant.

11 ADMINISTRATIVE LAW JUDGE: And for
12 full party status petition, Seneca Lake
13 Pure Waters Association.

14 MS. TREICHLER: Rachel Treichler and
15 I'm here with our experts Dr. Ray Vaughan,
16 Dr. Alberto Nieto. And we have consultants
17 Richard Young, Bill Hecht and Karen
18 Edelstein and Ed Przybylowicz from Seneca
19 Lake Pure Waters.

20 ADMINISTRATIVE LAW JUDGE: And for
21 full party petitioner Seneca Lakes
22 Communities.

23 MS. SINDING: Good morning, Your
24 Honor. Kate Sinding with Natural Resources

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1 Defense Council and I'm accompanied by my
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2 colleagues Dan Raichel and Jon Krois.

3 ADMINISTRATIVE LAW JUDGE: Shall we
4 list all of your clients at this point?

5 MS. SINDING: We could do that if
6 that is what you prefer. Let's see if I
7 can do this by memory while we look for --

8 ADMINISTRATIVE LAW JUDGE: Well, I
9 can do it.

10 MS. SINDING: Okay. That would be
11 great.

12 ADMINISTRATIVE LAW JUDGE: As I
13 understand you, you're representing Seneca
14 County, Yates County, Town of Fayette, Town
15 of Geneva, Town of Ithaca, Town of Romulus,
16 Town of Starkey, Town of Ullyses, Town of
17 Waterloo, City of Geneva, Village of
18 Watkins Glen and the Village of Waterloo.

19 MS. SINDING: That's correct, Your
20 Honor.

21 ADMINISTRATIVE LAW JUDGE: And for
22 amicus status petitioner, Finger Lakes Wine
23 Business Coalition.

24 MS. TOOHER: Yes, Your Honor. Meave

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1 Tooher, Tooher & Barone. My partner John
2 Barone for the Finger Lakes Wine Businesses
3 Coalition.

4 ADMINISTRATIVE LAW JUDGE: And for
5 amicus status petitioners Schuyler County
6 Legislators Van A. Harp and Michael L.

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Lausell.

MR. LAUSELL: I'm Michael Lausell and this is my fellow legislator Van Harp.

ADMINISTRATIVE LAW JUDGE: And for amicus status petitioner National Propane Gas Association.

MR. PETRASH: Good morning, Your Honor. Jeffry Petrash for National Propane Gas Association.

ADMINISTRATIVE LAW JUDGE: And for amicus status petitioners New York Propane Gas Association and Propane Gas Association of New England.

MR. GRIESEMER: Good morning, Your Honor, Matthew Griesemer from Freeman Howard.

ADMINISTRATIVE LAW JUDGE: And do we have an appearance for amicus status

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petitioner United Steel Workers International Union?

MR. BERNSTEIN: They will be here tomorrow as far as I understand when their items come up on the calendar.

ADMINISTRATIVE LAW JUDGE: Okay. Very good. Thank you.

An October 22nd, 2014 notice of deadline for petitions for party status and issues conference was published in the October 29, 2014 edition of the

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12 Department's Environmental Notice bulletin.
13 A copy of the ENB notice has been marked as
14 OHMS Document Number 201166576-00010. In
15 addition, Department staff counsel has
16 provided me with an affidavit of
17 publication of the notice on October 29,
18 2014 in the Watkins Glen Review & Express.
19 The affidavit of publication is marked OHMS
20 Document Number 11. Pursuant to 6 NYCRR
21 624.4(b) the notice scheduled this
22 pre-adjudicatory hearing issues conference
23 for today, Thursday, February 12th, 2015 at
24 10 a.m. at this location.

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1 The notice also originally
2 established Wednesday, December 10, 2014 as
3 the deadline for the filing of petitions
4 for party status. On November 18, 2014 a
5 notice extension of deadline for filing
6 petitions for party status was issued
7 extending the deadline to Friday, January
8 16, 2015. The notice of extension was
9 published in the ENB November 19, 2014 and
10 in the Village of Watkins Glen Review &
11 Express on November 26, 2014.

12 The following nine party staff
13 petitions have been filed with the
14 Department's Office of Hearings and
15 Mediation Services. For full party status
16 I have the petitions for Gas Free Seneca,
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17 Seneca Lake Pure Waters Association and the
18 Seneca Lake Communities. I also have the
19 amicus party status petitions of the Finger
20 Lakes Wine Business Coalition, Schuyler
21 County Legislators, Van A. Harp and Michael
22 L. Lausell. National Propane Gas
23 Associations, the New York L.P. Gas
24 Association, Inc., the Propane Gas

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1 Association of New England and the United
2 Steel Workers International Union.

3 The purpose of this issues conference
4 this morning is, one, to hear argument on
5 whether party status should be granted to
6 any petitioner. Two, to narrow or resolve
7 disputed issues of fact without resort to
8 taking. Three, to hear argument on whether
9 disputed issues of fact that are not
10 resolved meet the standards for
11 adjudication set forth in 6 NYCRR 624.4(c).
12 And four, determine whether legal issues
13 exist whose resolution is not dependent on
14 facts that are in substantial dispute and,
15 if so, to hear argument on the merits of
16 those issues.

17 An issues conference is not a hearing
18 at which testimony and evidence are
19 presented. If it is determined by myself
20 and the commissioner that factual issues
21 require adjudication in this proceeding, an

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22 adjudicatory hearing will be scheduled at a
23 later date. The identification of issues
24 for adjudication, if any, will be made in a

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1 post issues conference issues ruling by
2 myself and in an interim decision of the
3 Commissioner if any appeals are taken from
4 my ruling.

5 Some of the issues raised by the
6 party status petitioners may involve
7 discussion of documents and materials
8 Applicant Fingers Lakes LPG Storage claims
9 are confidential. The grounds for
10 confidentiality is trade secret,
11 confidential business information and
12 critical infrastructure information.
13 During argument on those issues, attendance
14 in this hearing room will be limited to
15 representatives of Applicant and Department
16 staff and those individuals subject to a
17 confidentiality agreement and order issued
18 in this proceeding. Any persons, including
19 in the press and the public, who have not
20 executed the confidentiality agreement and
21 order will be asked to leave the hearing
22 room at this time.

23 Presently we plan on closing the
24 hearing room at mid-day today for

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1 discuss ion of confi dential issues. We will
2 resume the public portion of the issues
3 conference tomorrow morning at 9 a.m.
4 Members of the public and press and other
5 interested individuals that wish to observe
6 the remaining public portion of the
7 conference after we close the hearing room
8 today, may return tomorrow morning.

9 So with that I would like to proceed,
10 but first I have a bit of housekeeping to
11 do. Yesterday I transmitted to the parties
12 a proposed schedule for the argument today.
13 I did my best to try to allot time fairly
14 to everyone based on the issues that were
15 presented in the petitions for party
16 status. After I sent that around, I -- did
17 everyone get a copy of this? I just want
18 to make sure before we go any further.
19 Okay.

20 After I sent it around, I received an
21 e-mail from Miss Treichler asking whether
22 or not she could be heard on the question
23 of water quality during the confidential
24 sessi on this afternoon. So I guess we can

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1 do that. How much time would you like to
2 have on the issue?

3 MS. TREICHLER: I guess the same as
4 the other parties.

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5 ADMINISTRATIVE LAW JUDGE: The full
6 20 minutes?

7 MS. TREICHLER: Maybe I only need 10.
8 I might only need 10.

9 ADMINISTRATIVE JAW JUDGE: Then I
10 would need to add time to the response by
11 Applicant and by staff. So if we, if we,
12 let's see.

13 MS. SINDING: Your Honor, the Seneca
14 Lake Communities would be willing to
15 concede 10 minutes of our time to Miss
16 Treichler and that'll keep us on schedule.

17 ADMINISTRATIVE JAW JUDGE: All right.
18 Very good of you to do that. All right.
19 So we will, 10 minutes for Seneca Lake
20 Communities and then 10 minutes for Seneca
21 Lake Pure Waters. So do we need to add any
22 time to the Applicant or staff's time on
23 that?

24 MR. ALESSI: Your Honor, we would

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1 just like, we don't think so, but depending
2 upon how new it may be, we may ask for
3 some, but we don't anticipate any at the
4 moment.

5 MR. BERNSTEIN: As I look at my notes
6 on their petition, I mean their report is
7 under cavern integrity, not water quality.

8 ADMINISTRATIVE JAW JUDGE: That was
9 my impression as well.

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10 MR. BERNSTEIN: So, I mean, as long
11 as they are not putting in anything new
12 that otherwise could have been put in their
13 petition for party status.

14 MS. TREICHLER: No. It is issues
15 that we feel were raised by our petition.

16 ADMINISTRATIVE JAW JUDGE: All right.
17 Fair enough. I mean, I could schedule at
18 this point, we will add another five
19 minutes to Applicants. Nobody should feel
20 compelled to use their full time.

21 MR. ALESSI: Understood.

22 ADMINISTRATIVE JAW JUDGE: So another
23 five minutes to staff too just in case?

24 MS. SCHWARTZ: Just in case.

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1 ADMINISTRATIVE JAW JUDGE: So that
2 would get us, if all goes according to
3 plan, we should be done at 4:30 this
4 afternoon. See how that goes. All right.
5 So what I'm going to do here is since I
6 don't have a white light and a red light,
7 I'm going to set a timer for one minute
8 less than the allotted time. When it goes
9 off, that means you got one minute left,
10 all right. So we will see how that works.
11 All right. Is there any other preliminary
12 matters anyone would like to raise at this
13 point before we start with the argument?
14 Is everybody fine with the order of

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15 presentation that I laid out or anybody

16 else that would not like to go first? Are
17 you going first?

18 All right. So let's start on the
19 issue of community carrier. Representative
20 Gas Free Seneca. Oh, and by the way would
21 everybody please turn off their cell phones
22 or put in airplane mode.

23 MS. GOLDBERG: I can sort of see you.

24 ADMINISTRATIVE LAW JUDGE: Can these

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1 microphones be pushed down? Let's go off
2 the record for a moment.

3 (OFF-THE-RECORD DISCUSSION.)

4 MS. GOLDBERG: As I mentioned
5 earlier, we are here representing Gas Free
6 Seneca which is a coalition of individuals
7 and now 315 businesses. I have a list of
8 those businesses if you're interested which
9 I can hand out to you at a later time.

10 Many of the members are here today. They
11 were instructed that T-shirts were
12 appropriate for rallies, but not for
13 judicial proceedings so they're a little
14 less visible, but I assure you that they
15 are here.

16 We're here to address obviously the
17 first issue and the one that is of greatest
18 concern and that is community character.
19 Community character is both a substantive

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20 and significant issue that should be

21 adjudicated because there is absolutely no
22 analysis whatsoever of impact on the
23 community character.

24 AUDIENCE: We can't hear.

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1 MS. GOLDBERG: Okay. Can you hear me
2 now?

3 AUDIENCE: Yes.

4 MS. GOLDBERG: Your Honor, I would
5 like to reserve two minutes so I'm not sure
6 if you're at nine minutes or seven minutes.
7 All right. The issue of community
8 character is a substantive and significant
9 issue because there is sufficient doubt
10 about the Applicant's ability to meet the
11 requirements of the State Environmental
12 Quality Review Act such that a reasonable
13 person would require further inquiries into
14 that issue. That's true because there is
15 no discussion whatsoever of community
16 character in the application or the draft
17 Environmental Impact Statement. The
18 project will have significant adverse
19 community characters for which there is no
20 proposed mitigation and therefore this
21 project is not the one, the alternative
22 that avoids or mitigates the impacts to the
23 maximum extent practicable so the DEC
24 cannot make the findings with the two

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1 requisite certifications.
2 It is also a significant issue
3 because these significant adverse community
4 character impacts should result in the
5 denial of this permit. Even if the permit
6 is not denied, the community character
7 impact should result in a major
8 modification of the project and at the very
9 least those impacts should result in
10 imposition of significant additional permit
11 conditions, additional study and public
12 disclosure of the results for visual
13 impact, noise, socioeconomic impact and
14 other components of the community character
15 analysis. Because there was no community
16 character analysis in the dSEIS or any of
17 the application measures. Dr. Harvey Flad
18 is a professional geographer formally at
19 Vassar with 45 years experience, did his
20 own culture landscape study to determine
21 the existing character of the Seneca Lake
22 community against which project impacts
23 could be measured.

24 As you know, Your Honor, community

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1 character is a separately listed element of
2 environmental concern under SEQR. It is
3 one of the independently identified

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4 significant conditions and under Chinese
5 staff it must be evaluated separately even
6 if there is no other physical impact on the
7 environment. The Applicant mocks, mocks
8 the cultural landscape study because
9 evidently it's unfamiliar with what
10 geographers do or the methodologies they
11 use, but DEC has endorsed them in the most
12 visible draft, revised draft supplemental
13 EIS, generic EIS on the hydraulic
14 fracturing program.

15 The community character analysis
16 provides the following definitions: A
17 community's character is defined by a
18 combination of natural physical features,
19 history, demographic and socioeconomics and
20 culture citing Robinson 2005. Key
21 attributes or features used to define
22 community character generally include local
23 natural features and land uses, local
24 history and oral traditions, social

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1 practices and festivals, unique local
2 restaurants and cuisines and local parks.

3 In addition, SEQRA acknowledges
4 community character as a component of the
5 environment including existing patterns of
6 population concentration, distribution of
7 growth and existing community or
8 neighborhood character. Further they say a

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9 sense of place also is central to community
10 character or identity. Sense of place can
11 be described as tangible and intangible
12 characteristics which over a period of time
13 have given a place its distinctiveness,
14 identity and authenticity. This is
15 Robinson 2005 again. And that is an
16 article that was delivered as a seminar
17 entitled Cultural Landscape in the 21st
18 Century.

19 This approach is consistent with
20 controlling precedents in Chinese staff, a
21 New York Court of Appeals decision clearly
22 binding on the Commissioner's decision,
23 recognizes that community character is a
24 distinct category and it is also consistent

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1 with the administrative decision cited by
2 the petitioner, the Applicant that
3 community character is intertwined with
4 other areas of environmental concern.

5 Having developed a clear account of
6 the Seneca Lake community character based
7 on an uncontested culture landscape
8 analysis, Dr. Flad can explain why the
9 project visual, noise and economic impacts
10 will significantly impair community
11 character. His approach incorporates all
12 of those elements and more. It is
13 inherently a multi-disciplinary approach,

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14 but it is not a reductive approach. It
15 does not assume that community character
16 can be reduced without loss to the various
17 components with which it's intertwined.
18 Instead community character emerges from
19 the relationship of the people in a place
20 to all of those elements.

21 As the 2010 SEQR Handbook recognizes,
22 courts' decisions have held that impact on
23 community character must be considered in
24 making determinations of significance even

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1 if there are no other impacts on physical,
2 on physical, on physical environment.
3 Moreover the SEQR Handbook recognizes
4 community character relates not only to the
5 built and natural environments of a
6 community, but also to how people function
7 within and perceive that community. The
8 perceptions of the community are key to
9 understanding community character and the
10 courts have recognized that those
11 perceptions are best expressed through
12 zoning and land use and other public
13 documents including such things as economic
14 development programs, historic
15 designations. In case the American
16 viticultural area designation, the scenic
17 byway designation, all of which are
18 expressions of the citizens' own vision for

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19 themselves. A vision that is mocked by the
20 client, but that is recognized clearly in
21 the branding that has been used by the
22 businesses that are represented here at the
23 conference.

24 ADMINISTRATIVE LAW JUDGE: Let me ask

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25

1 you one thing. If we adjudicate community
2 character as you've proposed, what is your
3 proposal? Would you basically use the
4 testimony of Mr. Glad to develop the record
5 on what the character of this community is
6 or is your position that, that that doesn't
7 need to be done. The community character
8 was not addressed, so therefore the permit
9 has to be denied at this point based on the
10 EIS that currently exists?

11 MS. GOLDBERG: I would argue as a
12 matter of law it ought to be denied. I
13 would also argue that if, that we should
14 have a record on the issue. That he would
15 be as prepared to testify on that. And we
16 also have the assistance of Dr. Susan
17 Christopherson who has done the economic
18 analysis. She is not being proposed as a
19 separate issue, but rather socioeconomic is
20 a key aspect of community character so she
21 would be prepared to testify as well. And
22 they would also testify about the
23 significant impact obviously.

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24 An alternative would be to direct the

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1 Applicant and DEC to consider this and
2 develop the record and then revise the
3 draft supplement EIS and put it out for
4 public comment so everybody could see it
5 and respond to it and then revisit the
6 issue at that time.

7 ADMINISTRATIVE LAW JUDGE: Can I take
8 the materials that you have submitted with
9 your petition and treat that as a
10 supplementation of the SEQR record in this
11 matter? Would that be sufficient in order
12 to provide the decisionmaker with
13 characterization of community character for
14 making SEQR findings?

15 MS. GOLDBERG: It certainly should be
16 adopted as comment on the dSEIS if nothing
17 else under the regulation. I don't think
18 it is sufficient, Your Honor. We had a
19 very short period of time in which to pull
20 these things together. There is, you know,
21 more elaboration that could be brought in
22 in order to fully develop the trends that
23 are developing and to address some of the
24 issues that have been proposed by the

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1 Applicant to contest the analysis that we

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2 don't have time to do and obviously we
3 haven't had an opportunity to do that
4 today. We also obviously could do the post
5 issues conference briefing on this issue to
6 develop the record farther. But I think
7 adjudication is appropriate for this case.
8 It's a highly fact dependent analysis with
9 a developed methodology that has been
10 ignored by both the Applicant and DEC in
11 this case.

12 ADMINISTRATIVE LAW JUDGE: Okay.
13 Thank you. So I have that you've reserved
14 two minutes of rebuttal time.

15 MS. GOLDBERG: Correct.

16 ADMINISTRATIVE JAW JUDGE: Miss
17 Sinding.

18 MS. SINDING: My colleague Mr.
19 Rachel is going to handle this.

20 ADMINISTRATIVE LAW JUDGE: Are you
21 reserving any time for rebuttal?

22 MR. RACHEL: No. Good morning, Your
23 Honor.

24 ADMINISTRATIVE LAW JUDGE: Good

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1 mornig.

2 MR. RACHEL: My name is Dan Rachel.
3 I'm representing the Seneca Lake
4 Communities. It's a collection of 12
5 municipalities in the Seneca Lake region
6 and is already detailed by Mrs. Goldberg on

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7 behalf of Gas Free Seneca.

8 The draft Environmental Impact
9 Statement for Applicant's proposed LPG
10 storage facility raises a significant and
11 substantial issue for adjudication because
12 it wholly ignores significant potential
13 community character impacts that will
14 affect the Finger Lakes region at large,
15 including the Seneca Lake communities.
16 These impacts are not speculative or purely
17 psychological, but are rooted in
18 fundamental and material conflict with the
19 character and development goals of the
20 communities of the Finger Lakes as
21 expressed in their comprehensive planning
22 documents, both on a regional and
23 individual municipal level.

24 The SEQRA regulations are clear that

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1 the creation of a material conflict with a
2 community's current plans or goals as
3 officially approved or adopted is a
4 significant environmental impact that must
5 be considered as part of the environmental
6 review process. This is supported by a
7 well known SEQRA case law such as Chinese
8 Staff and Village of Chestnut Ridge which
9 state that the impact of a project may have
10 an existing community character with or
11 without separate impact on the physical

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12 environment is a relevant concern in the
13 environmental analysis and that substantial
14 development in an adjoining municipality
15 can have significant detrimental impacts on
16 to character of that community,
17 specifically on the ability of the affected
18 municipality to determine its community
19 character through planning.

20 It is, this principle is also
21 bolstered by the cases cited by Applicant
22 in its response. I'm referring to the
23 Crossroads Ventures case and St. Lawrence
24 Cement cases which state specifically that

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1 the Department, to a large extent, relies
2 on local land use plans for the standard of
3 community character and adopted local plans
4 for the difference in ascertaining whether
5 a project is consistent with community
6 character.

7 In the present case it is clear that
8 the planning documents in the Seneca Lake
9 region reflect a strong desire to protect
10 their central and defining aspect, Seneca
11 Lake, and their identity as an emerging
12 center for tourism, viticulture and
13 agribusiness. This is apparent in regional
14 planning documents such as the Seneca Lake
15 Water Shed Management Plan, the Seneca
16 County Environmental Conservation plan and

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17 also in the planning documents of the
18 individual municipalities such as the
19 Comprehensive Plan for the Village of
20 Watkins Glen and the master plan for the
21 City of Geneva and its Local Waterfront
22 Management Plan.

23 For example, in the Seneca Lake
24 Waterfront Management Plan Seneca Lake, it

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1 describes Seneca Lake as key to tourism and
2 a primary economic driver of the region.
3 And even, and in the Watkins Glen
4 comprehensive plan also mentions that
5 Seneca Lake is a strength of the region and
6 that a weakness of the region is industry
7 on the waterfront and specifically that a
8 threat to its own land use planning goals
9 is this particular LPG facility.

10 Even the Schuyler County
11 Comprehensive Plan recognizes that Seneca
12 Lake is a defining feature of the county
13 and that the county's natural environment
14 is its biggest asset. That it is important
15 to protect in the best possible way. The
16 importance of Seneca Lake and the threat
17 that heavy industry poses to agricultural,
18 rural and small town character of the
19 region is also expressed in other efforts
20 taken, other efforts and legislative
21 actions taken by the municipalities in the

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22 region.

23 For example, after investing
24 substantial time, effort and money into

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1 revitalizing its own waterfront pursuant to
2 its waterfront management plan, the City of
3 Geneva, along with other municipalities,
4 opposed the construction of a rail spur in
5 Seneca Falls that would have serviced a
6 landfill there because multiple trash
7 trains running to and from the landfill
8 would have run directly through the Geneva
9 waterfront. Additionally nearly every
10 municipality on the western side of Seneca
11 Lakes at one point or another passed a ban
12 or moratoria on high volume hydraulic
13 fracturing and this includes in some cases
14 a prohibition of the storage of gas.

15 But even more so than fast trains,
16 the proposed facility with ambitions of
17 serving the northeast propane market by
18 making 2.1 million barrels of LPG available
19 through large scale truck, rail and
20 pipeline access will run through, will,
21 that will run through the heart of the
22 Seneca Lake region directly conflicts with
23 these planning goals in three major
24 respects. One, the fact that this facility

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1 is a heavy industrial use. Two, the fact
2 that it is located in close proximity to
3 Seneca Lake. And three, as will be
4 discussed later today, the fact that this
5 is a high risk industrial use with the
6 potential for a catastrophic incident that
7 could define and stigmatize the region for
8 years to come and displace desired and
9 compatible sustainable development such as
10 agribusiness and viticulture.

11 At an adjudicatory hearing, the
12 Seneca Lake Communities will proffer the
13 comprehensive planning documents of
14 municipalities within the region as well as
15 regional planning documents and the
16 testimony of local planning experts that
17 will corroborate the fact that this
18 facility is incompatible, plainly
19 incompatible with these comprehensive
20 planning goals. Although, overall the
21 Seneca Lake Communities will show that
22 given the heavy industrial nature of this
23 facility, the high risk nature of the
24 facility and the SEQRA's clear requirements

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1 regarding the consideration of community
2 planning goals as formally expressed in
3 planning documents make that the whole
4 scale omission of the effects of this
5 facility on community character in the

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6 region an inexcusable omission and a
7 violation of SEQRA.

8 ADMINISTRATIVE JAW JUDGE: The Town
9 of Reading doesn't have any plan; is that
10 correct?

11 MR. RAICHEL: That's correct,
12 however, according to a well known SEQRA
13 precedent including, which includes the
14 Village of Chestnut Ridge case, the impacts
15 of the planning decisions in one
16 municipality can have significant community
17 character impacts on adjoining
18 municipalities, in this case probably most
19 pronounced in Watkins Glen. And I'll note
20 that in the Village of Chestnut Ridge case,
21 what was at issue there was a local law
22 allowing adult student housing next to the
23 village border. This is something much
24 more obnoxious as a use and not to mention

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1 that it requires transportation of
2 hazardous materials through all of the
3 adjoining municipalities.

4 ADMINISTRATIVE LAW JUDGE: Do you
5 have authority that would support looking
6 as far afield as Geneva, which I understand
7 is at the top of Lake Seneca and several
8 miles away from the proposed facility?

9 MR. RAICHEL: We think that given the
10 nature of this facility and that it

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11 requires the transportation of hazardous,
12 large quantities of hazardous materials
13 through the region, that would be
14 appropriate particularly given at some
15 point this facility may expand in the
16 future. I mean, it's already, it already
17 envisions the transportation of large
18 amounts of this material and it's our
19 understanding that it could expand by
20 five-fold in the future.

21 ADMINISTRATIVE JAW JUDGE: I guess my
22 question is, do you have any case law that
23 would support looking regionally as opposed
24 to in the locality of the facility?

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1 MR. RAICHEL: We would probably cite
2 the Village of Chestnut Ridge.

3 ADMINISTRATIVE LAW JUDGE: Village of
4 Chestnut Ridge. All right. And I guess
5 I'll ask you the same question that I asked
6 Ms. Goldberg. Can I simply accept the
7 plans that you submitted with your petition
8 and that's sufficient to complete the SEQRA
9 record on the issue?

10 MR. RAICHEL: No. We would like to
11 supplement the record with additional
12 planning documents and also the testimony
13 of local planning experts.

14 ADMINISTRATIVE LAW JUDGE: All right.
15 I have no further questions.

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16 MR. RAICHEL: Thank you very much.
17 ADMINISTRATIVE LAW JUDGE: The Finger
18 Lakes Wine Business Coalition. Are you
19 reserving any time?
20 MS. TOOHER: Yes, please, Your Honor.
21 We would like to reserve two minutes for
22 rebuttal.
23 ADMINISTRATIVE LAW JUDGE: All right.
24 Very good.

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1 MS. TOOHER: Thank you. I'm Meave
2 Tooher. I'm here on behalf of the Finger
3 Lakes Wine Business Coalition. We are, as
4 you know, seeking amicus status. We are
5 seeking amicus status as it's defined as a
6 friend of the court. We think that the
7 Finger Lakes Wine Business Coalition has a
8 unique voice and opportunity to present
9 information to you, Your Honor, in
10 considering this application, particularly
11 on the issue of community character.

12 The mission of the Finger Lakes Wine
13 Business Coalition is to lead upstate
14 economic development through wine driven
15 agritourism and sustainable business
16 practices, unifying wineries, vineyards,
17 local food producers and creatives who are
18 the stewards of the Finger Lakes wine
19 country. The Finger Lakes Wine Coalition
20 has over 100 members representing these

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21 various businesses and interests. There
22 are over 140 wineries in and around the
23 Finger Lakes region. We provided a map
24 that shows you the density and spread of

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1 those wineries as Exhibit B to the
2 petition. We think that the voice that the
3 business coalition has to offer and the
4 perspective of the wineries will help you
5 in evaluating the community character
6 impacts of this project.

7 As part of 6 New York CRR 624.5(b),
8 we are required to show you the
9 environmental interests that we have in the
10 proceeding that we think relates to the
11 significant potential environmental impacts
12 to the local regional state wide national
13 and global perspectives that our entity
14 provides. We believe that we can provide
15 you perspective of the character of Seneca
16 Lake and the Finger Lakes wine country, the
17 social and economic vitality and base of
18 the area. That it overshadows and
19 stigmatizes the region to allow a facility
20 of this nature to be brought into the
21 community that it can lead to other large
22 scale industrial projects and create a
23 potential for environmental catastrophe and
24 ultimately transforms the Finger Lakes wine

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1 country from the unique configuration of
2 glacier formed lakes, rolling hillsides,
3 vineyards, bucolic viewsheds and historic
4 villages back to an industrial past of
5 environmental degradation and economic
6 blight. The failure to assess this impact
7 is irretrievable and will be felt both
8 throughout the Finger Lakes wine and the
9 tourism industry of the state.

10 We have provided you the affidavits
11 of various members of the coalition in
12 order to give you an idea of what the
13 impact is on this community. This is not,
14 as alleged by the Applicant, a pure
15 economic interest. It is the very
16 character of the Seneca Lake wine country
17 region.

18 We've provided you the affidavit of
19 Bruce Murray from Boundary Breaks Winery.
20 He speaks to the symbiotic regionalism of
21 the Finger Lakes wine industry. That there
22 is an entire industry that grows not as one
23 winery or one industry, but as a community
24 together working together to bring

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1 recognition to this industry within the
2 state and within the rest of the country.
3 He speaks to the role of Watkins Glen. The

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4 very place where this facility will be

5 located within that industry. Within the
6 Finger Lakes wine region.

7 We have the affidavit of Christina
8 Hazlett of Sawmill Creek. She speaks to
9 the historic nature of this industry
10 stretching back to the 1860s. This is
11 seven generations of a farm family
12 community that have worked to develop their
13 winery and their industry. It is a threat
14 to their way of life with no offsetting
15 benefits.

16 Justin Boyette has also provided an
17 affidavit from the Hector Wine Country and
18 Forge Cellar. He speaks to the growing
19 international participation in the region
20 that is threatened by this disregarded the
21 environment.

22 We provided a letter from French
23 vintner Louie Beroux (phonetic). He is
24 actually looking to invest in the Finger

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1 Lakes wine country to link it to the
2 international wine community. However, he
3 speaks to the wine industry and vintners as
4 a way of life. A way of life that is
5 dependent upon the very perception of this
6 area.

7 Louis Damiani of Damiani Wine Cellars
8 has provided an affidavit. He speaks how

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9 this will alter the viewshed of his winery
10 and he speaks to the regional success of
11 the wineries themselves and their
12 interrelationship among the very community
13 that they grow from on Seneca Lake and the
14 Finger Lakes wine region as an entire
15 community that works together.

16 Connor Evans of Castle Gris ch Winery
17 which is located in Watkins Glen. He notes
18 that Watkins Glen is the very gateway to
19 this area of the Finger Lakes Wine region
20 and that tourism is drawn through those
21 gateways. That this facility's location
22 will impact the character of the Watkins
23 Glen community and the Finger Lakes wine
24 region.

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1 William Ouwel een of O-Neh-Da and
2 Eagle Crest Vineyards also speaks to the
3 history of the Finger Lakes wine region.
4 They have been making sacramental wines
5 since 1872 at the O-Neh-Da Vineyards. And
6 it also is an example of the regional
7 symbiosis. He draws grapes from all over
8 the Seneca Lake region for use in his
9 vineyard.

10 Finally John Wagner of Wagner Brewery
11 Winery and Vineyards is again speaking to
12 generational devotion. That this is a
13 diversification of the region that brings

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14 unique community benefits and that this

15 project will stigmatize the region in a way
16 we cannot avoid.

17 Scott Signori of Stonecat Cafe brings
18 a unique perspective of a restaurant owner.
19 He has developed an artful food and
20 beverage industry that again is dependent
21 upon the Finger Lakes wine region. He sits
22 on the Seneca Lake wine trail. The
23 community character is very important to
24 his business and to the growth of this

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1 industry.

2 We would submit, Your Honor, that
3 failure to look at the community character
4 that the Finger Lakes wine businesses
5 present is a big gap in the record here and
6 that our voice is very important to
7 allowing you to give full and complete
8 consideration to that very important aspect
9 of the impact of this project.

10 ADMINISTRATIVE JAW JUDGE: So let me
11 ask you. You're petitioning for amicus
12 status and under the regulations, an amicus
13 party would be entitled to file briefs and
14 make argument and legal issues, but you're
15 saying you want to present information. So
16 how, how would you do that as an amicus?

17 MS. TOOHER: We think that the
18 information that we present is part of the

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19 legal argument here. The Applicant has
20 disputed community character as an
21 appropriate consideration separate and
22 apart from the various issues that are
23 raised. We think that the information that
24 we present goes to that very legal

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1 determination of what is community
2 character here and what you should be
3 considering evaluating.

4 ADMINISTRATIVE JAW JUDGE: But aren't
5 you trying to, aren't you trying to
6 establish a separate factual record of what
7 the community character is? I mean...

8 MS. TOOHER: No. I think what we're
9 trying to do here is we will be, obviously
10 the other parties are speaking to the issue
11 of community character. We are looking to
12 give you a full and informed viewpoint as
13 to what that issue involves.

14 ADMINISTRATIVE JAW JUDGE: Okay. All
15 right.

16 MS. TOOHER: Thank you.

17 ADMINISTRATIVE JAW JUDGE: Thank you.
18 So you'll have two minutes rebuttal.

19 MS. TOOHER: Thank you.

20 ADMINISTRATIVE LAW JUDGE: Finger
21 Lakes LPG.

22 MR. ALESSI: Yes, Your Honor. Is it
23 acceptable to Your Honor if we speak from

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24 the table or would you prefer we come up to

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1 the podium?

2 ADMINISTRATIVE JAW JUDGE: Podium.

3 Sorry. So you'll have 20 minutes.

4 MR. ALESSI: These are usually
5 circuit court of appeals podiums as opposed
6 to the documents you need for an issues
7 conference. Thank you, Your Honor. Robert
8 Alessi for the Applicant. I think you've
9 heard from remarkable statements already as
10 to this whole issues conference and with
11 regard to whether issues are adjudicable.

12 To start with, Your Honor, Gas Free
13 Seneca said that community character is
14 their greatest concern. I'm going to
15 repeat that. Community character is their
16 greatest concern and you've heard from
17 others who essentially made that statement.
18 What you didn't hear, Your Honor, was the
19 precedent. The true controlling precedent
20 for community character. I will get to
21 Chinese Staff and why that case is
22 completely inapposite for this proceeding.

23 But you didn't hear anybody speak to
24 the controlling precedent other than in

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1 passing of Crossroad Ventures, St. Lawrence
2 Cement and Aggregate that community

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3 character is not adjudicable. It can't be
4 any clearer that precedent has been without
5 a kink for 25 years.

6 So this is not a legislative public
7 hearing where people can speak to whatever
8 issues they choose to speak to. Your Honor
9 and the rest of us are guided by the rules,
10 the regulations and the precedent. We will
11 put in our brief. We aren't going to
12 elaborate because we don't believe it's
13 necessary to elaborate on that point that
14 community character is not an adjudicable
15 issue.

16 Remarkably Gas Free Seneca doesn't
17 even mention St. Lawrence Cement in their
18 brief. None of them hit this head-on.
19 None of them even tried to say we think
20 it's bad law and we think there's a basis
21 for overturning it. They don't even say
22 that. They ignore it. And they ignore it
23 because it cannot be an adjudicable issue
24 as a matter of law. It doesn't mean that

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1 community character isn't a relevant issue
2 in terms of the overall application, but
3 its relevance was answered in the scoping.

4 And another error that the potential
5 parties in amici make is they incorrectly
6 cite the SEQRA regulations about what's
7 required in an EIS. And we cite that, Your

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8 Honor, in our brief because they say that
9 among others that community character,
10 cumulative impacts, they use the word must.
11 And in 6 NYCRR 617.9 it is very, very clear
12 that it says the draft EIS should identify
13 and discuss the following only where
14 applicable and significant. That decision
15 was made in the scoping process. As to
16 what was to be addressed.

17 But even though, and this is, Your
18 Honor, the second bucket of where community
19 character is addressed in how it is
20 handled. It is addressed in two aspects.
21 You'll note that in no petition before you
22 has anybody spoken about, until Miss
23 Goldberg spoke about it, and only cited
24 part of it where the character of

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1 underground storage facilities, how they
2 exist in the state, how they are used, it's
3 spoken to.

4 And when you hear arguments today and
5 probably hear after about the sufficiency
6 of the EIS, never do they go into the
7 documents, the EISs upon which this sdEIS
8 is based. This sdEIS alone is about 136
9 pages. The SEQR regs say that EISs are
10 supposed to be analytical, not encyclopedic
11 although this one borders on encyclopedic.
12 There is no reference to the other EISs

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13 upon which is based. It speaks to many of
14 the issues that you are going to hear in
15 this issues conference.

16 With regard to community character
17 and Chinese Staff, you heard a statement
18 that Chinese Staff is controlling
19 precedent. They couldn't be further from
20 the truth. Even a simple reading of
21 Chinese Staff, the issue was were the
22 displacement of the individuals, they
23 called them then Chinese, but we now speak
24 in terms of Asians, the Asian community

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1 were going to be displaced. If that's
2 within the definition of an environment,
3 that's what that case was about.

4 What the case was not about is
5 community character an adjudicable issue in
6 a DEC proceeding. Moreover, it was on a
7 negative declaration. Whether the negative
8 declaration could stand given that
9 community character wasn't addressed. This
10 is completely different from a situation
11 where you have an EIS where you have a
12 scoping process. And it's determined what
13 issues are to be addressed and what are not
14 to be addressed. I want to now turn before
15 I get to the sort of substance of the
16 community character issues to some of the
17 questions you asked because I didn't

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18 necessarily hear answer to your question.

19 ADMINISTRATIVE JAW JUDGE: Can I ask
20 you some questions first?

21 MR. ALESSI: Oh, absolutely.

22 ADMINISTRATIVE JAW JUDGE: There is
23 nothing in the draft sEIS about the
24 community, I didn't see a section on

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1 community character at all in the draft.
2 Did I miss it?

3 MR. ALESSI: Your Honor, you did not
4 see a section entitled community character.

5 ADMINISTRATIVE JAW JUDGE: And you
6 said that it addressed community character
7 in the sense of storage facilities. You
8 mean the community character that it
9 addressed was a community consisting of
10 storage facilities, is that my
11 understanding?

12 MR. ALESSI: Your Honor, all of the
13 EISs going back to 1988, 1992 talk about
14 existing under salt formations in
15 communities. The fact that underground
16 storage gas occurs. That is basically what
17 exists in the community.

18 In terms of community character, as
19 the Commissioner's decisions make clear
20 community character for an issues
21 conference consists of visual, noise,
22 traffic and then sometimes you can have

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23 odor. That's what an issues conference
24 community character discussion is. All the

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1 other issues that you heard are not
2 appropriate for an issues conference. They
3 could be appropriate for an EIS. We
4 address in detail all of those particular
5 issues.

6 Also in the EIS that we prepared, you
7 will see environmental setting for each of
8 the areas we go through. So while it is
9 correct, we don't put a label community
10 character. The substance is there. And to
11 address your question what the petitioners
12 have put into the record absolutely can
13 form the basis of findings. There is case
14 law that's endless. They are creating a
15 record. This record is part of an sdEIS
16 whether, Your Honor's decision for an
17 issues conference, response to comments.
18 The Department still has the ability to
19 respond to these comments and therefore
20 create a record. So the arguments that
21 there is no, it's insufficient because
22 there would be no basis upon which the
23 findings they themselves have added to the
24 record and the law is clear on that so I

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1 want to address that.

2 ADMINISTRATIVE JAW JUDGE: I don't
3 think we've ever said that community
4 character per se is unadjudicable. What
5 cases like Crossroad Ventures and St.
6 Lawrence say is it's often not amenable to
7 adjudication. And generally it is
8 addressed through things like visual,
9 noise, etcetera, etcetera. But I don't
10 think we have unequivocally excluded it as
11 a possibility. In fact in St. Lawrence and
12 in Crossroads didn't we accept the comments
13 of the parties as petitioners as evidence
14 of what the community character was? For
15 example, St. Lawrence, it was, the dispute
16 was between whether or not the community
17 character was an industrial use versus a
18 more, bucolic, recreational tourist views.
19 And in St. Lawrence we accepted that view,
20 that other view of the region as part of
21 the issues ruling. You know, the second
22 interim decision.

23 MR. ALESSI: Judge --

24 ADMINISTRATIVE LAW JUDGE: In other

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1 words, we essentially allowed for the
2 development of the record on what in fact
3 was a community character.

4 MR. ALESSI: Your Honor, I had the
5 same reading of St. Lawrence Cement. I was

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6 the attorney for St. Lawrence Cement.

7 ADMINISTRATIVE JAW JUDGE: I recall
8 that.

9 MR. ALESSI: So I recall the
10 discussion. But that, what the, what has
11 never happened is the department has never
12 said, certainly not in the last 25 years,
13 that community character is an adjudicable
14 issue. You can, and I frankly believe
15 should, accept what has been stated in the
16 petitions as part of the record that
17 ultimately gets looked at in terms of the
18 SEQRA balancing and other issues. That is
19 fine. But what you heard today is
20 something much different is that community
21 character is our greatest concern and it
22 must be adjudicated. It is the substance
23 of a significant issue. St. Lawrence,
24 Crossroads are, you know, incontrovertibly

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1 clear that they can't be adjudicable
2 issues. Now is it true in an absolute
3 sense, I don't have a case that says it
4 will never. There is no case, especially
5 on the issues that are spoken here, that
6 says it's an adjudicable issue.

7 So that's why I put it in two
8 buckets, Your Honor. I put the one bucket
9 for what can be adjudicated and the other
10 bucket is what can be put into the record

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11 to make the ultimate decisions. We are

12 okay with the latter, but certainly not the
13 former and we think the precedence is there
14 and Chinese staff does not help that.

15 ADMINISTRATIVE JAW JUDGE: Well, what
16 Chinese staff, at least as I understand it,
17 it would require that the Department to
18 look at impacts -- well, it's difficult to
19 get your hands around Chinese Staff, but,
20 you know, Chinese Staff the question was a
21 new use coming into a neighborhood and did
22 the agency have to look at that. I think
23 they have the similar argument here. They
24 are saying this is an industrial use coming

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1 into what is basically an agricultural
2 environment. Not only an agricultural one,
3 but one that has been developed as a unique
4 Finger Lakes wine country type of
5 character.

6 MR. ALESSI: Your Honor --

7 ADMINISTRATIVE LAW JUDGE: So don't
8 we need to consider that, the potential
9 impacts of this on that character of the
10 community?

11 MR. ALESSI: Your Honor, a couple of
12 points. With regard to the community, you
13 were asking questions about how far away
14 can we go for that. We have two documents,
15 and I think you might have gotten an answer

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16 does Town of Reading have a comprehensive
17 plan. The answer was no. The answer is
18 yes. It's right on line. It's a 1991
19 comprehensive plan. I have it with me here
20 today. So I just wanted to dispel that
21 incorrect statement. We also have the
22 Schuyl er County comprehensive --

23 ADMINISTRATIVE JAW JUDGE: That plan
24 though has, is that in any of the materials

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1 that have been submitted?

2 MR. ALESSI: It's not, but Your Honor
3 could take official notice of it given the
4 nature of the document. We have also have
5 the Schuyl er County countywide
6 comprehensive plan May 2014. There's a
7 whole section on the Town of Reading.

8 ADMINISTRATIVE JAW JUDGE: That's
9 also not currently in the record?

10 MR. ALESSI: Well, we cited it in our
11 brief and you can take official notice of
12 it.

13 ADMINISTRATIVE JAW JUDGE: Right, but
14 it wasn't submitted?

15 MR. ALESSI: It wasn't submitted;
16 that's correct. Page 68 talks about the
17 Town of Reading. And it has a different
18 view than what you heard today about the
19 community and the industrial nature and the
20 importance of industry to the community,

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21 etcetera. So I wanted to correct the

22 record on that.

23 ADMINISTRATIVE JAW JUDGE: Those

24 plans weren't taken into account in the

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1 dEIS?

2 MR. ALESSI: They couldn't be because
3 the dEIS was 2011 and the comprehensive
4 plan is 2014.

5 ADMINISTRATIVE JAW JUDGE: That would
6 be difficult.

7 MR. ALESSI: That would be, that
8 would be more challenging for us. I just
9 wanted to address comprehensive staff.
10 Comprehensive, excuse me, Chinese Staff.
11 Chinese Staff was an issue of a negative
12 declaration. That is a far different
13 consideration because we had scoping here.
14 Because in the NEDEC (phonetic) you don't
15 have scoping, but here we had scoping. And
16 there was a determination as to what was
17 important and what was not important. And
18 in more importantly as we go through this
19 process, we have established it. So again
20 I think it's important to keep --

21 ADMINISTRATIVE JAW JUDGE: During
22 scoping was there, did any members in the
23 community raise --

24 MR. ALESSI: Yes.

♀

1 ADMINISTRATIVE LAW JUDGE: -- the
2 Finger Lakes wine business or country --

3 MR. ALESSI: Absolutely.

4 ADMINISTRATIVE JAW JUDGE: -- as a
5 potential community character?

6 MR. ALESSI: Absolutely.

7 ADMINISTRATIVE JAW JUDGE: How was it
8 addressed then?

9 MR. ALESSI: It was not deemed to be
10 an issue that needed to be per se. And I
11 can't tell you from, from complete memory
12 but because visual, traffic and noise and
13 looking at the precedence, everybody
14 considered that that would be the way
15 community character would be addressed.

16 ADMINISTRATIVE LAW JUDGE: Now
17 presumably staff made that determination,
18 right?

19 MR. ALESSI: Absolutely staff makes
20 that determination.

21 ADMINISTRATIVE LAW JUDGE: So staff
22 made the determination it was not necessary
23 to, as part of the environmental setting of
24 this project, include at least some

♀

1 reference to this burgeoning wine industry
2 in the area?

3 MR. ALESSI: Well, the answer is
4 certainly with regard to this burgeoning

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5 wine industry there's a proximity issue
6 here. And, you know, they are entitled to,
7 proximity meaning how far away in terms of
8 distance. But in terms are.

9 ADMINISTRATIVE LAW JUDGE: Well, how
10 near is the nearest vineyard or winery?

11 MR. ALESSI: I think one might be
12 like a mile or a little over a mile away,
13 but most of them are far and in excess.

14 ADMINISTRATIVE JAW JUDGE: All right.

15 MR. ALESSI: But, Your Honor, the
16 point is here is what, this isn't, the
17 issue of whether it's adjudicable I think
18 is clear. The other issue is is the record
19 sufficient upon which to make SEQRA
20 findings and I think they cured that if
21 there was ever an issue on that. And, Your
22 Honor, you had also asked questions --

23 ADMINISTRATIVE JAW JUDGE: Curative
24 by meaning that the submissions have been

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1 made?

2 MR. ALESSI: Exactly. Exactly. And
3 you asked for the authority for, you know,
4 and you've got Village of Chestnut Ridge
5 and, Your Honor, that is not, that is not
6 authority for their proposition for an
7 adjudicable issue. So in conclusion, Your
8 Honor, with regard to the community
9 character issue, they have stated that it

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10 is their greatest concern, and you can see
11 that all through the papers. And while we
12 understand they view that as their greatest
13 concern and we respect the fact that they
14 have a concern, this issues conference
15 process is not for whether something is of
16 greatest concern. It's whether there is a
17 substantive and significant issue and there
18 is precedent that deals with that and the
19 question about, there's no doubt that
20 community character is in the definition of
21 environment. But that gets addressed and
22 there are legions of decisions of the
23 commissioner that say not all concerns get
24 addressed in an issues conference, or

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1 excuse me, an adjudicatory hearing. There
2 is response to comments and the Department
3 should be given the opportunity to respond
4 to these comments to concrete a further, a
5 further record. That's the way the process
6 works.

7 And so in conclusion, Your Honor,
8 while we respect the concern with regard to
9 community character, the procedures here
10 are very clear and the precedent is very
11 clear and we can continue to develop the
12 record on that issue as the SEQR process
13 goes forward.

14 ADMINISTRATIVE JAW JUDGE: So you
Page 51

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15 have no objection then to, to basically
16 taking all of the various submissions and
17 reports and whatnot that the petitioners
18 have generated on community character,
19 simply allow that into the record and allow
20 that to be the basis for argument and, on
21 community character impacts and ultimately
22 record upon which the Commissioner can make
23 SEQRA findings? You're not going object to
24 that, is that my understanding?

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1 MR. ALESSI: Your Honor, when you
2 talk about the record, we would object to
3 that being part of the issues conference
4 record upon which a determination is made
5 as to whether the issue is adjudicable
6 because we think it is out of scope. We do
7 agree and we welcome the information for
8 part of the overall SEQR record which is
9 different from an adjudicatory hearing
10 issue. We welcome that information in
11 terms of developing the record so that when
12 the Commissioner does the balancing
13 ultimately, social, economic, and
14 environmental, that that information is
15 available to the Commissioner to balance
16 those three out. And we want to
17 participate in the response to comments and
18 contributing further information through
19 the SEQR process. Not an issues

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20 conference. Through the SEQR process to
21 contribute to the development --

22 ADMINISTRATIVE LAW JUDGE: Well, the
23 way that would play out then would be we
24 would accept these reports in and then I

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1 guess there would be briefing and that
2 would be the important then to make
3 argument about whether or not the
4 commissioner can make SEQR findings
5 vis-a-vis community character, that would
6 be the response to comments in this process
7 and there would be a draft and issues
8 ruling and any filed decision of the
9 Commissioner.

10 MR. ALESSI: Your Honor, first the
11 Commissioner has to --

12 ADMINISTRATIVE LAW JUDGE: Because I
13 think that's what was contemplated. Of
14 course we didn't get to the end of the road
15 in St. Lawrence, but, but I believe that's
16 what was contemplated there.

17 MR. ALESSI: Your Honor, I have the
18 same sense of what was contemplated,
19 however I will say two things. I want to
20 underscore your statement about argument.
21 They can make further argument with regard
22 to what's already in the record, but not
23 submit additional proof. I heard your
24 questioning with one of the amici on that

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1 because that information can go in from an
2 amici for the record we just talked about,
3 but not for determining whether an issue is
4 adjudicable. Lastly, with regard to what
5 you're talking about --

6 ADMINISTRATIVE JAW JUDGE: Well, I
7 mean, whether or not an issue is
8 adjudicable? I mean, what do you mean?
9 The question is do we have to have a fact
10 hearing on this to develop the record on
11 community character. If not, then we
12 simply take the materials that have been
13 submitted and then legal argument on the
14 issue of the impacts on community character
15 for purposes of SEQR findings by the
16 Commissioner.

17 MR. ALESSI: Agreed.

18 ADMINISTRATIVE JAW JUDGE: The two,
19 right. Because when you say whether or not
20 an issue is adjudicable or not, I think we
21 have to clear, are we talking about whether
22 or not we're going to actually try fact
23 issues or are we simply going to resolve
24 the legal issues?

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1 MR. ALESSI: I agree with your
2 distinction with regard to that, Your

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3 Honor, and with regard to the other part of
4 your question on community character. The
5 Commissioner also make a determination
6 about before community character as a label
7 had to be in the dEIS which is a whole
8 other issue that we've talked about because
9 the scoping process has to have some
10 meaning. We submit that visual, traffic,
11 noise are the essence for Commissioner
12 decisions --

13 ADMINISTRATIVE JAW JUDGE: But if the
14 Commissioner concludes that the record was
15 not complete on community character, is the
16 commissioner prohibited because of scoping
17 from considering the documents that have
18 been supplied by the petitioners?

19 MR. ALESSI: Your Honor, according to
20 the DEC's own regulations for an issue and
21 to answer your question, that was scoped
22 and it was not put per se in scope, there
23 is a procedure for parties who believe that
24 it should be considered in the dEIS. These

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1 parties didn't follow that procedure.

2 ADMINISTRATIVE JAW JUDGE: Don't we
3 have the hearing procedure now?

4 MR. ALESSI: We do have a hearing
5 procedure.

6 ADMINISTRATIVE JAW JUDGE: Isn't part
7 of the purpose of the adjudicatory

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8 proceeding is to complete the SEQR record

9 for purposes of any, the ultimate hearing
10 report of the administrative law judge is
11 the final EIS in a proceeding where the
12 Department is the lead agency. So aren't
13 we using procedure to complete the SEQRA
14 record here?

15 MR. ALESSI: You're absolutely
16 correct, Your Honor.

17 ADMINISTRATIVE JAW JUDGE: You think
18 it should be prohibited from adding an
19 issue because of scoping?

20 MR. ALESSI: Prohibited adding any
21 adjudicatory issue, Your Honor, yes.
22 However, he is not prohibited from saying
23 that this is going to be part of my
24 consideration in making findings with

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1 regard to the matter. But again, Your
2 Honor, the key point here is with regard to
3 the record, the petitioners have added to
4 the record on community character. I find
5 it very difficult given all the submissions
6 how the commissioner could come to a
7 conclusion that what they have put in would
8 be an insufficient record, but of course
9 that's your determination and that's the
10 commissioner's determination. I just
11 wanted to keep separate the adjudicatory
12 aspect of it.

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13 We didn't get to visual which we had.

14 We're going to reserve that for another
15 part because community character has, as
16 Your Honor knows, visual, traffic noise,
17 etcetera. And we just wanted to provide
18 some information to Your Honor.

19 So, Your Honor, just to conclude
20 here, community character is not
21 adjudicable. We understand that Your Honor
22 certainly has the authority to take further
23 briefing argument on that particular issue,
24 but with regard to offers of proof, that is

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1 sealed. We believe that the law is very
2 clear and there is no basis for overturning
3 the precedent and we support and respect
4 the SEQR process and again the petitioners
5 adding to the record as they have done
6 today for the Commissioner to issue his
7 findings and the Commissioner can look at
8 community character and make his own
9 decision as to whether it's sufficient as
10 can and will Your Honor. So thank you very
11 much for the opportunity to present on it.

12 ADMINISTRATIVE LAW JUDGE: Thank you.

13 MR. BERNSTEIN: Judge, can I just add
14 there's really no place to discuss visual
15 elsewhere on the schedule. The other thing
16 I wanted to add is as part of community
17 character, we have the visual impact in the

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18 record hearing document 1(b)35.

19 AUDIENCE: We can't hear you.

20 MR. BERNSTEIN: Well, it's okay. As
21 long as you hear me and she hears me,
22 that's fine. We've done the only visual
23 impact assessment that's in the record.
24 There are profiles, pictures that clearly

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1 demonstrate that there is not a visual
2 impact on neighboring communities,
3 particularly across the lake from which you
4 cannot see, you know, very much on the site
5 currently and will not be able to see
6 anything.

7 ADMINISTRATIVE LAW JUDGE: Well,
8 should we add visual impacts to the list of
9 issues to discuss? I mean, you probably
10 will have time tomorrow.

11 MR. ALESSI: We don't have much to
12 add on that. We do have Mr. Liuzzo just to
13 show you some shots from the visual impact
14 and how there is nothing really new, but he
15 can demonstrate how, the methodology that
16 he utilized and the conclusions that he
17 reached using pictures to demonstrate no
18 visual impact. So we can do that if you'd
19 like certainly.

20 ADMINISTRATIVE JAW JUDGE: Are the
21 parties interested in making presentation
22 on visual impacts?

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23 MR. WEINTRAUB: Your Honor, the staff

24 was prepared to address visual impacts. So

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1 if the Applicant is willing to address it,
2 then we will follow up on the Applicant's
3 presentation.

4 ADMINISTRATIVE JAW JUDGE: Well,
5 there were parties, weren't there, that
6 objected to the visual impact analysis? I
7 believe there is. I think there was
8 something in the petitions as I recall.

9 MR. BERNSTEIN: There may have been
10 references but it raised as a separate
11 adjudicable issue. It was really raised in
12 the context of community character. If
13 staff is going to address it in their
14 presentation, perhaps they will cover the
15 points we intended to cover anyway. And if
16 that is the case, we will let you know and
17 therefore we don't have to have a separate
18 kind of session or calendar session on
19 visual. Is that okay?

20 ADMINISTRATIVE JAW JUDGE: Sure.
21 Well, again, let me just make sure. Did
22 any of the party petitioners want to make
23 any argument about visual impacts?

24 MS. GOLDBERG: Your Honor, I think it

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1 is rather unorthodox that the Applicant is
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2 now introducing a new issue into the
3 proceeding without notice to any of the
4 other petitioners for party status. We did
5 not raise it and none of the other parties
6 raised it. I just admitted there is
7 nothing new in these materials. We are not
8 prepared. As a result we have not, you
9 know, we have not focused.

10 ADMINISTRATIVE JAW JUDGE: I think
11 one of the petitions there was some
12 discussion and maybe in the context of
13 community character there were visual
14 impacts that were not taken into account.
15 Was that in your petition?

16 MS. GOLDBERG: Yes. There are
17 certainly visual, there are definitely
18 visual, there's the viewshed and the visual
19 impact, part of the community character
20 analysis. Our expert did address that. We
21 do have a photo as well if you, from Hector
22 Falls.

23 ADMINISTRATIVE LAW JUDGE: And you
24 don't want to make any presentation on that

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1 at this point?

2 MS. GOLDBERG: I don't really see
3 given the limitations of the time right now
4 that --

5 ADMINISTRATIVE JAW JUDGE: Well, as I
6 said, I think we could add it as an issue

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7 tomorrow if you want to make a presentation
8 on your petition. It's up to you all.
9 But, yeah, I mean, I feel if petitioner
10 didn't want to specifically focus on it,
11 then I don't see any need to respond to it
12 at this point. I mean, we can deal with it
13 in briefing if we end up having that if
14 that's the case.

15 MR. BERNSTEIN: Well, the only thing
16 I would say is I'm certainly not raising it
17 as an issue.

18 ADMINISTRATIVE JAW JUDGE: I would be
19 surprised.

20 MR. BERNSTEIN: I will point to the
21 record at least what you said, that's not
22 what I'm suggesting. What I'm suggesting
23 is that whatever comments that you may have
24 made in your petition have no basis in fact

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1 or reality. I think our visual impact
2 assessment reflects that. And that's
3 really all I have to say. I don't know if
4 you want to add anything.

5 ADMINISTRATIVE LAW JUDGE: Well, your
6 time is up so I don't want to hear any more
7 arguing.

8 MR. ALESSI: It wouldn't be argument.
9 It would be procedure.

10 MS. GOLDBERG: They are up by about
11 three minutes already and I would, I would

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12 ask that we get some additional time for
13 rebuttal given the additional time granted
14 to the Applicant to react.

15 ADMINISTRATIVE JAW JUDGE: All right.
16 We'll add a minute.

17 MR. ALESSI: Your Honor, mine is just
18 procedural. Our suggestion is staff goes,
19 they speak to visual. We hear what they
20 have to say. If we don't have anything
21 meaningful to add, then we just say we're
22 done.

23 ADMINISTRATIVE LAW JUDGE: Right.
24 Okay. I just want everybody to be happy or

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1 not. All right. So Department of
2 Environmental Conservation, I gave you 10
3 minutes.

4 MR. WEINTRAUB: Your Honor, Lawrence
5 Weintraub for the staff of Department of
6 Environmental Conservation. On the larger
7 issue of community character, the staff
8 wishes to reserve taking a position until
9 briefing. And so --

10 ADMINISTRATIVE JAW JUDGE: Well, can
11 I ask you how was it that impacts on the
12 Finger Lakes wine country were not, wasn't
13 deemed to be something that needed to be
14 included in the EIS?

15 MR. WEINTRAUB: Well, all I can say
16 is it was a lengthy scoping process. And

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17 there were I believe scoping hearings.
18 There was a public comment period. There
19 was a draft scope that was put out and a
20 final scope. And it was not, there was,
21 there were some comments made about
22 community character in the comments, but it
23 did not end up in the scoping.

24 ADMINISTRATIVE JAW JUDGE: I mean, I

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1 went to the I Love New York site, which I
2 believe is a State site, you got the Seneca
3 Lake Wine Trail there, Cayuga Lake Wine
4 Trail. This seems to be of significance at
5 least to State tourism. And I understand
6 that there were comments raised about the
7 wine country, Finger Lakes wine country.

8 MR. WEINTRAUB: There were a few
9 comments in the scoping process on the
10 Finger Lakes Wine Trail. Not a lot, but a
11 few comments. But there was a scoping
12 process and the purpose of scoping is to
13 set, you know, to establish the issues to
14 be studied.

15 ADMINISTRATIVE LAW JUDGE: Right.

16 MR. WEINTRAUB: And scoping does, you
17 know, scoping, it's not as if an issue
18 can't be raised after scoping, but we do
19 scoping so we can give the Applicant fair
20 notice what it has to study and put it in
21 the dEIS.

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22 ADMINISTRATIVE JAW JUDGE: But you
23 can't tell me why it is that it was decided
24 not to include the wine industry in the

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1 environmental setting of this EIS?

2 MR. WEINTRAUB: Why it was
3 specifically not included in the scope?

4 ADMINISTRATIVE LAW JUDGE: Yeah.

5 MR. WEINTRAUB: I can't recall that.
6 I will say one other thing, that SEQRA is
7 an administrative process and there is
8 plenty of case law on that. And issues can
9 be iterated even after dEIS is accepted.
10 And, and so it may not be that important
11 because the issue obviously has, that it
12 wasn't specifically put in as an issue of
13 community character in the dEIS because
14 obviously it is being iterated very much
15 right now.

16 ADMINISTRATIVE JAW JUDGE: So you
17 wouldn't prohibit the Commissioner from
18 looking at the Finger Lakes wine country
19 because it wasn't included in the scope?

20 MR. WEINTRAUB. No. But I would
21 qualify my statement by saying that right
22 now the staff wishes to reserve on this
23 issue until briefing.

24 ADMINISTRATIVE LAW JUDGE: All right.

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1 What if we have no briefing?
2 MR. WEINTRAUB: Well, hopefully we
3 would request briefing.
4 ADMINISTRATIVE JAW JUDGE: All right.
5 MR. WEINTRAUB: Staff would request
6 briefing. As Mr. Alessi mentioned,
7 community character has its issues of
8 visual, noise, odor and truck traffic. It
9 appears that -- well, I'm not clear whether
10 visual is being raised or not being raised
11 as an issue for adjudication. There was no
12 expert reports that were filed in
13 submissions on visual. So what stands, the
14 record stands, as the record stands we have
15 a visual impact analysis. We have a whole
16 section of the dEIS that is dedicated to
17 visual impact analysis. And the, we have,
18 and the staff has made conclusions based on
19 that and the conclusions that, the
20 conclusion is for purposes of this issues
21 conference is that there are no substantive
22 and significant issues with regard to
23 visual impact.
24 The substantive conclusion is that

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1 the site would look pretty much, the
2 viewsheds from 414 which is the scenic
3 byway on the other side of the lake, and 14
4 and 14A would appear, would appear pretty

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5 much as it does now after mitigation is
6 applied and the visual impact analysis
7 provides for mitigation. That would be
8 included as a condition of permit. There's
9 screening mitigation and there is lighting
10 mitigation provided in the visual impact
11 record.

12 We have, I have with me Dave Bimber,
13 who is the regional permit administrator
14 for Region 7. He did the hands-on
15 evaluation of the Applicant's visual
16 analysis report. He also did early on a
17 visual analysis on his own of this project
18 and he is just going to talk about the fact
19 that the visual analysis complies with the
20 scoping with the visual, visual policy of
21 the Division's environmental permits.

22 ADMINISTRATIVE JAW JUDGE: Well, I
23 did say I wasn't going to have experts
24 making presentations at this issues

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1 conference. So I don't think it would be
2 appropriate to take that course at this
3 point.

4 MR. WEINTRAUB: Okay. So I will just
5 conclude that the visual impact study does
6 comply with our visual policy and
7 substantively, as I said, that the viewshed
8 would be pretty much as it is right now
9 after the mitigation is applied.

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10 The petitioning parties raise a
11 question about Hector Falls and the impact
12 of the project on the viewshed from Hector
13 Falls. I would like to note that Hector
14 Falls is not a receptor under the visual
15 policy, but there are receptor points above
16 and below Hector point and I have already
17 stated what the analysis shows.

18 And finally, and they also raised an
19 issue with regard to a flare. And again
20 the staff have concluded that there are no
21 substantive and significant issues with
22 regard to the operation of that flare from
23 the brine pond. How much time do we have
24 left?

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1 ADMINISTRATIVE LAW JUDGE: Three
2 minutes, three and a half minutes.

3 MR. WEINTRAUB: We do want to just
4 hit, staff wants to just hit on the traffic
5 issue. Again, I'm not clear as if the
6 petitioning parties are raising it as an
7 adjudicable issue. They are certainly
8 mentioning it in their report, so we're
9 just, the staff is just going to hit on it
10 briefly and I would like to bring on Lisa
11 Schwartz, assistant regional attorney, to
12 discuss that.

13 MS. SCHWARTZ: Your Honor, hi. I
14 just want to address the traffic for a

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15 minute, the highlights, just the highlights
16 because it's really all been said and it's
17 all in the record. We don't think that the
18 truck traffic is an adjudicable issue. We
19 also don't think the rail traffic is an
20 adjudicable issue either. On rail traffic,
21 we're preempted. It's a federal issue.
22 And under the, if I get this right, Federal
23 Surface Transportation Act. So everything
24 that goes on at the rail off the site we're

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1 preempted.
2 ADMINISTRATIVE JAW JUDGE: Truck
3 traffic. My understanding is they are not
4 planning on using trucks, right. They are
5 only going to use rail and pipeline?
6 MS. SCHWARTZ: So the highlight on
7 that, Your Honor, is the current plan is
8 that they are not even going to use trucks.
9 But the dEIS --
10 ADMINISTRATIVE JAW JUDGE: Is there a
11 permit condition that would prohibit the
12 use of truck?
13 MS. SCHWARTZ: No.
14 ADMINISTRATIVE JAW JUDGE: Why not?
15 MS. SCHWARTZ: Because I asked about
16 whether or not they would want to just take
17 the truck facility out altogether and they
18 did not want to. So I considered what the
19 dEIS, it's there in case, in case it's

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20 needed.

21 ADMINISTRATIVE JAW JUDGE: So

22 therefore we have to consider --

23 MS. SCHWARTZ: If there's a

24 particularly bad winter, etcetera,

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1 etcetera.

2 ADMINISTRATIVE JAW JUDGE: So if it's

3 not allowed, I mean, since it's not being

4 prohibited then under the permit then we

5 have to consider the potential impacts in

6 the event they do use trucks.

7 MS. SCHWARTZ: Yes. Yes.

8 ADMINISTRATIVE JAW JUDGE: So then

9 what that leaves us with is the dEIS does

10 analyze that adequately as well. And we

11 can consider it a worst case analysis. And

12 going to that, my highlight on that is that

13 I think we wrap up with the DOT letter that

14 came in January 11, 2012 and that is a

15 document list Roman Numeral I-i-b-4. And

16 also Roman Numeral I-b6, attachment 9. We

17 put it in two places. That's the letter

18 that states that they, that the DOT has

19 concluded that the traffic impacts

20 associated with the proposed action do not

21 represent a substantial increase to the

22 existing traffic volume, nor do they

23 present a need for mitigation to the

24 highway. That's DOT. That's the agency

♀

1 with jurisdiction. That's what they had to
2 say. And that's with the worst case
3 scenario.

4 I'd also like to say the Department
5 staff did a little analysis of our own, not
6 that we don't trust the DOT. We went over
7 to the DOT website, looked at some of their
8 data in the dEIS. In doing our analysis
9 determined that on Routes 14 and 14A the
10 increase in truck traffic would be no more
11 at any point than 1.2 percent. The
12 increase, no more than 1.2 percent. And
13 that's what we have to say about truck
14 traffic.

15 ADMINISTRATIVE LAW JUDGE: You have
16 one more minute.

17 MS. SCHWARTZ: And yet I'm done.

18 ADMINISTRATIVE LAW JUDGE: Okay. Is
19 that document --

20 MS. SCHWARTZ: There is one more
21 thing I would like to --

22 ADMINISTRATIVE LAW JUDGE: The DEC's
23 own analysis, where is that documented? Do
24 you have a document number for that?

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1 MS. SCHWARTZ: I don't have a
2 document on that, Your Honor. If we would
3 have, we would put it in our comments, in

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4 our response to comments when we finish the
5 sdEIS we would have done that before and
6 now we'll do it I think in the future.

7 ADMINISTRATIVE JAW JUDGE: Otherwise
8 it's not documented at this point?

9 MS. SCHWARTZ: That's why I thought
10 it would be good to say something on it.

11 ADMINISTRATIVE JAW JUDGE: Okay.

12 MS. SCHWARTZ: I do have one more
13 thing, Your Honor, that's entirely on my,
14 whatever. I wasn't, I wasn't positive from
15 what you sent around that we would not be
16 able to use any of our people to talk for a
17 minute within our allotted time. Is that,
18 you know, you're wedded to that?

19 ADMINISTRATIVE JAW JUDGE: Yeah. I
20 really felt like this, you know, this is
21 basically oral argument on whether or not
22 we have adjudicable issues to try and to
23 hear argument on the legal issues. I
24 didn't want to have experts testify because

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1 this is not an appropriate place to have
2 testimony.

3 MS. SCHWARTZ: I do understand but --

4 MR. BERNSTEIN: We were, I mean, I
5 would agree with Miss Schwartz. We were of
6 the understanding particularly when it got
7 to the more scientific and technical issues
8 that perhaps the ones we'll discuss this

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9 afternoon, for example, that we would
10 incorporate within our time frame, not any
11 additional time.

12 ADMINISTRATIVE JAW JUDGE: I thought
13 I was pretty clear in telephone conferences
14 before this and e-mail communications that
15 I did not want to hear from experts. I
16 don't want to have an issues conference
17 where we're basically taking direct
18 testimony of the analyst. I want, the
19 purpose of this is to determine whether or
20 not we have triable issues of fact or not.
21 And if not, then to hear legal argument.
22 So that was my expectation. I thought I
23 was pretty clear about it.

24 MS. SINDING: Your Honor, we were

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1 entirely clear about that. And on behalf
2 of the Seneca Lake Communities we are not
3 prepared to have you take testimony from
4 our experts at this point based on, based
5 on what we thought was your clear directive
6 that this was a forum for legal argument
7 only.

8 MR. BERNSTEIN: Well, again, I mean,
9 just to be clear, our experts are here and
10 they weren't going to testify under oath or
11 anything, all they were going to do is
12 summarize and/or present some of their
13 results.

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14 ADMINISTRATIVE JAW JUDGE: Yeah, but
15 if they're up there doing this, they are
16 essentially testifying, aren't they, on the
17 record?

18 MR. ALESSI: Judge, if I could be
19 heard on that. The issues conference as
20 you know operates such that the petitions
21 come in and in the ordinary course there
22 would not be any responses of the Applicant
23 or the Department. There would be none.
24 They would come into the issues conference

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1 and speak to the issues and under 624.4(b)2
2 and, (b)3 and (b)2 in determining whether
3 there is a substantive significant issue,
4 the ALJ may consider the proposed issue in
5 light of the application and related
6 documents, the draft permit, the content of
7 any petitions filed for party status, the
8 record of the issues conference. If you,
9 if in the ordinary course you don't even
10 have a response, how is it then that the
11 Department, that the Applicant could come
12 in and only be limited to argument. In
13 most issues conferences you do come in, you
14 do provide technical information, sometimes
15 the experts do speak with regard to the
16 matter. We certainly don't want the
17 Crossroads Ventures matter where we end up
18 spilling into an adjudicatory hearing with

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19 oath. But the question would be how would
20 you, in the absence of a response, how
21 would you ever put in some of that
22 information if you're limited to attorneys
23 making an argument. And I apologize, I
24 didn't understand, and I might have missed

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1 it with regard to that the Applicant and
2 the Department was not going to be able to
3 have people speak to why the issues are
4 substantive and significant as to resolve
5 factual disputes as Your Honor said earlier
6 today. And you resolve factual disputed
7 conferences sometimes by having the experts
8 speak to factual issues with regards to the
9 matter. So I apologize if I misunderstood.
10 I don't recall an e-mail or a statement to
11 that regard, but I'm trying to understand
12 if we didn't put in a response, how would
13 the record be developed with regard to
14 these factual issues if only the attorneys
15 could speak to the issues?

16 MS. GOLDBERG: Your Honor, we very
17 explicitly raised this issue because we
18 really weren't sure. It was discussed on
19 the telephone. And I believe the 200 pages
20 or whatever this is of response that we
21 received on Monday night would provide
22 exactly the opportunity that the Applicant
23 would need and you would consider so that

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24 we would have oral argument here today.

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1 None of the petitioners here are prepared
2 to be putting on experts. We understood
3 that would be inappropriate. And we would
4 be very much prejudiced if their experts
5 were here today.

6 ADMINISTRATIVE JAW JUDGE: Anybody
7 else want to be heard on this issue? All
8 right. It's, you know, interesting you
9 raised Crossroads Ventures and of course
10 the Department has been criticized for the
11 way that that issues conference was
12 conducted. And my understanding of the
13 issues conference, and maybe if you have a
14 different ALJ you would get a different
15 understanding of it, but my understanding
16 of the issues conference it's like summary
17 judgement. It's not for presentation of
18 evidence. It's to make argument about
19 whether or not there are triable issues of
20 fact or not. And if not, then to hear
21 argument on the legal issues.

22 So that is what I contemplated this
23 is what it's going to be today and thought
24 I made it clear. So how would you rebut

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1 the attempt to show that there is a triable

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2 issue of fact would be the way you would do
3 it on a summary judgement issue. I don't
4 think we have to take, you know, a civil
5 judicial proceeding I don't think a judge
6 would allow an opponent to summary
7 judgement to allow a witness to go up and
8 testify at the hearing now would they on
9 the motion?

10 MR. ALESSI: Your Honor, your analogy
11 to a summary judgement motion I get, I
12 understand. I'm not so sure I go that far
13 with the analogy because the, for example,
14 the Inergy decision which is in our brief
15 talks about the ability of the Department
16 to rebut factual and scientific
17 information. And my question is this, my
18 point is, Your Honor, this is different
19 than a summary judgement motion because
20 again the way the procedures go as you know
21 is the petitioners you see for the first
22 time in a petition for party status, expert
23 reports. That's the very first time you
24 see what the other side has to say.

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1 If you're just limited, in the
2 ordinary course there is no response, Your
3 Honor put in the notice clearly that we
4 didn't even have to respond to what was in
5 the notice. My question would be if it's
6 summary judgement completely analogous to,

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7 there would never be an opportunity unless

8 Your Honor who graciously granted the
9 ability to respond. There would be no
10 opportunity to put in the fact.

11 ADMINISTRATIVE JAW JUDGE: Well, that
12 was part of the reason why we had the
13 written responses. You took advantage of
14 that. And in fact I believe you submitted
15 some reports of your own experts to try and
16 rebut the factual showings of the
17 petitioners so it looks like it worked to
18 me.

19 MR. ALESSI: But, Your Honor, you
20 also put in that very notice, right, that
21 you, we didn't have to do it and it was
22 without prejudice to us coming to the
23 issues conference and making presentations.
24 The Department can speak for itself Your

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1 Honor. We're very, very comfortable with
2 what we put in with regard to the
3 information on the issues. But the
4 Department can speak for itself, but where
5 is the opportunity for the Department to
6 have their folks speak with regard to
7 cavern integrity because they didn't
8 respond. We all understood it was optional
9 whether we did. So we're okay with regard,
10 if Your Honor's decision is the Applicant,
11 you're limited to argument. We'll accept

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12 that. We think the law is a little

13 different, but we will accept it. But with
14 regard to the Department that had to make a
15 choice are they going to respond or not, we
16 think that would be a rather unfortunate
17 situation for their folks to talk about.

18 ADMINISTRATIVE JAW JUDGE: Well, I
19 think the Department can speak for itself
20 on this issue. Does the Department feel
21 it's going to be prejudiced at this point?

22 MS. SCHWARTZ: No.

23 ADMINISTRATIVE JAW JUDGE: All right.
24 Thank you. All right. So we have some

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1 rebuttal time reserved. Shall we go ahead
2 and proceed on that now and then we will
3 take a break after rebuttal. So I added a
4 minute to your time, Miss Goldberg.

5 MS. GOLDBERG: Thank you, Your Honor.
6 With permission of the other partitioners,
7 I'll take the three minutes. So I would
8 like to address, if I can in my minutes
9 three points, all that were raised by Your
10 Honor during the course of the questioning.
11 The first question is whether there is any
12 case law saying that you legally cannot
13 adjudicate community character. And the
14 case cited, the physical case cited was
15 St. Lawrence Cement for that proposition.
16 St. Lawrence Cement dEIS covered the trend

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17 away from industrial uses and towards
18 greater reliance on recreation and tourism.
19 That's a quote, 2004 West Law 2026420 star
20 one star 50. Here the dSEIS has no
21 discussion of community character. No
22 discussion of land use and recreation. No
23 socioeconomic study. Moreover in St.
24 Lawrence Cement, the Applicant did not

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1 contest that the local trend could affect
2 the Hudson Valley community. Here the
3 Applicant is denying there is any local
4 trend away from heavy industrial uses and
5 that alone, Your Honor, is a factual issue
6 that ought to be adjudicated.

7 Chinese Staff states, and I quote,
8 the impact that a project may have on an
9 existing community character with or
10 without a separate impact on physical or
11 environment is a relative concern in an
12 environmental analysis since the statute
13 includes these concerns as elements of the
14 environment.

15 There is no basis that I know of in
16 the law for treating community concerns
17 differently than all of the other relevant
18 areas of environmental concern. All of
19 those issues, if there are disputed issues
20 of fact and I just named one, are
21 adjudicable in this proceeding.

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22 Second, Your Honor, you asked whether

23 there were comments made about a community
24 character in scoping and the Applicant

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1 admitted that there were. He also pointed
2 you to procedures that are supposed to be,
3 accommodate the fact that they failed to
4 include community character in the scoping.
5 The only procedures I was able to identify
6 cover when an issue is raised after the
7 scoping for the first time. And there is
8 new, you know, new information coming in.
9 There is a procedure for that. There is no
10 question. But in this case it was raised
11 before the scoping. And it was rejected as
12 far as we can tell without any explanation
13 whatsoever. The positive declaration in
14 the record doesn't have, has no explanation
15 of why they failed to mention or identify
16 community character as significant. No
17 explanation of why they failed to identify
18 land use changes or the effects on
19 recreation and is insignificant. No
20 mention of why the socioeconomic impacts
21 would be considered insignificant.

22 So again, Your Honor, I will mention
23 that when we were retained in 2013, we did
24 send a written letter to DEC asking that

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1 they consider community character. There
2 has been ample time since then to do so or
3 to ask the Applicant to do so. They have
4 not done so. You know, that now presents a
5 very serious issue and the third factual
6 issue --

7 ADMINISTRATIVE JAW JUDGE: That's
8 three minutes.

9 MS. GOLDBERG: That's three, okay.

10 ADMINISTRATIVE LAW JUDGE: Thank you.
11 And Finger Lakes wine business reserved two
12 minutes.

13 MS. TOOHER: If we could have an
14 additional minute as well it would be
15 appreciated.

16 ADMINISTRATIVE JAW JUDGE: On what
17 basis?

18 MS. TOOHER: Well, the Applicant was
19 given a substantial amount of additional
20 time. We were not given a total three
21 minutes amongst the groups. It was my
22 understanding when you said one minute, I
23 thought it was one minute for each of us.

24 ADMINISTRATIVE JAW JUDGE: I'll give

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1 you three minutes. So this is three
2 minutes.

3 MS. TOOHER: I will try to be as
4 quick as possible.

5 ADMINISTRATIVE LAW JUDGE: Please.

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6 MS. TOOHER: On the issue of
7 community character and the obligation we
8 would say for you to review that issue I
9 would just point you to ECL 801056 defining
10 environment as in the physical conditions
11 which would be affected by a proposed
12 action including existing population
13 concentrations, distribution or growth, and
14 existing community or character. It's in
15 statute, Your Honor, as a separate criteria
16 in examining the environment. It is for
17 the legislature to remove that from the
18 statute if it is going to be removed from
19 your consideration or renew.

20 We would also submit that the case
21 law is clear that community character can
22 be a region. In Wal-Mart Stores versus
23 North Alba, they looked at the region of
24 the Adirondacks in considering whether or

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1 not a Wal-Mart store affected the
2 community's character. We would submit
3 that there is a picture, Your Honor, in the
4 record Exhibit B which identifies the
5 wineries and shows that the entire region
6 is taken up by the Finger Lakes wineries
7 and their impact in this community.

8 As far as our ability to present
9 information to you, we would submit that we
10 are obligated under the statute to show you

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11 what our environmental interest is and we
12 have tried to do so by demonstrating both
13 the location of the wineries and the
14 interest that our members have shown.

15 As far as the scoping session, our
16 members were present at the scoping
17 session. They did distinctly raise the
18 interest of the Finger Lakes wineries in
19 this, the impact of this facility and the
20 impact upon the community character for
21 their interests. And that the Department
22 has chosen not to make that an issue is the
23 very reason that we are here.

24 As far as the factual decision that

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1 we're having, I think that that
2 demonstrates that this in fact suited to
3 the adjudicatory hearing. That's the time
4 to resolve factual disputes as Your Honor
5 correctly pointed out. This is the time
6 for legal argument. Our legal argument
7 would be that this issue is worthy of
8 adjudication. It requires adjudication and
9 that our members have a voice that will
10 provide valuable input to you in
11 considering that issue for adjudication.

12 We would submit that you should in
13 fact consider community character and that
14 we should have an opportunity for our voice
15 to be heard in that regard. Thank you very

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16 much.
17 ADMINISTRATIVE LAW JUDGE: Thank you.
18 So that concludes community character.
19 Before we move on to the public safety
20 issues, I propose that we take a ten minute
21 break. I mean, it's going to put us behind
22 schedule, but I don't think we want to
23 soldier right through, do we? So let's
24 take a ten minute break. Off the record.

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1 (RECESS TAKEN.)
2 ADMINISTRATIVE LAW JUDGE: On the
3 record.
4 MS. NASMITH: Thank you, Your Honor.
5 I would like to reserve five minutes of my
6 time for rebuttal. Please.
7 ADMINISTRATIVE LAW JUDGE: Just a
8 moment.
9 MS. NASMITH: Sure. I'd like to
10 begin by saying that, emphasizing that
11 while community character is a very
12 important issue to the petitioners, we also
13 have multiple other important issues we
14 would like to discuss and that we think are
15 of grave concern for an adjudicatory
16 hearing. One of them is the public safety
17 implications of this project.
18 Gas Free Seneca has presented a
19 substantive and significant issue regarding
20 the potential risk the project poses to the

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21 community. The operation of the facility
22 presents risks from storage of LPG in the
23 salt caverns as well as the transportation
24 of the LPG to and from the facility. In

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1 support of that position, Gas Free Seneca
2 with its petition for full party status
3 submitted a quantitative risk analysis by
4 Dr. Rob Mackenzie which concluded that
5 while not all the risks posed by the
6 facility were high, the potential
7 consequences were sufficiently severe that
8 additional investigation is required. This
9 reality is the only underscored by the
10 voluminous submissions the Applicant
11 submitted Monday evening which although
12 purport to dismiss Gas Free Seneca's
13 concerns, actually reenforced that there is
14 a large amount of information relating to
15 the risks of this project that have yet to
16 be very much public or even department
17 review.

18 As a result, this issue is a
19 substantive one in that there is sufficient
20 doubt as to the ability of the Applicant to
21 meet the requirements under SEQRA to avoid
22 or minimize adverse impacts to the extent
23 practical and a reasonable inquiry is
24 required in order to resolve this doubt.

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1 This is also a significant issue because
2 proper consideration of risks posed by the
3 project could result in the denial of the
4 permit under SEQRA or major modification of
5 the project or potentially additional
6 conditions on top of those already in the
7 draft permit. The Applicant --

8 ADMINISTRATIVE JAW JUDGE: Just
9 quickly. So this is, these are purely
10 SEQRA issues. There's no ECL standards
11 that apply with respect to this issue as
12 far as you are concerned?

13 MS. NASMITH: This issue is a bit of
14 a broader one, sir, insofar as it does
15 cover cavern integrity issues that end,
16 some of these issues we'll be talking about
17 later today and those absolutely implicate
18 the ECL. To the extent that we're talking
19 about those risks, they do implicate the
20 ECL as well as SEQRA. This is --

21 ADMINISTRATIVE JAW JUDGE: Does the
22 consideration of the risks driven by the
23 cavern integrity requirement of the
24 Environmental Conservation Law.

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1 MS. NASMITH: Yes.

2 ADMINISTRATIVE LAW JUDGE: It does?

3 MS. NASMITH: Yes.

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4 ADMINISTRATIVE LAW JUDGE: So it's
5 not just SEQRA?
6 MS. NASMITH: It's not just SEQRA.
7 ADMINISTRATIVE LAW JUDGE: All right.
8 MS. NASMITH: Thank you. The
9 Applicant has attempted to distract from
10 the importance of this topic by attacking
11 Dr. Mackenzie's qualifications to act as an
12 expert in this area. These contentions are
13 not, contentions are not supported by the
14 facts here, are contradicted by the
15 Applicant in their own submissions and are
16 not supported by New York law. Experts can
17 be qualified based on academic credentials
18 or training, but they also can be qualified
19 based on job experience. Just as Finger
20 Lakes wishes to use an expert Mr. Istvan, I
21 apologize if I'm not pronouncing that
22 correctly, who has no advanced degree and
23 BA only in geology. But he has many years
24 experience working for Crestwood and

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1 therefore his opinion is relevant according
2 to the Applicant to their submissions.
3 Dr. Mackenzie has extensive
4 on-the-job experience as in this case a
5 medical doctor and CEO whose
6 responsibilities include conducting risk
7 analyses and prioritizing, managing and
8 mitigating risks. In fact his experience

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9 is sufficiently extensive that other CEOs

10 have ask him to come and train them in how
11 to manage risk at their facilities.

12 In addition, the case law the
13 Applicants cite in no way supports their
14 contention that Dr. Mackenzie's report
15 should be ignored. In fact none of the
16 cases they cite bear on the actual question
17 of what constitutes qualified experts. At
18 best they stand for the general proposition
19 that you need a qualified expert, but do
20 not delve into the details of why expect
21 they think Dr. Mackenzie should be omitted
22 for consideration here. Dr. Mackenzie is a
23 qualified expert on risk analysis. He has
24 ten years of on-the-job experience and his

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1 opinion should be given full consideration.
2 I also wanted to quickly address the
3 point that the DEC has made as well the
4 Applicant has made in their submission
5 which is to say that the risk posed by rail
6 and pipelines should be ignored because
7 somehow the DEC is preempted from
8 consideration of those issues. Federal
9 preemption in this area applies to the
10 State's inability, or is defined as the
11 State's inability to regulate railway or
12 the pipeline. No one is suggesting that
13 the pipelines or the railway be regulated

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14 here. What we are suggesting is that it is
15 part of the DEC mandate under SEQRA to
16 review the project. The LPG Storage
17 project, which no one disputes, has full
18 jurisdiction to permits. They need to
19 consider the risks that would be caused but
20 for this project which do involve the
21 operation of the railway and the pipeline.
22 The case law they support is again about
23 the regulation of a railway, not the
24 evaluation of the risks associated with the

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1 project that happen to involve the railway.
2 And in fact the governor of this state
3 recently asked DEC to conduct a risk
4 assessment of crude by rail in this case
5 and there didn't seem to be any preemption
6 problem there. The preemption issue is
7 with respect to possible mitigation
8 measures. But the fact that these risks
9 may not be mitigated does not obviate the
10 department's responsibility to consider
11 those risks as part of their SEQRA
12 determination. And we are happy to brief
13 that issue for you more fully after this
14 conference if you would like.

15 Turning back to the actual risk
16 assessment here, the hundred page
17 submission that Finger Lakes put into the
18 record on Monday contains a quantitative

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19 risk analysis complete with exhibits and
20 purports to analyze the transportation
21 risks associated with the project, although
22 the Applicant also claims that those risks
23 don't need to be analyzed and that the
24 record was sufficient before the

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1 submi ssi on.
2 If you compare the report that was
3 recently submitted in Dr. Mackenzie's
4 report what you end up with is two experts
5 employi ng di fferent methodol ogi es,
6 di fferent cal culati ons and di fferent
7 assumptions. The Quest report does not
8 negate the findi ngs in Dr. Mackenzie's
9 submi ssi on. It presents only an
10 al ternative manner to evaluate some of the
11 risks proposed by the project. There is in
12 essence a di sputed i ssue of fact as to how
13 to cal cul ate the ri sk whi ch i s exactl y the
14 type of questi on that shoul d move on to an
15 adju di catory heari ng.

16 Dr. Mackenzie's methodology is to
17 conduct a top down analysis looking at
18 where there have been serious incidents
19 relating to hydrocarbon storage in salt
20 caverns. He calculates all cause of actual
21 historic death and injury rates based on
22 reputable sources such as the Federal
23 government's Pipeline Hazards and Safety

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24 Management Authority.

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1 Quest's analysis takes a different
2 tactic and focuses on theoretical
3 predictions about the equipment rather than
4 analysis of historical incidents. There
5 are limits to Quest's general approach.
6 For example the Quest risk analysis would
7 not take into account an accident that
8 occurred at an Inergy property years ago.
9 Inergy being the predecessor to Crestwood.
10 At which where there is storage in Bath,
11 New York and where there was an accident
12 and a fire and four injuries.

13 The calculations in the Quest versus
14 Dr. Mackenzie's report are simply done
15 differently. And there are questions about
16 selection of data points which further
17 underscores the need for additional inquiry
18 into the methodologies used and the results
19 arrived at. For example, Mackenzie looks
20 at the risks associated with all the
21 pipeline at Schuyler County that would be
22 used to feed this project whereas Quest
23 looks at half a mile of pipeline that would
24 be installed on the actual facility site.

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1 Quest numbers also don't include past
2 accidents in the US where there were

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3 actually a larger number of accidents over
4 the time period Quest was examining.
5 Mackenzie looks at worldwide figures.
6 Quest selected only European figures which
7 were much lower at the time. If Quest had
8 used the number for US accidents, their
9 figure would have been 20 times higher.
10 Quest also looks at accidents per cavern
11 instead of accidents per facility. That
12 you have a larger number of caverns and
13 therefore the risk number you end up with
14 is lower by virtue of just dividing by a
15 larger number. Mackenzie uses the number
16 of that facility. Quest also looks at
17 accidents per cavern rather than -- I'm
18 sorry, I've mentioned that. They also look
19 at only accidents involving the loss of the
20 cavern for storage purposes and whereas
21 Mackenzie looks at all serious accidents
22 even if the cavern was later repurposed and
23 used for future storage.

24 The conflicting calculations from

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1 these two experts clearly show there is a
2 need for an adjudicatory hearing to further
3 develop the record and arrive at
4 comprehensive understanding of the risks of
5 this project. The risk of serious
6 accidents from storing LPG in salt caverns
7 are real. As I mentioned, there was an

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8 accident at the Inergy site. There have
9 been other accidents such as the one at
10 Hutchison, Kansas where gas stored in an
11 underground salt cavern escaped the cavern
12 and caused significant damage in the town
13 as well as a couple of deaths and other
14 casualties.

15 Again, the bottom line here is
16 storing hydrocarbons in salt caverns poses
17 a significantly greater risk than storing
18 it elsewhere. Transporting LPG also
19 creates the potential for serious accidents
20 involving death, injury or the need for
21 substantial evacuation. An adjudicatory
22 hearing is required in this instance to
23 allow for further inquiry, resolve which
24 report approach, comparing Mackenzie versus

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1 Quest should be taken, and ultimately
2 coming up with a calculation that would
3 form the basis for the Department to
4 conclude one way or the other whether the
5 risk posed by this project to the community
6 are acceptable. The question here
7 therefore presents substantive and
8 significant issue and provides the basis
9 for Gas Free Seneca to be afforded full
10 party status. I'm happy to answer
11 questions you have.

12 ADMINISTRATIVE JAW JUDGE: So I just
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13 want to make sure I'm clear. Your proposal
14 then would be to essentially complete SEQRA
15 record by adjudicating your risk analysis
16 in an adjudicatory hearing?

17 MS. NASMITH: That's correct.

18 ADMINISTRATIVE JAW JUDGE: You're not
19 simply arguing because they haven't done
20 the analysis that you think they should
21 that we should deny at this point and be
22 done?

23 MS. NASMITH: Well, I think, Your
24 Honor, that there are certain pieces of the

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1 analysis that they have failed to do which
2 may especially with the respect to the salt
3 cavern integrity questions that we will be
4 discussing later this afternoon it would
5 argue for the denial of the permit. At a
6 minimum we would say that given the
7 conflicting expert reports that we have on
8 the overall risk, when you factor in all of
9 the components of the project that there
10 are real questions of fact here and that
11 those need to be, the record needs to be
12 further developed. There needs to be
13 further inquiry as to which numbers you
14 should use, what assumptions should be
15 based, used in this calculation to
16 determine what the actual risk is proposed
17 by the entire facility, in addition the

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18 cavern integrity and transport as well.

19 ADMINISTRATIVE LAW JUDGE: And
20 assuming that you develop a record on these
21 additional risks, then would you be
22 proposing some additional mitigation or
23 what at this point would be the outcome?

24 MS. NASMITH: It would depend on the

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1 risk that we would be addressing in that
2 case. I think there are some mitigation
3 measures that might be appropriate. There
4 might also be some discussion of modifying
5 the project, especially with respect to
6 cavern integrity. But there also might be
7 the reality that some of these risks cannot
8 be mitigated. Again, the risk of rail and
9 pipeline transportation may be such that
10 there are no mitigation measures that can
11 be proposed and as well as some of the
12 risks proposed by storing the LPG in the
13 salt cavern may be sufficient that we
14 cannot mitigate them in this case. That
15 these caverns are inappropriate for storage
16 and therefore the permit should be denied.

17 ADMINISTRATIVE LAW JUDGE: All right.

18 MS. NASMITH: Thank you.

19 ADMINISTRATIVE LAW JUDGE: So you
20 will have another five minutes in rebuttal.

21 MS. NASMITH: Thank you.

22 ADMINISTRATIVE LAW JUDGE: Seneca

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23 Lakes Community -- Communities. Are you
24 reserving any time?

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1 MS. SINDING: Yeah. I'll reserve
2 three minutes, Your Honor, but I don't
3 expect to take the full seven now subject
4 to whatever questions you might have of
5 course. Again I'm Kate Sinding. The
6 Seneca Lake Communities are deeply
7 concerned about the ability of emergency
8 personnel and first responders to address
9 an accident, especially a catastrophic one,
10 at the proposed facility. They are
11 moreover deeply concerned that the risks of
12 such an incident have been completely
13 inadequately considered by the Applicant in
14 the application dEIS and accompanying
15 materials in turn by the Department. They
16 have raised a substantive and significant
17 issue with respect to public safety in this
18 regard.

19 The Communities proffer the testimony
20 of Richard E. Cooperwitz (phonetic) that
21 the quantitative risk assessments conducted
22 on behalf of the Applicant are solely
23 deficient and fail to identify the real
24 potential for significant adverse impacts

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1 from a catastrophic failure at the
2 facility. Mr. Cooperwitz's qualifications
3 are detailed in his affidavit sworn to on
4 January 15 and submitted in conjunction
5 with, in support of our petition for full
6 party status. Mr. Cooperwitz is widely
7 recognized as a national expert on
8 hydrocarbon infrastructure risk management
9 spanning a 40-year career serving on both
10 Federal and State advisory bodies
11 concerning pipeline safety. Due to the
12 very late date of Energyscapes' attention
13 in this matter and by extension that of Mr.
14 Cooperwitz, he was unable to prepare a
15 detailed report for submission in support
16 of the petition, or he was able to submit a
17 brief affidavit on the basis of his review
18 of the relevant materials.

19 Based on that review Mr. Cooperwitz
20 is highly concerned that the proposal to
21 store extremely large amounts of liquefied
22 as in underground caverns, as much as 2.1
23 million barrels between the two caverns,
24 present extraordinary risk, the ones that

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1 have been inadequately considered by the
2 Applicant or the Department. At an
3 adjudicatory hearing Mr. Cooperwitz is
4 prepared to testify as to the outside
5 risks presented by LPG Storage in large

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6 volume in underground caverns as well as

7 the astronomical costs that would be
8 associated with responding to a
9 catastrophic release at LPG from one of
10 those caverns. And that's something that
11 will come up again tomorrow when we discuss
12 the indemnification clause.

13 To, and to support, respond to one of
14 the questions you directed to Ms. Nasmi th,
15 based on our discussions with Mr.
16 Cooperwitz, I believe that he would testify
17 that it is essentially an unmitigatable
18 risk. And it's Mr. Cooperwitz's opinion
19 that it is a common fallacy to dismiss
20 so-called low probability events with
21 serious potential consequences. The
22 fallacy that the Applicant has committed
23 here. He would testify regarding the
24 potential for a series of failures along a

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1 chain of linked events to actually drive
2 the system to catastrophic failure with
3 much greater probability than that
4 associated with each individual event. In
5 other words, he would testify that it is
6 necessary to consider the cumulative risks
7 presented by a number of potential failures
8 along a chain and that although the risks
9 associated with each one of those might be
10 small, together they could lead to a

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11 catastrophic event at a much higher rate of
12 probability and that is something, an
13 analysis that has not been undertaken here.

14 ADMINISTRATIVE JAW JUDGE: All right.
15 So he would not be presenting any evidence
16 on potential mitigation of these risks then
17 based on your view or his view that they
18 are unmitigatable risks?

19 MS. SINDING: I believe that he might
20 be able to speak to what mitigation is
21 conceivably available. I believe that it
22 is his opinion though ultimately that the
23 risk is so great here that those mitigation
24 measures are inadequate.

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1 ADMINISTRATIVE JAW JUDGE: All right.
2 I have no questions.

3 MS. SINDING: Thank you.

4 ADMINISTRATIVE LAW JUDGE: Finger
5 Lakes Wine Business. Are you reserving any
6 time?

7 MS. TOOHER: Yes, please, Your Honor.
8 We would like to reserve four minutes.

9 ADMINISTRATIVE JAW JUDGE: Four
10 minutes.

11 MS. TOOHER: Thank you. Again, Your
12 Honor, we present the position of the
13 Finger Lakes Wine Business Coalition and we
14 feel in terms of the risks that have been
15 identified as landowners, adjoining

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16 landowners, business owners and members of
17 the public we face potential for injury
18 from the Applicant's project and that
19 injury falls squarely within the zone of
20 interest protected by the statutes of DEC.
21 We feel that the dSEIS fails to address the
22 potential impact of a catastrophic event.
23 It fails to provide sufficient information
24 regarding indemnification to the

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1 surrounding community as a consequence of
2 the event and it fails to adequately
3 address the irreversible and irretrievable
4 commitment of resources to the project by
5 the local community. The draft permit
6 currently fails to provide conditions that
7 are sufficient to protect the surrounding
8 community from the potential damages from a
9 catastrophic event. It fails to identify
10 or mitigate the potential harmful impacts
11 of gas storage so as to adequately protect
12 health and human safety and particularly
13 the agricultural uses unique to my clients.

14 The vineyards themselves take years
15 to develop. This is not something that's
16 an instantaneous product. There's years
17 that go into the developing the vines and
18 then the harvests themselves. In the event
19 of a catastrophic event, my clients and
20 their interests would be uniquely damaged.

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21 They would not be able to recover from a
22 catastrophic event that impacted either the
23 water or the lands themselves.
24 So we would submit that the petition,

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1 our petition raises issues that are, that
2 fall squarely within those issues that need
3 to be considered under SEQRA. SEQRA
4 requires that an agency approving an action
5 must make findings regarding the agencies
6 consideration of the environmental effects,
7 alternative actions and the minimization or
8 avoidance of an adverse environmental
9 impacts. It's our opinion that the impacts
10 upon the agricultural community, the
11 vineyard community has not been considered
12 at all.

13 Finally, the draft permit conditions
14 do not adequately protect health and human
15 safety or the impacts upon health and human
16 safety for crops and animals that may be
17 subject to exposure from fire, from
18 explosion or from the slow escape of gas.
19 Draft permit condition seven provides that
20 the Applicant must install certain shutdown
21 devices at the LPG facility. We submit
22 that there is no consideration of those
23 shutdown considerations for the
24 agricultural impacts. Additionally,

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1 condition eight requires reporting of
2 certain nonroutine incidents to the DEC.
3 It does not identify what those nonroutine
4 incidents are or the impact of the
5 well-being of the community.
6 No sufficient inquiry has been made
7 to determine the scope of potential damages
8 which may arise from either an explosion
9 or a fire or from the slow release of gas
10 and the reliance of the public services in
11 the community and the volunteer emergency
12 services would be woefully inadequate in
13 the event of a catastrophic event. This is
14 a substantive issue that needs to be
15 identified and examined in the context of
16 an adjudicatory hearing and we need to
17 examine proposed mitigation measures in
18 relying upon the local volunteer fire and
19 EMT services since these services are
20 insufficient to deal with any type of
21 catastrophic event. The issue raised by
22 the petitioner is significant because if
23 the Applicant is unable to comply with the
24 proper health and safety requirements or to

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1 assume the obligations that arise from
2 that, then they fail to meet the
3 requirements for approval in the draft
4 permit.

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5 ADMINISTRATIVE JAW JUDGE: So again
6 you've applied for amicus status so --
7 MS. TOOHER: Yes, Your Honor.
8 ADMINISTRATIVE JAW JUDGE: -- to the
9 extent that it's your view that they're
10 inadequate, that the draft EIS inadequately
11 addresses some of these issues, how as an
12 amicus would you be filling those gaps
13 since you wouldn't be seeking to provide
14 any testimony or expert testimony on the
15 issue?

16 MS. TOOHER: It's not expert
17 testimony, Your Honor, but our perspective
18 in the legal issues as far as whether or
19 not they have sufficiently met their
20 requirements both under SEQR or the permit
21 conditions our voice should be heard in
22 that regard and we think it does provide
23 input to the court.

24 ADMINISTRATIVE JAW JUDGE: So for

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1 example, you argue that there would be
2 impact on local emergency response that
3 hasn't been analyzed, but you're not
4 proposing to make that analysis, correct?

5 MS. TOOHER: No. We are not
6 proposing to make that analysis, but we do
7 propose that under the statutory
8 requirements the Applicant is required to
9 make that analysis and that that analysis

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10 has not been presented to you.
11 ADMINISTRATIVE LAW JUDGE: What
12 particular expertise do your clients have
13 to provide argument on these risk issues?
14 MS. TOOHER: I don't think under the
15 statute we're required to show that we have
16 particular expertise, but that we have an
17 environmental interest. And I think that
18 we do have an environmental interest as a
19 member of the community, the businesses
20 that serve that community, the tourists
21 that come to that community that they too
22 will be impacted in the event of a
23 catastrophic event and the Applicant's
24 failure to meet those public safety issues.

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1 ADMINISTRATIVE LAW JUDGE: All right.
2 Thank you very much. So Legislators Harp
3 and Lausell, Are you reserving any time?
4 MR. LAUSELL: Yes. We would like to
5 reserve two minutes for rebuttal and I will
6 share the time with my colleague Mr. Harp.
7 ADMINISTRATIVE LAW JUDGE: Well, you
8 don't each have ten minutes, right?
9 MR. LAUSELL: No. Four minutes each.
10 We filed our amicus brief as two county
11 legislators to ensure that certain issues
12 are adequately brought forward before the
13 DEC. As our petition states, the first
14 issue is the geography of our county,

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15 particularly the Glen and the Watkins Glen
16 State Park, which the trestle that passes
17 through that park would be transporting
18 tankers full of LPG. The Watkins Glen
19 State Park is the second most visited state
20 park in the state. Just last week the
21 headline in our county was that 700,000
22 people were in the park last year. Now the
23 geography of the park is a very steep,
24 narrow gorge so that if a significant

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1 number of tourists were in there and there
2 was an accident, there would be no escape.
3 When you, given for the time that the park
4 is closed there's about 3,000 people in
5 there every day. So this is an issue that
6 we feel is proper to be before the issues
7 conference and the decision I cited in Akzo
8 there was, it was found to be proper to
9 decide whether gas would be delivered by
10 rail or by pipeline. And I would again
11 repeat what others have said that sure,
12 once the gas is being transported over the
13 tracks, that Federal jurisdiction, but the
14 DEC would have authority to remodel or
15 modify it if they thought that the danger
16 particularly to a park that is also
17 administered by the DEC would be affected.

18 The other issue that we bring forward
19 is the adequacy of our local comprehensive

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20 emergency management plan. To be quite
21 clear about this, I would say that our
22 county legislature is in something of
23 disarray when it comes to this issue. We
24 filed our petition on January 16th and 10

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1 days later our emergency management officer
2 had our draft plan ready for review. At
3 the next Wednesday's legislative review
4 meeting we discussed it. Now I will
5 mention that along with not addressing the
6 Akzo decision, the response talks about the
7 ratings of certain hazards, but it uses a
8 2008 plan. And this plan hazmat, a hazmat
9 accident in transit. The hazmat scale of 0
10 to 400 was rated 276. A terrorism incident
11 was rated at 279. At our legislative
12 review committee, I asked why all of a
13 sudden was the hazmat release in transit
14 lowered to 166 and a terrorism incident to
15 188. Keep in mind that Watkins Glen with
16 the Watkins Glen International Race Track
17 and the mass gatherings that occur there is
18 referred to as the number 2 site for
19 terrorism attacks outside of New York City.

20 So even with those discussions it was
21 left on the agenda from last Monday's
22 legislative session and at that point the
23 chair of the legislature asked that it be
24 withdrawn for consideration tabled so that

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1 we could take a few months to really review
2 this plan. And that is our big concern
3 that if this facility is approved, does
4 Schuyler County have a plan that will
5 adequately address the dangers that will be
6 coming into the county.

7 Legislator Harp and myself have taken
8 different steps over the year and I think
9 our brief adequately sets that out. But we
10 are, our primary concern is that Schuyler
11 County have an adequate plan. And I would
12 say that it is, in anticipating your
13 question of what would we have to offer,
14 the fact that as legislators and the
15 legislative record we can bring that
16 information before the DEC.

17 ADMINISTRATIVE JAW JUDGE: All right.
18 But again, you've applied for amicus status
19 so you're not asking or seeking an
20 opportunity to present information through
21 testimony or evidence.

22 MR. LAUSELL: Other than through a
23 brief, yes.

24 ADMINISTRATIVE JAW JUDGE: But if

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1 you're proposing to provide new information
2 in your brief, that would be essentially

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3 trying to provide evidence, isn't it? I

4 mean, as an amicus generally you would be
5 limited to simply responding to the record
6 as it exists and making arguments about
7 that record.

8 MR. LAUSELL: Yes. And it may be
9 that we should have applied for full party
10 status, but then again we are legislators
11 and that's our primary responsibility.

12 ADMINISTRATIVE JAW JUDGE: I'm sorry,
13 what is your primary responsibility?

14 MR. LAUSELL: We are legislators in
15 Schuyler County. We wanted to make sure
16 the information we have is brought before
17 this issues conference, but we stopped
18 short of applying for full party status.

19 ADMINISTRATIVE JAW JUDGE: All right.
20 Now with respect to sufficiency of Schuyler
21 County's plan, that's not really a matter
22 for the Department, is it? I mean, isn't
23 Schuyler County responsible for its plan?

24 MR. LAUSELL: Right. But Finger

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1 Lakes LPG has submitted an affidavit from
2 our emergency management officer stating
3 that he believes the plan is adequate so --

4 ADMINISTRATIVE JAW JUDGE: And that's
5 the 2008 plan.

6 MR. LAUSELL: Apparently so. I'm not
7 really sure because --

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8 ADMINISTRATIVE JAW JUDGE: Is there a
9 more recent plan? I just want to make
10 sure.
11 MR. LAUSELL: There's a draft plan.
12 ADMINISTRATIVE JAW JUDGE: There's a
13 draft plan, but it hasn't been finalized
14 yet.
15 MR. LAUSELL: Right.
16 ADMINISTRATIVE JAW JUDGE: And that's
17 the one that's been tabled --
18 MR. LAUSELL: Right.
19 ADMINISTRATIVE LAW JUDGE: -- for
20 further consideration.
21 MR. LAUSELL: My impression was his
22 affidavit was concerning the draft plan,
23 that these issues have been adequately
24 addressed because back in 2008 the facility

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1 was not even included. It had not been
2 brought up.
3 ADMINISTRATIVE JAW JUDGE: Okay.
4 Thank you. You said your co-legislator
5 wanted to speak?
6 MR. LAUSELL: Yeah.
7 ADMINISTRATIVE JAW JUDGE: All right.
8 MR. HARP: Good afternoon, Your
9 Honor. How much time do I have?
10 ADMINISTRATIVE LAW JUDGE: Good
11 afternoon. You have two minutes, but you
12 have two minutes reserved.

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13 MR. HARP: I'm very concerned as a
14 legislator. I've been a legislator for one
15 year. I'm a newcomer to the community
16 having lived here only for about 11 years
17 now, okay. I'm concerned about the impact
18 of this issue on the business of the
19 community which has been described here
20 already. But I'm more concerned about the
21 collateral effect on the voting, taxpaying
22 working members of this community on both
23 sides of this issue.
24 I spent two careers responding to and

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1 addressing a broad variety of risks, risk
2 mitigation and human behavior, particular
3 human behavior that is unacceptable. My
4 concern is focused on the safety and
5 security from the perspective of human
6 error which we can't predict, but can
7 prepare for. And therefore there's a
8 proliferation of safety manuals out there
9 in existence in a variety of spectrum of
10 any industry and government agency in this
11 country. But it's the intentional human
12 action that concerns me. And I have seen
13 that and responded to that over the last 43
14 years in my two careers in federal law
15 enforcement as well as director of global
16 security for a Fortune 500 company.
17 The relative, I'm concerned about the

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18 vulnerability, integrity and safety of the
19 transportation of LPG both by truck and by
20 train. And in my opinion, my personal
21 opinion based on those 43 years of
22 responding to those risks and mitigating
23 those risks, I believe the truck
24 transportation poses a low to medium risk,

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1 but has a relatively high impact
2 particularly during race season and the
3 height of the tourism season. The train
4 issue, the train risk is medium in my
5 opinion and certainly a very high impact.
6 And an extremely high impact during the
7 race season and tourism season in this
8 county. The races do not occur on just one
9 day. Three times, you know, three times a
10 summer. It's two weeks building up to that
11 and there's an influx of people, tourists
12 and visitors and fans and all that into
13 this county. That's a primary target. And
14 because of that, these, target selection is
15 based on the risk. And it is a low cost,
16 no cost virtually to create some type of
17 catastrophe here.

18 I think there has to be safety
19 precautions and risk mitigation focused on
20 the train trestle and the bridge crossing
21 that gorge.

22 ADMINISTRATIVE JAW JUDGE: Thank you.

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23 You'll have two more minutes in rebuttal.

24 All right. Finger Lakes.

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1 MR. BERNSTEIN: Bear with me for a
2 second. I have notes all over the place.

3 ADMINISTRATIVE LAW JUDGE: So I'll
4 give 30 minutes.

5 MR. BERNSTEIN: In part my initial
6 comments will be in response to some of the
7 statements made by the petitioners. First
8 of all, Your Honor, we feel that the public
9 safety issue, the purported issues raised
10 by the petitioners do not raise a
11 substantive and significant issue.
12 Basically we are putting the public safety
13 issues into four buckets. I'll call them
14 general safety, risk assessment, emergency
15 preparedness and rail safety. We do
16 address all of these items in the brief.
17 I'm not going to regurgitate that, but I
18 might highlight some of the points we do
19 raise and talk about some of the comments
20 that I mentioned that petitioners make.

21 We start off with risk assessment
22 because that's really where it started with
23 I think Gas Free Seneca. And they started
24 off talking about how in this case we have

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1 two experts who are disagreeing. Now we
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2 disagree wholeheartedly. We think that
3 there are only two experts who have
4 actually opined with regard to risk
5 assessment. Quest Consultants and William
6 Kennedy. Dr. Mackenzie is not one of them.
7 Suggesting that he has any expertise in
8 risk assessment with regard to storage
9 facilities is like suggesting that he is
10 competent to perform brain surgery. And I
11 looked at his CV and he is not a brain
12 surgeon. So he we think is totally
13 unqualified to be an expert on this
14 purported issue and for that reason we
15 actually think he should be disqualified
16 from being an expert and his report should
17 be either dismissed or considered for the
18 weight it deserves which is actually none.
19 And we mention that in our report. So
20 again, this shouldn't be mischaracterized
21 as a disagreement among experts. This
22 should be the experts are in total
23 agreement here, Quest and Bill Kennedy with
24 regard to safety. So I'll start off by

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1 saying that.
2 ADMINISTRATIVE JAW JUDGE: To what
3 extent can I get into expert qualifications
4 at the issues conference stage of a
5 proceeding? I mean, we're not, we haven't
6 called experts, we haven't voir dired them.

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7 This is like a summary judgement motion.
8 So as long as they are minimally qualified,
9 isn't that all they have to be to raise a
10 trial issue of fact?

11 MR. BERNSTEIN: Well, first of all we
12 don't think that Dr. Mackenzie is even
13 minimally qualified to assess the risks
14 associated with a hydrocarbon storage
15 facility or the transportation of
16 hydrocarbon storage or LPG for example. So
17 we don't even think he is minimally
18 qualified. But, you know, in terms --

19 ADMINISTRATIVE JAW JUDGE: Well, Gas
20 Free Seneca said that he
21 has on-the-job qualifications I believe
22 they said ten years of experience doing
23 risk assessment and management so.

24 MR. BERNSTEIN: For hospitals.

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1 ADMINISTRATIVE LAW JUDGE: Okay.

2 MR. BERNSTEIN: And the kind of risks
3 for example that Quest Consultants twice by
4 the way assessed in their QRAs is quite
5 different given their expertise and what
6 Dr. Mackenzie assessed quite qualitatively
7 I might say and subjectively in his
8 assessment. And, you know, the analogy is
9 attempted to be made between his experience
10 and Mr. Istvan's experience who has more
11 than 40, I dare say even close to 50 years.

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12 I'm sure not sure how old John actually is
13 at this point. I'm sorry, John. Of
14 geology and salt formation. To make that
15 analogy is a preposterous attempt at --

16 ADMINISTRATIVE LAW JUDGE: So the
17 only kind of expert that can be heard on
18 this would be one who's had experience
19 solely in risk assessment for the petroleum
20 industry?

21 MR. BERNSTEIN: I think relevant
22 experience in --

23 ADMINISTRATIVE LAW JUDGE: Aren't
24 there general principles of risk assessment

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1 and management that would apply?

2 MR. BERNSTEIN: There certainly may
3 be general principles of quantitative risk
4 assessment and modelling that wasn't even
5 done by Dr. Mackenzie. I mean, so he
6 didn't get to that level. I think that the
7 methodology explained in QRA's report
8 described the kind of quantitative
9 modelling that really is necessary to
10 determine what the risk is in fact and
11 compare it to other common everyday risks
12 and determine what the risk is with regard
13 to this project and that wasn't done in
14 Dr. Mackenzie's report.

15 So I think that certainly since it is
16 an offer of proof that is made. We

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17 disagree with his qualifications. We don't
18 think he is an expert. You can accept his
19 offer with whatever weight you deem
20 appropriate, we think that it should not be
21 given any weight whatsoever.

22 Just moving on with some of the
23 comments. First of all, our response does
24 go through quite exhaustively the risk

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1 assessment that was done, the safety,
2 there's a complete section on safety in the
3 sdEIS. Section 4.6, 4.1, we set forth the
4 sections in the dEIS in our written
5 response. So to say that the dEIS -- and
6 in addition to that can I just talk about
7 safety with regard to the facility training
8 and the like? In addition to that there is
9 a whole section with regard to emergency
10 preparedness, emergency response, the
11 ability of the emergency responders to be
12 trained and be knowledgeable in the kind of
13 material that will be stored and the kind
14 of risks associated with that. So we think
15 that the record is pretty clear in the
16 dSEIS alone that we minimize environmental
17 impacts. We've addressed SEQRA to the
18 maximum extent possible. We certainly
19 evaluated the risks and identified all the
20 mitigation that will be part of the design
21 of the facility. You're going to add

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22 something?

23 ADMINISTRATIVE JAW JUDGE: Well,

24 sounds to me like the folks who might be

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1 having to respond with volunteer fire
2 departments and EMTs express some concern
3 about whether or not they were prepared to
4 respond to the kind of accident that might
5 happen and what you would expect in this
6 facility. Is part of this project going to
7 be to train those EMT and fire persons?

8 MR. BERNSTEIN: That, yes. And
9 that's set forth right in the DSEIS that
10 this is cooperative training. In addition
11 to that it is set forth in the letter of
12 Dominic Smith, a former fire chief at the
13 Watkins Glen Fire Department that's hearing
14 document 1D6 attachment 17, how he talks
15 about the cooperative training. Keep in
16 mind, Your Honor, this is not the first LPG
17 facility in the Town of Reading. We've had
18 historically a facility that was in
19 existence since 1964 to 1984. We've had
20 the what was in the NYSEG facility. Well,
21 we had the TEPPCO facility across the
22 street. We actually have, there was a new
23 facility that was recently permitted, an
24 above ground facility by AmeriGas in the

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1 Town of Reading. And then you also have
2 the underground natural gas storage
3 facilities as well. So this is not the
4 first time that underground hydrocarbons
5 have been stored underground. So it's
6 really nothing new and interestingly --

7 ADMINISTRATIVE LAW JUDGE: Have they
8 had occasion to have to respond to an
9 emergency?

10 MR. BERNSTEIN: No.

11 ADMINISTRATIVE LAW JUDGE:
12 Thankfully.

13 MR. BERNSTEIN: But that says a lot I
14 think.

15 ADMINISTRATIVE LAW JUDGE: Although
16 we don't know what the response would be if
17 they did have to respond.

18 MR. BERNSTEIN: I disagree. I think
19 the 2008 hazard mitigation plan and even
20 though it's just a draft, the draft
21 attached to the petition of the county
22 legislators does kind of describe what that
23 response would be. Now I will say what,
24 even though this document, this document

♀

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1 being the appendix to the hazard materials
2 plan is just a draft and apparently it's
3 going through some revisions. What it does
4 reflect I think is that currently, today

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5 LPG is transported in Schuyl er County by
6 pipeline, by rail and by truck and it's
7 been happening for years. So these are not
8 new, potential risks that are just being
9 identified today for the first time. These
10 are things that, and again Mr. Kennedy
11 drafted this document. This is in the
12 petition. It identifies the different
13 manners in which LPG and other kind of
14 hydrocarbons are transported in Schuyl er
15 County already and the potential risks.
16 And he characterizing in his affidavit that
17 risk and more importantly as the
18 professional who is responsible for
19 emergency management in the County of
20 Schuyl er. Legislators, they are
21 legislators. They are politicians. They
22 are not professional emergency response
23 personnel. Mr. Kennedy is. He is the only
24 one that's qualified to say, along with

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1 Mr. Smith, Chief Smith whether or not the
2 local emergency response personnel are
3 ready to respond to an emergency in the
4 unlikely event that that occurs. Mr.
5 Kennedy talks about again and he confirms
6 what I just said, that liquid petroleum gas
7 and natural gas have been stored for years
8 and transported in Schuyl er County. He
9 gives his professional opinion which I

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10 think is probably the most relevant. In
11 terms of emergency response. That the
12 county government and you yourself noted
13 that it's the responsibility of the county
14 government to anticipate and address the
15 risks of various activities throughout the
16 county including risks associated with the
17 storage and transportation of LPG. And he
18 talks about how hazardous materials
19 released in transit was rated at a
20 moderately low hazard level during 1980,
21 2008. That's not inconsistent with the
22 conclusions that Quest has made in their
23 two reports with regard to the comments
24 made on the QRAs that have been submitted

♀

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1 by Quest. I will add a few comments about
2 that.
3 First of all, the frequencies in the
4 Quest report are based on historical data
5 of storing hydrocarbons and this is in
6 response to some of the comments that Gas
7 Free Seneca made. Storing hydrocarbons in
8 salt caverns is not significantly more
9 risky than other forms of storage.
10 Mackenzie's risks are qualitative, Dr.
11 Mackenzie's risk are qualitative and based
12 on worst case events only. Quest's QRA is
13 quantitative and compared to certain
14 acceptability criteria. You have to

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15 compare risk to something and that's what

16 Quest did.

17 Now I will add that before I go on
18 with some of the comments that were made,
19 the offer of proof made by Mr. Cooperwitz
20 is stated in his affidavit. Not as stated
21 by the petitioner. I don't recall which
22 petitioner it is. The statements may go
23 well beyond --

24 ADMINISTRATIVE JAW JUDGE: Seneca

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1 Lakes Communities.

2 MR. BERNSTEIN: Those statements go
3 well beyond what is stated in Mr.
4 Cooperwitz's affidavit. That affidavit
5 represents what his offer of proof is. And
6 what was stated in the record here in terms
7 of comments about what I believe he will
8 testify to, what I believe he will say.
9 They had an opportunity to put that in his
10 affidavit and that's not in his affidavit.
11 There is no excuse there was a shortness of
12 time because you yourself extended the
13 period of time in which the petitioners
14 could put in and arrange for this
15 affidavit. So a lot of what said in the
16 record, and I didn't want to interrupt,
17 goes well beyond what was stated in his
18 affidavit. What this affidavit does is
19 make conclusory comments about things that

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20 apparently some of which are not within

21 Mr. Cooperwitz's expertise. He talks about
22 how salt caverns safety prevent release of
23 LPG. That's a critical pathway. Well,
24 that's not his expertise. That's the next

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1 session this afternoon, okay. He talks
2 about how there hasn't been a risk
3 assessment. Well, apparently at the time
4 he prepared his affidavit he didn't have
5 the chance to read the 2012 risk assessment
6 or the most recent risk assessment that was
7 presented. I know he didn't have a chance
8 to read the most recent one because this
9 affidavit came before that, but certainly
10 the 2000 -- he should have had an
11 opportunity and those petitioners should
12 have had an opportunity to provide him that
13 risk assessment, but there is no detailed
14 analysis of that --

15 ADMINISTRATIVE JAW JUDGE: Well,
16 under the regulations they are only
17 required to give us an offer of proof.
18 They are not necessarily required to give
19 us, you know --

20 MR. BERNSTEIN: But that's not even
21 done here, Your Honor. We have to at least
22 see the words of what the offer of proof
23 will be and those are not here. What you
24 heard was testimony in fact, but factual

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1 testimony by an attorney. Not factual
2 testimony of what is based in the record
3 and therefore when you review the
4 transcript, I would ask you to keep that in
5 mind that those arguments should be
6 ignored.

7 And so the point is that Mr.
8 Cooperwitz certainly does not substantiate
9 his claims that risk is not being properly
10 addressed. Low probability events were
11 actually included in the Quest QRA and
12 chain of events risk is not a proper way to
13 evaluate risk according to Quest and its
14 QRA.

15 In our opinion the facility is not
16 capable of physically damaging the
17 wineries. They are simply too far away.
18 The closest winery in the list of those who
19 have submitted affidavits on behalf of the
20 Wineries Business Coalition is a driving
21 distance 3.4 miles and the furthest is over
22 40 miles I believe. So this notion of zone
23 of interest, I don't know exactly where
24 they are going with that, but if they are

♀

1 trying to argue that that's some kind of
2 akin standing that certainly the case law
3 would support the conclusion that 40 miles

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4 is not placed within the zone of interest.

5 In terms of the suggestion that LPG
6 consequences and risks have not been taken
7 into account, of course they have because
8 it already exists in the region and we've
9 shown that. Including up, not that I'm
10 suggesting that this should be the zone of
11 interest, but even up north on Route 14 as
12 you get closer to Geneva there are LPG
13 facilities and distributors. Large ones in
14 fact who are supporters of the project.

15 ADMINISTRATIVE LAW JUDGE: Well, rail
16 accidents involving petroleum products are
17 not unknown. Was any consideration given
18 to this trestle going across the chasm?

19 MR. BERNSTEIN: You know, I visit
20 Watkins Glen State Park and enjoy it, but I
21 know that that train trestle is there for a
22 reason and that is for trains to transport
23 goods and products and those trains have
24 been doing that for years and years. And

♀

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1 NS has been controlling that operation
2 since 1999 I believe.

3 ADMINISTRATIVE LAW JUDGE: If a train
4 was to derail at that location though, I
5 mean, was that specifically looked at at
6 all in this risk assessment?

7 MR. BERNSTEIN: I believe that was,
8 Your Honor. I believe it was in Mr.

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9 Kennedy's analysis and the Quest
10 transportation QRA. And particularly in
11 the context of the response of Quest to Dr.
12 Mackenzie's so-called qualitative risk
13 assessment that towards the end of the QRA
14 report they do address that and the
15 potential consequences of that. But, Your
16 Honor, the fact is based on the record and
17 based on statistics that you're talking
18 about 99.9977, all hazardous, hazardous
19 material shipments reached their
20 destination without a release caused by a
21 train accident and that's pretty telling.
22 And in addition to that Norfolk Southern
23 and the dSEIS explained the level of
24 inspection that they conduct on their own

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1 and also as required by Federal regulation.
2 The rail companies are regulated by the
3 Surface Transportation Board, the Federal
4 Railroad Administration. We argued in our
5 brief about how, exactly how those
6 operations are conducted is preempted under
7 Federal case law.

8 ADMINISTRATIVE JAW JUDGE: I
9 understand, but, I mean, wasn't there a
10 train derailment in West Virginia recently?
11 It does happen and again my main question
12 was was it considered that if such a
13 derailment were to occur, for example at

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14 this trestle, is there going to be an
15 adequate response?

16 MR. BERNSTEIN: And the answer is
17 yes.

18 ADMINISTRATIVE JAW JUDGE: And that's
19 been studied?

20 MR. BERNSTEIN: Both.

21 ADMINISTRATIVE LAW JUDGE: And I can
22 find the results of that in the Kennedy
23 analysis and the Quest quality review?

24 MR. BERNSTEIN: Yes. But again, I

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1 don't want to gloss over the fact of
2 statistics. Now you may, while the press
3 may put on the front page very rare
4 instances where you see that occurring in
5 West Virginia or wherever state, the fact
6 is the safety record of the rail industry
7 speaks for itself. It's not just the rail
8 industry telling you what their safety
9 record is.

10 ADMINISTRATIVE LAW JUDGE: Well,
11 that's why it's a low risk though, but
12 there's a high potential harm to result in
13 the, you know, unfortunate circumstances
14 that rail safety fails then we want to know
15 if there's a sufficient response.

16 MR. BERNSTEIN: And there is.

17 ADMINISTRATIVE JAW JUDGE: And I can
18 find that in these documents?

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19 MR. BERNSTEIN: Oh, absolutely. Yep.
20 And again, this is not something that's
21 new. I mean, this is something that has
22 been known for a long time and so Mr.
23 Kennedy explains in his affidavit in his
24 professional opinion that the county is

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1 prepared to respond to any potential
2 release, whether it's LPG or any other kind
3 of hazardous material that may be used at
4 other locations in the county. And there
5 are other industrial facilities in the
6 county where that could occur and where
7 hazardous materials are transported.

8 ADMINISTRATIVE LAW JUDGE: Is by
9 pipeline considered to be safer?

10 MR. BERNSTEIN: Well, I think that
11 they are both safe to answer your question.
12 I will say, however, since you bring up the
13 issue that pipelines are also regulated by
14 the Federal government. And to suggest for
15 some reason, and it sounds like that
16 pipelines aren't safe and therefore should
17 be shut down would suggest that the
18 existing pipeline and there are miles and
19 miles of existing pipeline currently in
20 this county as reflected in the document
21 that the county legislator submitted,
22 suggest that those pipelines should be shut
23 down is a preposterous suggestion. Now

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24 they may not be suggesting that, but that's

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1 how I heard it. But rail safety is
2 regulated. Pipelines are regulated by the
3 Pipeline and Hazardous Material Safety
4 Administration which is an arm of the US
5 DOT. There is specific regulations with
6 regard to pipeline safety under 49CFR Part
7 192. So there are stringent regulations
8 and those regulations have been adopted by
9 state agencies as well. So rail safety,
10 we're not just relying on the fact that,
11 okay, the Feds have jurisdiction here.
12 What we are relying on is safety record.
13 We are relying on really the fact that it
14 already exists today. And I think the
15 record reflects the fact that there is not
16 in terms of the project and what it adds to
17 rail. At most maybe one trip per day, but
18 that's it. Otherwise there are rail cars
19 going over that bridge today that have
20 hazardous materials in them and there has
21 not been a problem and that's because the
22 track is inspected I think twice weekly
23 and then the bridge is inspected annually.
24 So there is a good record there. And so,

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1 almost done.

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2 You now, I would also say a couple
3 other points. You asked about amicus
4 status and I think you asked a couple of
5 petitioners about this and what does it
6 mean to them, I'm paraphrasing of course,
7 and what would they bring. And part of the
8 response I heard from the county
9 legislators was well, maybe we should ask
10 for full party status. And what I also
11 heard, by the way, was information. Again
12 factual information that goes above and
13 beyond what is written in their petition
14 for party status. Unsubstantiated --

15 ADMINISTRATIVE JAW JUDGE: Would we
16 take that in though as comments on the EIS?

17 MR. BERNSTEIN: Yes. Frankly I think
18 comments that have already been responded
19 to by what is in the record, but perhaps
20 they haven't reviewed all of the records.
21 Look at what their county emergency manager
22 has said. What the fire chief has said.
23 What we have said in the dSEIS and that is
24 that we have addressed these concerns.

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1 They are in the record. You can certainly
2 take it in as comments. Again some of
3 their comments were again unsubstantiated
4 facts that they presented. So I don't mind
5 taking in a comment, but if they are facts
6 being offered as facts but without any

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7 substantiation and documentation, this was

8 the time to do it.

9 ADMINISTRATIVE LAW JUDGE: Well, it
10 seemed like a significant point was that
11 this, that you have the 2008 plan, that the
12 current one is only a draft and in fact
13 that's being further considered. I mean,
14 isn't that important to know. Particularly
15 if we're relying on the local response,
16 isn't it important to know what the status
17 of the local plan is? Can I accept that,
18 can I take official notice of that?

19 MR. BERNSTEIN: I think you can.
20 That's not really what I was talking about.
21 There was other comments about WGI for
22 example being the number one, number two
23 terrorist target outside of New York City.
24 Where is the substantiation for that? And

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1 there were other facts. You know, the
2 status of the plan that's something else,
3 but as you parse through the transcript,
4 you will see that their testimony and
5 others who have testified, it goes well
6 beyond what has been set forth in the
7 petitions for party status which was their
8 opportunity. This is not the opportunity
9 to supplement the offers of proof. Maybe
10 explain. Maybe to characterize, but not go
11 beyond in essence what they had the

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12 opportunity to do to begin with. And, Your

13 Honor, in terms of the 2008 plan, that was
14 referenced, but it's not in the record. I
15 mean, I have a copy of it if you want to
16 add that to the record.

17 ADMINISTRATIVE LAW JUDGE: It's not
18 in the record? I thought that it was.

19 MR. BERNSTEIN: It was not, no, the
20 addendum. The appendix, the draft appendix
21 was, but not the existing plan. Now you
22 can take judicial notice of it or I
23 actually have copies of it so you can mark
24 it. Whatever you want to do.

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1 ADMINISTRATIVE LAW JUDGE: Sure.
2 I'll take it.

3 MR. BERNSTEIN: I have extra copies
4 by the way as well.

5 ADMINISTRATIVE LAW JUDGE: All right.
6 Yeah, that would probably be good.

7 MR. BERNSTEIN: It's an official
8 document. Something I created. It was
9 right off their website. I thought for the
10 completeness of the record it was important
11 to get that in.

12 Going back to my point on amicus
13 status, the regulations say under 6.4.5(b)3
14 that additional contents required for
15 petition for amicus status is to provide a
16 statement explaining why the proposed party

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17 is in a special position with respect to
18 that issue, that issue. The issue being
19 proposed here is public safety. You asked
20 Miss Tooher a question about that, about
21 amicus status, not necessarily focusing on
22 that part of the regulation, but I would
23 like to focus on it because I don't think
24 that there is anything in their petition

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1 that necessarily reflects a special
2 position with respect to safety. Now it's
3 more of an economics and business
4 perspective and maybe generally they talk
5 about safety, but they are not in any
6 particular special position because of any
7 expertise or knowledge to present beyond
8 what's already been presented in the
9 petition. So I would disagree with the
10 statements made earlier by Miss Tooher in
11 that regard.

12 So I would like to just come back one
13 more, a couple other items, Your Honor. In
14 addition to Mr. Kennedy's affidavit in the
15 record we do have letters in the record by
16 the designer of the surface part of the
17 facility, Superior Energy in hearing
18 documents 1(b)6, 14 and 16. And then
19 National Fire Protection Association Code
20 58 is also included for the record 1(b)6
21 attachment 15. And the purpose of me

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22 mentioning these letters is simply to
23 demonstrate that the designer of the
24 facility, Mr. Young who is actually in

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1 attendance or was, I'm not sure if he is
2 still here, has over 50 years designing LPG
3 facilities. He know what the safety and
4 design standards are and describes them in
5 his letters which are dated October 31st
6 and December 8, 2001. And as well as the
7 NFPA 58 which relates to, which was
8 prepared by the liquified petroleum code
9 committee of the NFPA addresses how these
10 facilities, particularly the surface aspect
11 of the facilities should be safely
12 designed.

13 Just going back to finally, and I
14 think my time is probably running out. I
15 would like to go back where I started and
16 that is to talk about -- maybe you never
17 started it back up.

18 ADMINISTRATIVE LAW JUDGE: Oh, I did.
19 You got two minutes and 20 seconds, 19
20 seconds.

21 MR. BERNSTEIN: Just going back,
22 going back to where I started, Dr.
23 Mackenzie. His qualifications go to
24 whether there is scientific formulations

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1 which is required. You need to have
2 experience regarding underground storage
3 facility's geology to provide scientific
4 foundation for these. You don't
5 necessarily need experience in petroleum,
6 but you have to have a foundation in
7 science with regard to the kind of
8 materials stored. He does not. So he
9 fails as an expert for lack of specified
10 scientific foundation.

11 So going back to the four buckets to
12 conclude. There are four buckets of public
13 safety. One is risk assessment. There are
14 were three quantitative risk assessments
15 done, two by Quest and one by Mr. Kennedy
16 and they all show that in their opinion
17 that the risk is low. We had a dSEIS and
18 other letters in the record that support
19 the kind of safety measures that will be
20 taken with regard to the facility and the
21 design of the facility and the emergency
22 release prevention and preparedness
23 policies that will be in place. By the way
24 that's supplemented by the DEC permit which

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1 has a very lengthy condition with regard to
2 safety and emergency shutdown devices. I'm
3 sure the Department can respond to comments
4 made criticizing them for that and their
5 ability to determine whether or not such a

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6 plan is sufficient. But we have certainly
7 shown and we were the only party to show
8 that through letters and affidavits,
9 through documents, through references in
10 the dSEIS that in fact those who are
11 trained and responsible to respond to
12 potential emergencies know the properties
13 of LPG and trained in such through their
14 experience over the last however many
15 years, probably 50 years and know how to
16 respond and have the personnel and
17 facilities to do so.

18 And finally, with regard to train
19 safety, I would say that the record speaks
20 for itself in terms of the statistics.
21 Statistics don't lie and I think that much
22 has been made in the petitions and it's to
23 us all speculation, all melodrama frankly.
24 It's not based on any fact. So on the one

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1 hand you have speculation and melodrama not
2 based on fact and on the other hand you
3 have scientific quantitative risk
4 assessments, statistics, Federal
5 regulations and the mitigation and safety
6 controls that will be in place to make sure
7 that this facility is designed safely and
8 it operates safely and no matter which way
9 the materials is done in a safe way, but in
10 the unlikely event any kind of event, as

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11 low as that might be, that there are
12 trained emergency responders in place who
13 are working with our facility and TEPPCO
14 facility across the street and the AmeriGas
15 facility in the other part of Reading to
16 know the properties of LPG and how to
17 control it.

18 ADMINISTRATIVE JAW JUDGE: I think
19 your time is up. Thanks.

20 MS. SCHWARTZ: All right. So Lisa
21 Schwartz again. I'm going to make a few
22 points and then I'm going to pass the baton
23 to Jenn Maglienti on the issue of public
24 safety. I would like to start out by

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1 saying that it's Department staff position
2 that there is no substantive and
3 significant issue related to public safety
4 regarding this project and therefore --

5 AUDIENCE: Microphone.

6 MS. SCHWARTZ: I forget I'm short.
7 Say that again. Okay. I'd like to start
8 out by saying staff's position is there is
9 no substantive and significant issue
10 related to public safety regarding this
11 project, therefore the same being that
12 there is no adjudicable issue related to
13 public safety.

14 Now just to talk, to highlight for
15 you about the Applicant's original QRA, the
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16 first one in 2012 which made assessment,
17 quantitative assessment of the risks
18 associated with the release of LPG which we
19 found to be at that point an appropriate
20 scope for it and still do. The staff
21 reviewed the submission required of the
22 Applicant. There was a conference call.
23 There was a follow up letter. Let me give
24 you the cites in case you want to go back

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1 and look up this record. The actual QRA is
2 the document list Roman Numeral I(b)8 and
3 also I(b)7, Exhibit 1, and the follow-up
4 letter.

5 ADMINISTRATIVE JAW JUDGE: It's in
6 the same thing in both places?

7 MS. SCHWARTZ: Yeah, we put it, you
8 know, it just ended up in two places. And
9 then there was a follow-up letter after our
10 conversation. I think it was a conference
11 call with Quest and the Applicant's, Quest
12 being the consultants that wrote the 2012
13 QRA and that follow-up letter is at
14 document list I(b)13.

15 ADMINISTRATIVE JAW JUDGE: I'm sorry.

16 MS. SCHWARTZ: Roman Numeral I(b)13.

17 ADMINISTRATIVE JAW JUDGE: 13.

18 MS. SCHWARTZ: Which at that point
19 was a response to a Department letter, a
20 prior in the document list and I'm sorry I

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21 don't have the site there, but it's in
22 order.

23 I want to note first about that QRA
24 that the dEIS already addressed safety

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1 impacts so this was in addition. In
2 addition to saying that the Department
3 staff found the QRA acceptable, I would
4 have to say a QRA in and of itself and this
5 one in particular did go beyond the level
6 of evaluation in this area that is
7 typically required by the Department. So
8 we think that that should be noted. In
9 particular about this QRA we think it is
10 important to note that it concludes the
11 hazards and risks associated with facility,
12 the closed facility are similar to those
13 presented by LPG transport storage in
14 processing facilities worldwide. And while
15 the offsite risk of the LPG, associated
16 with the operation of the LPG facility
17 isn't quite zero, the offsite areas
18 impacted by higher risk levels, it doesn't
19 say impacted an event, but are impacted by
20 the higher risk level are limited to a few
21 uninhabited locations. I think that's
22 important. And most offsite areas are
23 found to be impacted with relatively low
24 levels of risk. In addition, the

♀

1 consultant preparing the QRA noted its
 2 analysis is conservative in nature so it
 3 should provide an over prediction of the
 4 true risk proposed by the facility. Those
 5 are the things we thought should be noted
 6 about it. We haven't heard it discussed
 7 much yet here today. And I would like to
 8 give my time now to Mrs. Maglienti.

9 MS. MAGLIENTI: Good afternoon, Your
 10 Honor. So Ms. Schwartz talked a little bit
 11 about what was in the dSEIS and what was in
 12 the QRA and I want to talk about what was
 13 in the petitions for party status because
 14 as you know the standard here is that
 15 burden of persuasion is on the petitioners
 16 to prove that there is omission in the
 17 application for consideration and for
 18 detailed litigation.

19 There are two affidavits we want to
 20 talk about specifically. One is the
 21 affidavit of Richard Cooperwitz. Mr.
 22 Bernstein talked about that generally. Mr.
 23 Cooperwitz's background is in pipelines,
 24 but he offers here an opinion about the

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1 relative safety of this project and one of
 2 the conclusions he comes to is that LPG is
 3 less safe than natural gas and it poses a

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4 greater risk than aboveground storage. Of
5 course when you look at the application,
6 the Department here isn't weighing the
7 alternatives of the aboveground storage or
8 an alternative fuel for storage, we're
9 actually looking at alternatives to the
10 proposed project sites within the
11 constraints, within the constraints of the
12 Applicant's ability to change. So in some
13 ways Mr. Cooperwitz opinion is irrelevant
14 to consideration of relative risk.

15 The other thing that Mr. Cooperwitz
16 talks about is the opinion about local
17 responders and ultimately what his
18 conclusion is that well the local, it's not
19 likely that the local emergency response is
20 going to be able to effectively handle any
21 kind of accident to the facility. The
22 problem is as Mr. Bernstein pointed is that
23 there is no detailed analysis in the
24 affidavit. What he offers is a mere

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1 conclusion, well, it's likely that they are
2 not going to be able to handle an accident
3 at this location. Of course that is a mere
4 conclusory statement. There is no
5 literature references in his offer of proof
6 and there is no citations of available
7 literature and no analysis of its own. Now
8 you look at that in contrast to what we

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9 have in the DSEIS we actually have an

10 analysis of local resources and their
11 capability of response. So as a matter of
12 fact their offer of proof fails to raise an
13 issue because it doesn't even give enough
14 detail for the Department to actually
15 respond to it.

16 As you know the regulation is at
17 624.5(b)2 and there it states that the
18 offer of proof is it has to actually
19 identify what evidence is intended to be
20 presented by the petitioner and the basis
21 of their opinion. In the case of Mr.
22 Cooperwitz, they have none of that.

23 It's important and noteworthy to
24 indicate that the memorandum of law that

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1 was submitted by NRDC used words like
2 perhaps, maybe. Dr. Cooperwitz, you know,
3 may testify to this. We do not go to
4 costly adjudication on perhaps and maybe.
5 It's important for expert opinions to offer
6 detailed analysis of their own to refute
7 what's in the application materials. Mr.
8 Cooperwitz's affidavit doesn't do any of
9 that.

10 As Mr. Bernstein indicated,
11 Ms. Sinding actually got up in her
12 presentation and said that Mr. Cooperwitz
13 will testify that the QRA is insufficient.

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14 That's interesting because his actual offer
15 of proof in paragraph 13 of the affidavit
16 says that I understand that others who have
17 had more time to fully consider the
18 Applicant's risk assessment have concluded
19 that it is extremely deficient in this
20 critical regard. But really what we have
21 is Mr. Cooperwitz relying on somebody
22 else's unnamed opinion of other's
23 assessment. So in fact despite what Miss
24 Sinding said to you, the offer of proof

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1 didn't indicate that he had an opinion
2 about risk assessment. He just said well
3 relative to other types of facilities,
4 there's a higher risk of LPG storage. So
5 the Department staff submits that they
6 failed to meet the burden of persuasion at
7 issue.

8 They also offered the opinion of Mark
9 Venuti from the City of Geneva, the
10 supervisor for the City of Geneva and he
11 made some statements about public safety as
12 well and there might be an issue if the
13 City of Geneva has to respond for service
14 back up to another fire company that has to
15 respond to Watkins Glen. And again we
16 don't have analysis here. We just have a
17 general statement. And we can take that as
18 public comment. We can address that in our

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19 NFCIS (phonetic), but here's certainly no

20 obligation for us to have an opinion, a
21 conclusory opinion offered up as a matter
22 for adjudication.

23 So that takes us to Dr. Mackenzie.

24 It certainly doesn't give Department staff

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1 pleasure to do this, but we have to agree
2 with the Applicant. There is nothing in
3 Dr. Mackenzie's background to suggest that
4 he is actually competent to testify in this
5 that concerns any kind of storage.

6 Now you talked about to Mr. Bernstein
7 a little bit about what is the standard
8 that you apply, you know, how far can we go
9 on an issues conference. Well, I have an
10 answer for you. So at an issues conference
11 what we say, and I can give you some
12 citations. It's a matter of application,
13 it's an October 26, 2012 issues ruling.
14 And there it says that the qualifications
15 of the expert witness that a petitioner
16 identifies may be subject for consideration
17 at this stage and what is it that we need
18 to look at.

19 And so there's another administrative
20 case that says that at the issues
21 conference it should be enough that the
22 witness is competent and willing to
23 testify. So how do we judge competency.

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24 So the way that we judge competency is that

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1 we actually --

2 ADMINISTRATIVE LAW JUDGE: Where did
3 that come from, the same --

4 MS. MAGLIENTI: Gannett Asphalt
5 Products, Incorporated, the March 3rd, 1994
6 issue. So how do we judge competency? We
7 judge competency by looking at the expert
8 witness and saying do they possess the
9 requisite skill, training, education,
10 knowledge and experience from which it can
11 be presumed that the opinion rendered is
12 reliable. And that is actually a citation
13 in the matter of Enew Sobol (phonetic), 208
14 82nd 1123. It's the Third Department 1994
15 case.

16 ADMINISTRATIVE LAW JUDGE: I'm sorry,
17 what was the AD site?

18 MS. MAGLIENTI: 208 82nd 1123.

19 ADMINISTRATIVE LAW JUDGE: 1113?

20 MS. MAGLIENTI: 1123.

21 ADMINISTRATIVE LAW JUDGE: 1123.

22 MS. MAGLIENTI: I'm sorry. Well, the
23 interesting thing about that case it was an
24 actually an Article 78 proceeding to

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1 challenge a physician's disciplinary case
2 and there the challenge was is a general

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3 practitioner qualified to judge a
4 qualification of a urologist. Well, here
5 you actually have two people that went to
6 medical school and there was a dispute
7 about the level of expertise that was
8 needed. Here we have a medical doctor
9 talking about risk assessments in an
10 underground gas storage operation. There's
11 certainly nothing in his CV to indicate
12 that his experience is in pipelines. That
13 he has experience in transportation. And
14 the degree of expertise that he needs is
15 reflective of the material that he is
16 presenting. He is presenting information
17 that's highly complex and highly technical
18 and makes summary conclusions about it
19 without any expertise or education in the
20 field.

21 So let's talk a little about what he
22 actually said in the affidavit. So one of
23 the things that Mr. Mackenzie does is, and
24 it's a little harder to follow because in a

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1 lot of ways his analysis, he puts a matrix
2 in there to say that well, there is a high
3 risk, low risk. High impact, low impact.
4 But there is no actually explanation in
5 there as to how we actually assigned
6 specific types of operations at this
7 facility to that matrix. And it's

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8 important to note that as an offer of proof
9 he also just said well, I'm not actually an
10 expertise in salt caverns, I'm not
11 expertise in integrity, but nonetheless I'm
12 going to make judgements about integrity
13 and advise my party that you should deny
14 the permit. So again he assigns this
15 matrix. It's nice. It's a nice, colorful
16 chart, but he doesn't give an indication of
17 how he assigns the values. So it's hard to
18 follow the methodology.

19 ADMINISTRATIVE JAW JUDGE: Wouldn't
20 that be, wouldn't that be done at a
21 hearing?

22 MS. MAGLIENTI: It would be done at a
23 hearing.

24 ADMINISTRATIVE JAW JUDGE: I mean,

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1 again how far do we have to go if you're
2 only required to have an offer of proof.
3 So it doesn't have to be the full showing.

4 MS. MAGLIENTI: Right. It doesn't
5 have to be the full showing. But what it
6 has to do is it has to demonstrate that we
7 actually can understand the basis of
8 opinion. The offer of proof specifically
9 says provide the basis of your opinion.
10 And what he did was he just offered the
11 conclusion. Well, if there is this type of
12 fact, then I concluded this. It's a matter

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13 of opinion that he has to offer more than
14 this. They just have to explain. We
15 certainly don't want full testimony on this
16 because we disagree with his
17 qualifications, but certainly we have to
18 have more to understand how you actually
19 apply this. There is certainly nothing in
20 the field of risk assessment that suggests
21 that you just arbitrarily assign values.

22 One of the other problems that I sort
23 of hinted on in oral argument today is
24 incremental risk. And we do talk about

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1 these existing industrial activities in
2 this area. We do the TEPPCO facility
3 across the street which is an LPG storage
4 facility. We have a natural gas storage
5 facility sited just to the south of Finger
6 Lakes. So Dr. Mackenzie started
7 introducing this concept and he asks the
8 question right upfront in his risk analysis
9 what the incremental risk associated with
10 this facility and then he never actually
11 answers the question. So it's difficult to
12 say what his opinion might be because he
13 never evaluated well, what is the actual
14 existing industrial character of this area
15 and what risks are present in the community
16 right now on which to compare the impacts
17 annually. So it's difficult to say where

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18 his analysis comes from. There is also a
19 hundred year history of solution mining in
20 this area.

21 ADMINISTRATIVE LAW JUDGE: But this
22 isn't solution mining.

23 MS. MAGLIENTI: No, it's not, but
24 there are risks associated with that. I

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1 mean, you're talking about pressure in
2 caverns. It is an industrial activity and
3 it is something that should be considered.
4 There is, there are other activities at US
5 Salt that go on there that should be part
6 of the consideration of what happens in
7 this particular area of the state. His
8 analysis doesn't consider any of that.

9 So to wrap up, Dr. Mackenzie,
10 obviously we dispute his qualification, but
11 and we dispute the methodology. There are
12 certain key points that he failed to
13 include in his analysis. And when you look
14 at that in comparison to what's in the dEIS
15 and in the analysis done by the Applicant
16 here, we actually have 113 different
17 operating scenarios reviewed. We have the
18 zone of impact analysis. We have rail car
19 analysis. Truck accident analysis. So
20 there is a lot of detail in what was
21 presented by the Applicant and certainly
22 rebuffs anything that was put in by the

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23 petitioner's expert.

24 The other point when Ms. Sinding was

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1 up here she said that, going back to Dr.
2 Cooperwitz, that he introduced the concept
3 that a low probability and high risk events
4 and she, what she said was, I believe he
5 will be able to speak on mitigations that
6 are available and of course that speaks to
7 the level of specificity of the offer of
8 proof.

9 On public safety in general the
10 Applicant talked about this a little.
11 There is detailed information in the draft
12 and permit conditions as well as the draft
13 SEIS that speak to public safety. Mr.
14 Bernstein referenced the National Fire
15 Protection Association that requires
16 redundant measures. There are shut down
17 mechanisms that can be put in place. The
18 draft permit conditions include a detailed
19 list of requirements that have to be in the
20 emergency response plan. It's we gave
21 absolute due consideration to public safety
22 and the substantive conditions raised by
23 petitioners.

24 ADMINISTRATIVE JAW JUDGE: Did you

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1 consider the train going across the trestle
2 and derailling and spilling?

3 MS. MAGLIENTI: We did, yeah. It is
4 something that is proposed. I mean, we can
5 talk about, you know, we can talk about
6 that in our briefs more fully, but we do
7 consider and it is okay for a state agency
8 to disclose those types of impacts. And
9 the Applicant did evaluate, okay, what is
10 the level of incidents and how can we
11 quantify the risk posed by train accidents.
12 And they also have detailed charges when
13 you're talking about well, here is how a
14 puncture, a major release. Not only the
15 type of accident, but the scope of that
16 accident. Not all accidents are going to
17 be the same. Not all accidents are going
18 to have, you know, a high release event.
19 So that information is in there. It's in
20 their quantitative risk assessment.

21 ADMINISTRATIVE LAW JUDGE: And I
22 think what people are concerned with is
23 there an adequate response. Was the
24 response, would it be adequately analyzed

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1 within the Department.

2 MS. MAGLIENTI: Right. And the
3 Department made an elaboration in our
4 DSEIS. We did what we could. There is
5 outreach. There is local training

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6 involved. And obviously the local
7 emergency responders have experience with
8 the TEPPCO facility and the natural gas
9 facility so they do have the means
10 available to them to respond.

11 And to get to the preemption issue, I
12 mean we can certainly detail the legal
13 precedent involved there, but certainly the
14 state agency can expose impacts, but we are
15 not with the ability to mitigate them. As
16 soon as that train leaves the station, so
17 to speak, we do not have the ability to
18 either, as the petitioners suggest, ban
19 training, limit training or eliminate them.
20 We certainly can discuss impacts. As far
21 as other community type, community
22 character type impacts, we can certainly do
23 things at the site to try to mitigate the
24 noise that might be experienced from rail

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1 traffic, but we are not allowed to decide
2 how articles of interstate commerce move
3 across the State.

4 ADMINISTRATIVE JAW JUDGE: SEORA
5 wouldn't allow us to ban trains?

6 MS. MAGLIENTI: No, it would not.

7 ADMINISTRATIVE LAW JUDGE: If there
8 was unacceptable environmental impact
9 resulting from them?

10 MS. MAGLIENTI: We are not.

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11 ADMINISTRATIVE LAW JUDGE: Really?
12 MS. MAGLIENTI: Absolutely a Federal
13 case. It absolutely is.
14 ADMINISTRATIVE LAW JUDGE: All right.
15 MS. MAGLIENTI: Not only for the
16 Surface Transportation Board because of it
17 is a pipeline. And also the pipeline,
18 there's also a petitioner that all the
19 pipelines present a safety risk or all the
20 pipelines has to appear open and the
21 Transportation Act speaks to Federal
22 jurisdiction for pipeline safety. So it
23 has been adequately covered.
24 ADMINISTRATIVE LAW JUDGE: But we

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1 would mitigate by imposing stricter
2 requirements in terms of say training the
3 locals or providing them with funding or
4 something like that, right?
5 MS. MAGLIENTI: Certainly.
6 Certainly. Those are within our control.
7 ADMINISTRATIVE LAW JUDGE: Right.
8 MS. MAGLIENTI: But as far as
9 limiting the amount of trains or limiting
10 the amount of movement through a pipeline,
11 that is a matter strictly within the
12 Federal domain. All right.
13 ADMINISTRATIVE LAW JUDGE: All right.
14 Thank you. All right. We have some
15 rebuttal time reserved. Start with Gas

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16 Free Seneca. I have five minutes for you.

17 Do you want me to set this for four minutes
18 or set it for five?

19 MS. NASMITH: Four would be
20 fantastic. Thank you, Your Honor. I want
21 to start by just clearing up a few things.
22 First of all Gas Free Seneca is not arguing
23 that somehow the DEC has any kind of
24 authority to ban trains or stop --

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1 ADMINISTRATIVE JAW JUDGE: That might
2 have been my idea so.

3 MS. NASMITH: Well, no. I think
4 actually the Applicant might have raised
5 the issue of shutting down pipelines.
6 That's not what we're suggesting. What
7 we're suggesting here is that in evaluating
8 and approving this project, if they, if the
9 DEC determines that the risk posed by
10 trains and pipelines is too great, the
11 remedy is not to approve the project. That
12 is what SEQRA requires you to do is assess
13 the entirety of the project's adverse
14 impacts and if you can't mitigate them
15 because of Federal preemption or any other
16 reason, then you don't allow the project to
17 move forward.

18 ADMINISTRATIVE JAW JUDGE: Well, we
19 do a balancing at that point. If we find
20 there is unmitigated environmental impacts,

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21 then we balance those impacts against the
22 socioeconomics considerations.
23 MS. NASMITH: Yes. But ultimately
24 if you do conclude that the risk is so

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1 great that it does outweigh everything
2 else, your remedy is you do not allow the
3 project to move forward.
4 ADMINISTRATIVE LAW JUDGE: So you're
5 relying on Lane?
6 MS. NASMITH: Pardon?
7 ADMINISTRATIVE LAW JUDGE: You're
8 relying on Lane.
9 MS. NASMITH: I'm not familiar with
10 that, Your Honor.
11 ADMINISTRATIVE LAW JUDGE: That's the
12 case where the unmitigated impacts outweigh
13 the socioeconomic benefits and the
14 Department denied the permit.
15 MS. NASMITH: Yes, I am relying on
16 it. Thank you, Your Honor. I also want to
17 point out that a lot of the statements by
18 the Applicant is that this is perfectly
19 safe and there is no higher rate of
20 accidents amongst, in salt caverns and when
21 you use salt caverns for storage of LPG and
22 that just from the standpoint of historical
23 data is inaccurate. There is a much higher
24 incidence of accidents with storing LPG in

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1 salt caverns than there are in other kinds
2 of underground facilities.

3 ADMINISTRATIVE JAW JUDGE: I thought
4 what counsel was saying was with respect to
5 transport. I don't think we've talked
6 about cavern integrity yet.

7 MS. NASMITH: He did mention cavern
8 integrity issue as well, Your Honor.

9 ADMINISTRATIVE JAW JUDGE: Okay.
10 Well, we're going to have a whole afternoon
11 on that so.

12 MS. NASMITH: And I don't want to bog
13 us down on that at all. I'd also just like
14 to go to the question of the Kennedy
15 affidavit and whether or not any of the
16 submissions by the Applicant addressed
17 specifically a potential for accident at
18 the rail trestle and the answer is no.
19 There is nothing in this affidavit that
20 specifically addresses that. What Kennedy
21 actually does is discuss the plan that Mr.
22 Bernstein handed to you, but then it
23 continues on to suggest in paragraphs four,
24 five and six going, stating that in each

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1 instance the plan indicates that serious
2 injury or death is likely to large numbers
3 are anticipated outcomes of uncontrolled
4 releases. They then, the Kennedy then

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5 moves on to talk about the process that is
6 being undertaken in Schuylar County of
7 updating the 2008 plan which strongly
8 suggests that the 2000 plan might not be
9 adequate to deal with these sorts of
10 incidents.

11 I also want to in the time I have
12 address the question of Dr. Mackenzie's
13 qualifications again and to point out that
14 if we are quibbling about whether 10 years
15 of experience versus 50 years of experience
16 is what meets the standard, I think that's
17 exactly the type of inquiry that is more
18 appropriate for a adjudicatory hearing.
19 Meanwhile Dr. Mackenzie does have
20 experience developing comprehensive
21 emergency management. He is not merely a
22 medical doctor. He is also the CEO of a
23 hospital and in that capacity he has gained
24 significant experience that leads back to

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1 risk assessments and risk analysis rather.
2 There is a difference actually. And in
3 that role he has collaborated closely with
4 emergency management personnel and even
5 supervised them in fact. So to completely
6 discredit that and say he has not
7 experience and focus solely on his medical
8 degree does not give him the due
9 consideration that he warrants in this

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10 situation.
11 There's also some question raised
12 about his methodology and the fact that
13 there is no explanation of his methodology
14 in his reports and in fact he does describe
15 how hazard events are scored using a
16 methodology employed by the Marco Gas
17 European Underground Gas Storage Study Data
18 Base and he in fact includes an entire
19 appendices to his report entitled
20 methodology. So to say that he doesn't
21 explain his methodology and to try to
22 discredit him on that ground is really not
23 accurate either.

24 In conclusion, Your Honor, I think

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1 there are many issues here that we have
2 raised in Dr. Mackenzie's report that do
3 demonstrate that there are disputed issues
4 of fact here and the only appropriate
5 action at this point is to push this off
6 into an adjudicatory hearing for those
7 issues of fact to be more fully discussed
8 and elaborated on. Thank you so much.

9 ADMINISTRATIVE JAW JUDGE: Thank you.
10 So Finger Lakes Communities, you have three
11 minutes. I'm going to set this for two.

12 MS. SINDING: Your Honor, I asked for
13 three minutes, but given that there were
14 some rather outrageous mischaracterizations

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15 of what both I and Mr. Cooperwitz said, I'd
16 ask if I could have one additional minute
17 since I didn't take all my time in the
18 initial presentation and Mr. Bernstein was
19 allowed to go rather beyond his allotted
20 time.

21 ADMINISTRATIVE LAW JUDGE: So we're
22 talking four minutes?

23 MS. SINDING: That would be great and
24 I'm trying to go through it quickly.

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1 ADMINISTRATIVE JAW JUDGE: Just a
2 moment. So I'm going to set this for
3 three.

4 MS. SINDING: Thank you. So I first
5 want to respond to Mr. Bernstein's
6 contention that statements that I made in
7 my presentation go beyond Mr. Cooperwitz's
8 affidavit and venture into factual
9 argument. They do not. They merely
10 clarify and explain that which Mr.
11 Cooperwitz says in his affidavit. DEC
12 argues what Mr. Cooperwitz says in
13 paragraph 13, that he is relying on what
14 others assessment of risks from cavern
15 integrity are, that's not true. What Mr.
16 Cooperwitz says is in paragraph nine and I
17 will read it. I conclude that the proposed
18 Finger Lakes LPG Storage facility has not
19 provided adequate or appropriate risk

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20 assessments for this highly unique proposed
21 LPG storage and/or transportation
22 infrastructure project. That's his
23 conclusion and that's what we would testify
24 to.

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1 Secondly, nothing I said in my
2 presentation constitutes factual argument
3 or testimony. Even if you put quotations
4 around it. It was an offer of proof and
5 I'm confident that when you review the
6 record, that will confirm that.

7 To be clear, what I said was merely
8 an elaboration on the methodology Mr.
9 Cooperwitz believes should have been, but
10 as Mr. Bernstein expressly conceded was not
11 utilized in this case which is the chain of
12 events methodology.

13 Third, regarding the history of
14 storage of hydrocarbons in this area,
15 something Mr. Bernstein spent a lot of time
16 on. I will read what Mr. Cooperwitz would
17 say to that so that there is no question
18 whether it is what I'm saying or Mr.
19 Cooperwitz said. And that's paragraphs 10
20 through 12 of his affidavit. The safety
21 risks of storing up to 2.1 million barrels
22 of liquefied petroleum gas in underground
23 salt caverns are substantially different in
24 orders of magnitude greater than those

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1 associated with the storage of high
 2 pressure natural gas in the same
 3 underground salt caverns. The consequences
 4 of a release of highly volatile liquids
 5 such as LPG would be significantly greater
 6 than those associated with a release from a
 7 natural gas storage facility. Storage of
 8 LPG in underground salt caverns presents
 9 much greater safety risks than those
 10 associated with LPG storage in above ground
 11 facilities or those associated with LPG
 12 transportation. That is not a discussion
 13 of alternatives as Miss Maglienti seems to
 14 suggest. That is a direct reputation of
 15 the Applicant's reliance on the history of
 16 storage of other hydrocarbons in other
 17 kinds of facilities within the region and
 18 the adequacy of the region's ability to
 19 respond to emergencies from those in
 20 opposite types of facilities.

21 Fourth, as to the claim that Mr.
 22 Cooperwitz's affidavit is an insufficient
 23 offer of proof. Ms. Maglienti says there's
 24 a lack of citation to available literature

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1 and then she cites to the regulations.
 2 There is nothing in the regulations that

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3 required the citation to available
4 literature. In fact the first two pages of
5 Mr. Cooperwitz's affidavit lay out in
6 detail his extensive experience and
7 expertise in these issues. That's the
8 basis on which we would offer his
9 testimony. And we submit that together the
10 offer of proof that's contained in the
11 testimony as further explained by me today
12 or on the basis merely of what's on the
13 paper together with his qualifications
14 satisfies the requirements of the
15 regulations.

16 Fifth, DEC argues that Cooperwitz
17 doesn't conclude that the QRA is
18 inadequate. Again that's belied by the
19 actual language of Mr. Cooperwitz's
20 affidavit which I read to you at the
21 outset.

22 And finally, as to the contention
23 that NRDC's petition contains words such as
24 maybe or perhaps, the two pages in the

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1 petition that refer to Mr. Cooperwitz and
2 his testimony and the offer of proof that
3 we put forward are pages 19 and 24.
4 Nowhere on either of those two pages is the
5 word maybe, the word perhaps or any
6 recognized synonym of those words appear.
7 Thank you.

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8 ADMINISTRATIVE LAW JUDGE: Thank you.

9 Finger Lakes Wine Business, four minutes.

10 MS. TOOHER: Thank you, Your Honor.

11 Again, Your Honor, we would like to respond
12 to some of the statements that were made
13 concerning our presentation and concerning
14 the interest of my clients. There has been
15 repeated assertions that none of the
16 wineries are within the proximity to this
17 facility. The map that we referred to as
18 Exhibit B does detail the wineries and we
19 would submit they are throughout the region
20 along the shores of Seneca Lake as well as
21 the adjoining area. However the Castle
22 Grisch Winery is within a quarter mile from
23 the facility and they have actually as set
24 forth in the affidavit purchased property

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1 that adjoins the facility. So we would
2 submit that they are indeed impacted
3 directly and within the region itself.

4 We would submit that those are
5 concerns that need to be taken into
6 consideration in terms of an emergency
7 response plan. And in fact I believe the
8 information that has been presented to by
9 Mr. Cooperwitz's affidavit and other proof
10 demonstrates that there could be a
11 catastrophic event from this facility. No
12 one has really discussed what a

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13 catastrophic event means in this context
14 and this facility. A catastrophic event
15 would have wide-reaching implications. We
16 have no idea how far, if there were any
17 kind of an explosion or a spread of gas the
18 impact of such a catastrophic event would
19 be. In terms of emergency planning, we
20 would need to analyze exactly what a
21 catastrophic event would do.

22 My clients and the agricultural
23 interest they assert could be very much
24 impacted by such a catastrophic event, the

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1 spread of any kind of an explosion, the
2 damage from fire or the spread of gas to
3 the natural environment has not been
4 assessed. All of that is why we feel as an
5 amicus we should be granted status. We
6 believe that the agricultural issues, the
7 agricultural perspective here on safety is
8 a very valuable and unique perspective that
9 the wineries and the wine businesses
10 surrounding them can present for your
11 consideration as you look at these issues.
12 We think that the experts that have
13 addressed these issues have not addressed
14 the agricultural issues and in fact the
15 risk assessment has not in fact addressed
16 the agricultural issues.

17 The cumulative impacts of these

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18 facilities and the cumulative impacts of
19 any incidents that occur have also not been
20 considered in an agricultural context.
21 Whether or not there is seepage of any gas
22 from the facility. Whether or not there is
23 a slow deterioration in water quality.
24 Those issues have not been considered in

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1 terms of the public impact, the safety
2 impact and the impact to the agricultural
3 community.
4 We have a letter from the fire chief
5 that says that they may be adequate to
6 address what happens in these incidents.
7 There is no indication that anyone
8 consulted with any of the agriculture in
9 the area to determine what their needs are
10 in an emergency response facility. Whether
11 or not they would need some special address
12 to their concerns. There is also the
13 determination that we don't have enough of
14 an impact or I'm sorry enough of an impact
15 upon my clients for us to speak to this
16 particular issue. I would also submit that
17 Route 14 that runs up along the facility is
18 regularly traveled by the tourists that we
19 bring to this community and that that would
20 impact upon their safety and my clients
21 interests in the community. Again we would
22 submit that there has not been adequate

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23 consideration.

24 We don't believe that this is

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1 melodrama. We believe that the very
2 dramatic impacts of public safety need to
3 be adequately considered. In looking at
4 the fracking issue, the Department of
5 Health, the Commissioner spoke to the
6 health impacts and said he wouldn't want
7 his family next to such a facility. My
8 clients and their businesses don't want
9 their tourists and their businesses next to
10 this facility. So we would submit that
11 those considerations and the safety
12 considerations and that perspective is of
13 value to you in evaluating these issues.

14 ADMINISTRATIVE JAW JUDGE: Thank you.
15 So legislators, we have two minutes.

16 MR. VAN: Thank you again, Your
17 Honor. I would like to note that William
18 Kennedy submitted this affidavit as an
19 employee of Schuyl er County, number one.
20 He does, he is the supervisor, manager of
21 the emergency response effort for the
22 county. In his affidavit on page 3, second
23 line from the bottom I believe Mr.
24 Bernstein misquoted that and we have not

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1 seen this affidavit in our role as the
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2 legislators until this meeting. But I
3 think he has flip flopped the
4 characterization of the hazards at the
5 bridge, hazardous materials in transit
6 particularly at the bridge.

7 In 2015 he downgraded it to a low
8 hazard from a relatively high hazard in
9 2008 the last time an emergency plan had
10 been revised. We do not know the reason
11 for that reevaluation, if you will. As
12 legislators, we do have the oversight
13 responsibility. So we have not seen this
14 and there are a number of gaps, but it's
15 difficult to maintain currency with the
16 changes in technology and the threats in
17 today's world. As you see going on around
18 the world and four, the most dangerous
19 combination of four words that I can think
20 of are it won't happen here. That's what
21 they said in '93. That's what they said on
22 September 10th of 2001 down in New York
23 City. And also during a recent hearing of
24 the county legislature --

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1 ADMINISTRATIVE LAW JUDGE: That's
2 your time. So wrap it up.

3 MR. VAN: Can I have -- okay. Direct
4 question to the chief law enforcement
5 officer of the county, are there security,
6 is there any security technology monitoring

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7 devices at all at that bridge. There are
8 none. I would be much more comfortable and
9 maybe not as strident if there was some
10 security for that location. Thank you.

11 ADMINISTRATIVE LAW JUDGE: Thank you.
12 All right. I believe that concludes the
13 public safety issue. While we're here, did
14 everyone get a copy who wants one of the
15 May 2008 Schuyl er County hazardous
16 mitigation plan that was handed out? I'm
17 going to be marking it as Issues Conference
18 Exhibit 00031. So I guess we will adjourn
19 now for half an hour for lunch. Is that
20 going to be enough time for everyone or do
21 you want longer or less? Let's go off the
22 record just a moment.

23 (OFF-THE-RECORD DISCUSSION.)

24 ADMINISTRATIVE JAW JUDGE: So we are

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1 going to adjourn then for one hour for
2 lunch, so let's please everyone who is
3 involved in the confidential session please
4 be back by 2:30. Those members of the
5 public and press, if you aren't signatories
6 of a confidentiality agreement, we will
7 have to ask you to leave the hearing room.
8 You are free to come back tomorrow morning
9 at 9:00 when we will be resuming the public
10 portion of this proceeding. Unless there
11 is anything else right now, we stand

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12 adjourned.

13 (CONFIDENTIAL TRANSCRIPT PAGES 200
14 THROUGH 382 ARE CONTAINED IN A SEPARATE
15 CONFIDENTIAL VOLUME. DAY 2 OF THE PUBLIC
16 HEARING WILL RESUME AT PAGE 383.)

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19 C E R T I F I C A T I O N

20 I hereby certify that the proceedings and
21 evidence are contained fully and accurately in the
22 notes taken by me on the above cause and that this
is a correct transcript of the same to the best of
my ability.

23

DELORES HAUBER

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